PRIVATE ANTITRUST DAMAGES ACTIONS IN THE EU: SECOND GENERATION QUESTIONS

*Assimakis P. Komninos**

Abstract: *This article deals with the role of national courts in their capacity as forums of private antitrust enforcement in Europe and concentrates on damages actions. It revisits the past decade and attempts to have a glimpse of what we can define as "second generation" topics, assuming that the "first generation" questions (existence of a remedy and basic conditions for the exercise of the corresponding right) have now been settled. Emphasis is placed on the questions of standing and passing-on, causation, characterisation of damages, quantification of harm, binding effect of public authorities' decisions, collective claims, access to evidence, access of claimants to the public authority's file and to corporate statements, and finally co-operation mechanisms with the European Commission and national competition authorities.*

Summary: I. Introduction. II. The Nature and Objectives of Private Antitrust Enforcement. III. The Evolution of EU Law on Civil Antitrust Remedies. 1. The Court of Justice's General Case Law on Rights and Remedies. 2. The Court of Justice speaks: *Courage* and *Manfredi*. 2.1. *Courage*. 2.2. *Manfredi*. 3. The Quest for EU Legislation: the Commission's White Paper of 2008. 4. The Residual Role of National Laws. IV. Specific Issues. 1. Standing and Passing-on. 2. Causation. 3. Characterisation of Damages. 4. Quantification of Harm. 5. Binding Effect of Infringement Decisions. 6. Collective Claims – Class Actions. 7. Access to Evidence. 8. Private actions and the Leniency Programme: The Problem of Discovery of Corporate Statements. 9. Co-operation with the Commission. V. Conclusions.

I. INTRODUCTION

National courts play a key role in the enforcement of EU competition law.[1] They may be called upon to apply Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) in two main capacities:

* White & Case LLP; University College London. The present views are strictly personal.

1 See generally Komninos, 2008.

First, in private litigation cases, when either

- a party raises EU competition law arguments as a defence ("shield litigation"); this will usually occur in cases of contractual liability, where a plaintiff claims specific performance of a contract or alleges its breach by a defendant and claims damages, while the latter raises the nullity of that contract or of parts thereof. Another instance is unfair competition actions against "free riders"; or
- when a party puts forward a claim for injunction, damages, restitution or interim measures that intends to compensate the harm caused by the infringement of the EU competition rules and/or to put an end to the latter ("sword litigation").

Second, in public enforcement cases, when either

- the national courts act as public enforcers; indeed, a national court may be designated as the authority responsible for the application of Articles 101 and 102 TFEU under Article 35(1) of Regulation 1/2003.[2] This is the case, for example, in Ireland; or
- the national courts exercise judicial review over decisions of national competition authorities.

This article mainly deals with the role of national courts in relation to the first of these two capacities and concentrates on damages actions. It revisits the past decade and attempts to have a glimpse of what we can define as "second generation" topics, assuming that the "first generation" questions (existence of a remedy and basic conditions for the exercise of the corresponding right) have now been settled. We leave aside purely procedural questions or questions faced only in one Member State and concentrate on the questions of standing and passing-on, causation, characterisation of damages, quantification of harm, binding effect of public authorities' decisions, collective claims, access to evidence, access of claimants to the public authority's file and to corporate statements, and finally co-operation mechanisms with the European Commission and national competition authorities.

2 Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2004] L 1/1.

II. THE NATURE AND OBJECTIVES OF PRIVATE ANTITRUST ENFORCEMENT

From a purely competition law perspective, antitrust enforcement pursues three systematically different, yet substantively interconnected, objectives-functions.[3] The first one is *injunctive*, i.e. to bring the infringement of the law to an end, which may entail not only negative measures, in the sense of an order to abstain from the delinquent conduct, but also positive ones to ensure that such conduct ceases in the future. The second objective-function is *restorative* or *compensatory*, i.e. to remedy the injury caused by the specific anti-competitive conduct. The third one is *punitive*,[4] i.e. to punish the infringer and also to deter him and others from future transgressions. These three basic objectives-functions are optimally pursued inside an enforcement system that combines public with private elements.

Both public and private enforcement may – directly or indirectly – pursue all three objectives-functions:

- The injunctive objective-function is served with cease and desist orders and negative or positive injunctions ordered both by competition authorities, in the course of public proceedings, and by the courts, in the course of civil proceedings. Indeed, the latter may go even further than public enforcement. For example, it may be easier to obtain a preliminary injunction from a national judge within the EU than from the European Commission, since the latter, unlike the former, cannot issue orders imposing positive measures to undertakings in Article 101 TFEU cases.[5]
- Private enforcement primarily serves the restorative-compensatory objective, since private actions ensure compensation for those harmed by anti-competitive conduct. However, even in such cases, the role of public enforcement is not inexistent. For example, a competition authority's action may in effect amount to redress in specific cases. Then, the competition authority may impose on the wrongdoer or accept commitments from him

3 See Harding & Joshua, 2003: 229 *et seq*.; Komninos, 2008: 7 *et seq*. For a slightly different classification of tasks-objectives of antitrust enforcement, compare Wils, 2009) who speaks of three tasks: (a) clarifying and developing the content of the antitrust prohibitions, (b) preventing the violation of these prohibitions through deterrence and punishment, and (c) pursuing corrective justice through compensation. Compare also Hodges, 2011: 384.

4 The term "punitive" is used here in its generic sense and does not necessarily correspond to criminal law.

5 Case T-24/90, *Automec Srl v. Commission (II)*, [1992] ECR II-2223, para. 51.

to put in place a compensatory scheme.[6] In addition, some competition regimes give powers to certain public authorities to claim damages, acting on behalf of the victims. For example, this is the case in France,[7] and in the United States, where State Attorneys General can bring *parens patriae* actions on behalf of victims located within their States.[8]

- Finally, as for the punitive objective-function, public enforcement is undoubtedly predominant. This objective is pursued through the imposition of fines, which punish the wrongdoers and deter them from breaching the law in the future (specific deterrence) but also deter other persons from entering into or continuing to engage in behaviour that is contrary to the competition rules (general deterrence).[9] However, here again, private actions may supplement the retributive and deterrent effect of the public sanctions by attaching punitive elements to the civil nature of remedies, this being the case of legal systems that provide for punitive antitrust damages. Then, it is argued that the very existence of private enforcement furthers the overall deterrent effect of the law, by adding a supplementary system of sanctions and risks for the wrongdoer.[10]

There is some misunderstanding as to the interests protected by competition law in the contexts of public and private enforcement. A distinction sometimes is made between public enforcement, which pursues the public interest of protecting the competition norms through administrative or criminal sanctions, and private enforcement, which pursues the private interest of competitors

6 This has happened in very exceptional cases. See, for example, the OFT's case on the independent schools' cartel, where the OFT settled the case and accepted a commitment by the schools to make an ex-gratia payment totalling £3 million into an educational charitable trust to benefit the pupils who attended the schools during the academic years to which the cartel related.

7 Art. L442-6(3) *Code de commerce*. France also has another interesting specificity: it is possible for aggrieved parties to take part as *partie civile* in a criminal proceeding against the wrongdoer and, thus, be awarded damages, apart from the criminal conviction of the (natural) persons involved in anti-competitive conduct.

8 ABA Section of Antitrust Law, *Antitrust Law Developments* (Chicago, 2007), p. 727 *et seq*.

9 See European Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ [2006] C 210/2, para. 4; Case 41/69, *ACF Chemiefarma v. Commission*, [1971] ECR 397, para. 173; Case C-308/04 P, *SGL Carbon AG v. Commission*, [2006] ECR I-5977, para. 37; Case C-76/06 P, *Britannia Alloys & Chemicals Ltd v. Commission*, [2007] ECR I-4405, para. 22.

10 See further European Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final, under 1.1; Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules, SEC(2008) 404, paras 15, 20; Komninos, 2008: 7-10.

and consumers. However, although the courts decide disputes *inter partes*, at the same time, they cannot simply confine themselves to considering the interests of the litigants, but must also have regard to the general interest.[11] This explains why courts must raise the competition law question *ex proprio motu* and may not allow the performance of an anti-competitive agreement, even if the parties have not raised the issue of its legality.[12] Courts are also not bound by judicial or in-court settlements, when the latter infringe the competition rules; indeed, they are under a duty stemming from Article 4(3) of the Treaty on European Union (TEU) to consider the above as null and void, since they are against public policy.[13] Likewise, the possibility for public competition authorities in the EU and in some national competition systems to intervene in civil proceedings and submit *amicus curiae* observations is partly due to the public policy-interest nature of competition law-related litigation.[14]

Similarly, the public interest expressed by the competition laws cannot be varied simply because civil litigation is primarily driven by the private interest. Protection of private rights cannot and should not by itself set in motion the mechanisms for the protection of free competition. The law is indifferent to harm caused *to a specific person*, unless that harm is the consequence of a certain practice, whose object or effect is the distortion-prevention-restriction of *effective competition on the market*. To give some examples, an agreement or practice might cause harm to certain persons but may still not be considered anti-competitive, because it does not affect appreciably competition in the market (*de minimis*). Again, certain unilateral conduct may foreclose competitors and actually harm them, but may not be anti-competitive, in the first place. Conversely, there may be illegal anti-competitive conduct which does not, however, harm any specific person or no person has standing to sue for damages.

---

11 See Bourgeois, 1994: 485-486.

12 See Canivet, 1997: 24.

13 Judicial settlements can have in some jurisdictions *res judicata* effect between the parties and may even constitute an enforceable act or be so declared by a court. The Court of Justice has stressed that such settlements, even if constituting judicial acts, are capable of falling within the prohibition of Article 101 TFEU. See Case 65/86, *Bayer AG and Maschinenfabrik Hennecke GmbH v. Heinz Süllhöfer*, [1988] ECR 5249, paras 14-15; Case 258/78, *L.C. Nungesser KG and Kurt Eisele v. Commission (Maize Seed)*, [1982] ECR 2015, paras 80-89.

14 See Rincazaux, 2002: 1.

The Court of Justice has recognised that private actions strengthen the working of the EU competition rules and discourage practices that are liable to restrict or distort competition, thus making a significant contribution to maintaining effective competition in the Union.[15] In other words, this is a case where the private interest contributes to the safeguarding of the public interest. Indeed, in *Pfleiderer*, the Court dispelled any doubts about the role and function of courts and considered both the competition authorities and the former as servants of the general interest and did not make any differentiation between them as to the interest they pursue when applying the Treaty competition rules. In the words of the Court,

> "*the competition authorities of the Member States* and their courts and tribunals *are required to apply Articles 101 TFEU and 102 TFEU, where the facts come within the scope of European Union law, and* to ensure that those articles are applied effectively in the general interest".[16]

So, even if we suppose that in a given case a civil litigant's private interest might not be compatible with the public interest, as may be the case, for example, if inefficient competitors allege the "anti-competitive nature" of certain practices that in reality enhance effective competition, such a private action *would and should fail*, because the alleged harm would not have been caused by conduct prohibited by Articles 101 and 102 TFEU.[17] Consequently the private interest can never and should never contradict the public interest, in this context. In sum, an effective system of private enforcement should not alter the basic goal of the competition rules, which is to safeguard the public interest in maintaining a free and undistorted competition, and should by no means be thought of as antagonistic to the public enforcement model. Ideally the two models can work to complement each other.[18]

---

15 Case C-453/99, *Courage Ltd v. Bernard Crehan*, [2001] ECR I-6297, para. 27; Joined Cases C-295/04 to C-298/04, *Vincenzo Manfredi et al. v. Lloyd Adriatico Assicurazioni SpA et al.*, [2006] ECR I-6619, para. 91.

16 Case C-360/09, *Pfleiderer AG v. Bundeskartellamt*, Judgment of 14 June 2011, not yet reported, para. 19, emphasis added.

17 Indeed, in such cases, there is no need to have recourse to an "antitrust injury" doctrine in Europe, since there would be no infringement of EU competition law, in the first place.

18 See e.g. Recital 7 Reg. 1/2003: "*The role of the national courts here complements that of the competition authorities of the Member States*".

III. THE EVOLUTION OF EU LAW ON CIVIL ANTITRUST REMEDIES

1. The Court of Justice's General Case Law on Rights and Remedies

At the heart of private antitrust enforcement in Europe lies the question of the relationship between EU and national law. At the current stage of European integration, rights and obligations emanating from Union law are in principle enforced by having recourse to national administrative and civil law before national administrative authorities[19] and national courts (*juges communautaires de droit commun*).[20]

Thus, on the side of *substance*, there is no EU-wide law of contract, tort or unjustified enrichment, or a European Civil Code. Indeed, even if the Union had the power or intention to legislate in such a vast cross-sector area, it would be almost impossible to arrive at a common denominator applicable throughout the EU Member States, taking into account the century-long divisions in the European legal systems and families. Equally, on the side of *procedure*, there are no Union courts of full jurisdiction that could apply EU law and deal with EU law-based claims. Although it has already been proposed to introduce Union courts of general jurisdiction, following the US model of federal circuit courts,[21] the current judicial structure is bound to remain unchanged for some time.

At the same time, the Court of Justice has consistently recognised the "procedural and institutional autonomy" of the Member States to identify the remedies, courts and procedures that are necessary for the exercise of EU law rights at the national level.[22] More importantly, however, the Court has

---

19 Case C-453/00, *Kühne & Heitz NV v. Productschap voor Pluimvee en Eieren*, [2004] ECR I-837, para. 20: "*it is for all the authorities of the Member States to ensure observance of the rules of [Union] law within the sphere of their competence*".

20 Case T-51/89, *Tetra Pak Rausing SA v. Commission*, [1990] ECR II-309, para. 42: "*when applying Article [102] ... the national courts are acting as [Union] courts of general jurisdiction*". Compare, however, AG Léger's Opinion in Case C-224/01, *Gerhard Köbler v. Austria*, [2003] ECR I-10239, para. 66, who sees this *dédoublement fonctionnel* more symbolically than literally: "*That expression must not be understood literally, but symbolically: where a national court is called upon to apply [Union] law, it is in its capacity as an organ of a Member State, and not as a [Union] organ, as a result of dual functions*".

21 See e.g. Hawk, 1997: 338-339.

22 The Court of Justice has, until recently, avoided to refer explicitly to the Member States' "procedural autonomy". From 2004 and onwards this is no longer the case. See Case C-201/02, *The Queen ex parte Delena Wells v. Secretary of State for Transport, Local Government and the Regions*, [2004] ECR I-723, para. 70; Case C-212/04, *Konstantinos Adeneler et al. v. Ellinikos Organismos Galaktos (ELOG)*, [2006] ECR I-6057, para. 95; Case C-53/04, *Cristiano Marrosu and Gianluca Sardino v. Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate*, [2006] ECR I-7213, para. 52; Case C-180/04, *Andrea*

imposed demanding EU law limits and safeguards upon that autonomy. These are the principles of *equality-equivalence* and *effectiveness*.[23] The first principle means that the enforcement of Union law at the national level should not be subject to more onerous procedures than the enforcement of comparable national law. The second principle is a much more demanding test. It means that although Union-derived rights will have to count on national substantive and procedural remedies for their enforcement, such remedies still have to be *effective* and must not render the exercise and enforcement of those rights impossible or unjustifiably onerous. It reflects a more general guiding principle of EU law, full and useful effectiveness (*effet utile*).

The Court of Justice has, nevertheless, proceeded further than that. Starting with such cases as *Francovich*, *Factortame I* and *Zuckerfabrik Süderdithmarschen*,[24] it has also recognised the existence of certain autonomous EU law remedies for Union law-based rights,[25] and has delegated to national law only the very specific conditions for their exercise, as well as the procedural framework rules, always within the limitations of equality and effectiveness. In doing so, it has been guided by the principle *ubi ius, ibi remedium*, under which a Union law right must be protected through an appropriate corresponding remedy,[26] and has relied upon "*the full effectiveness of [Union] rules and the effective protection of the rights which they confer*" and upon the duties that Article 4(3) TEU imposes on Member States and their judicial organs.[27]

Vassallo v. Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate, [2006] ECR I-7251, para. 37; Case C-1/06, *Bonn Fleisch Ex- und Import GmbH v. Hauptzollamt Hamburg-Jonas*, [2007] ECR I-5609, para. 41.

23 See e.g. Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, [1976] ECR 1989, para. 5; Case 45/76, *Comet BV v. Produkschap voor Siergewassen*, [1976] ECR 2043, paras 12-13; Case 130/79, *Express Dairy Foods Ltd. v. Intervention Board for Agricultural Produce*, [1980] ECR 1887, para. 12; Case 199/82, *Amministrazione delle Finanze dello Stato v. San Giorgio*, [1983] ECR 3595, para. 12; Case C-261/95, *Rosalba Palmisani v. Istituto Nazionale della Previdenza Sociale (INPS)*, [1997] ECR I-4025, para. 27.

24 Joined Cases C-6/90 and C-9/90, *Andrea Francovich et al. v. Italy*, [1991] ECR I-5357; Case C-213/89, *Regina v. Secretary of State for Transport, ex parte Factortame Ltd et al. (I)*, [1990] ECR I-2433; Joined Cases 143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen AG v. Hauptzollamt Itzehoe* and *Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn*, [1991] ECR I-415.

25 See e.g. Craig, 2006: 791 *et seq*.

26 See e.g. Pliakos, 1997: 141 *et seq*.

27 Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. Germany* and *Regina v. Secretary of State for Transport, ex parte Factortame Ltd et al (Factortame III)*, [1996] ECR I-1029, para. 39. On the Art. 4(3) TEU legal basis, see in particular Temple Lang, 2001: 87.

A former Advocate General of the Court of Justice and eminent scholar of EU law has therefore proposed a more global approach to remedies in EU law, thus stressing the requirement of effective judicial protection which better describes the Court's case law on remedies. Walter Van Gerven speaks of four already existing EU law substantive remedies: a general one, to have national measures that conflict with EU law set aside;[28] and three specific ones, compensation, interim relief and restitution.[29] Individual civil liability is integrated in the first limb of these three specific remedies, beside its more developed sibling, state liability.

The former Advocate General further makes a distinction between the "constitutive" and "executive" elements of remedies. The first pertain to the principle of the remedy as such; the second to its "content and extent". The first type of elements must be uniform, since they are entirely connected with the Union "right" of which individuals avail themselves. The executive elements, on the other hand, may to a certain extent be governed by national law, but only under more substantial EU law requirements. For these elements EU law should require an "adequacy test", rather than a mere "minimum effectiveness" or "non-impossibility" test which may continue to apply for simple procedural rules.[30]

2. The Court of Justice speaks: *Courage* and *Manfredi*

2.1. *Courage*

The fundamental issue of the EU or national law basis of the right to damages in EU competition law violations was explicitly addressed by the Court of Justice in its *Courage* ruling of 2001. There, the Court recognised a right to damages as a matter of EU rather than national law, and stressed the fundamental character of the EU competition rules in the overall system of the Treaty.

The facts of *Courage* were rather undistinguished. Breweries in Britain usually own pubs which they lease to tenants, while the latter are under

28 This general remedy encapsulates the duty of national courts to ignore national law that conflicts with directly effective EU law (principles of supremacy and direct effect), and to interpret national law in conformity with Union law.

29 See Van Gerven, 2007.

30 See Van Gerven, 2007: 502-504, 524-526.

contractual obligations to buy almost all the beer they serve from their landlords. In 1991, Mr. Crehan signed a 20-year lease with Courage Ltd. whereby he had to buy a fixed minimum quantity of beer exclusively from Courage, while the brewery undertook to supply the specified quantities at prices shown in the tenant's price list. The rent was initially lower than the market rate and it was subject to a regular upward review, but it never rose above the best open market rate. In 1993, Mr. Crehan and other tenants fell into financial arrears, basically blaming this on Courage's supply of beer at lower prices to other non-tied pubs, "free houses". In the same year Courage brought an action for the recovery from Mr. Crehan of sums for unpaid deliveries of beer. Mr. Crehan, alleging the incompatibility with Article 101 TFEU of the clause requiring him to purchase a fixed minimum quantity of beer from Courage, counter-claimed for damages.

There were two specific obstacles to Mr. Crehan's success. The first one was that according to earlier English case law, Article 101 TFEU had been interpreted as protecting only third parties, i.e. competitors or consumers, but not co-contractors, i.e. parties to the illegal and void agreement.[31] The second issue was that under English law a party to an illegal agreement, as this was considered to be by the Court of Appeal, could not claim damages from the other party. This was as a result of the strict construction English courts were giving to the *nemo auditur turpitudinem propriam (suam) allegans* or *in pari delicto potior est conditio defendentis* or *ex dolo malo non oritur causa* rule, which in essence meant that Mr. Crehan's claim in damages would fail, because he was co-contractor in an illegal agreement. The Court of Justice, following the ruling in *Francovich* which had recognised the principle of state liability as a principle of EU law, and also relying on its *Eco Swiss* ruling, stressed the primacy of Article 101 TFEU in the system of the Treaty[32] and the corresponding task of national courts to ensure the full effect (*plein effet*) of Union rules and the protection of individuals' rights conferred by those rules. The full effectiveness (*pleine efficacité*) of the Treaty competition rules and, in particular "*the practical effect [effet utile] of the prohibition laid down in Article [101(1)]*" would be put at risk if individuals could not claim damages for losses caused by the infringement of those rules. The instrumental character of such

31 *Gibbs Mew plc v. Gemmell* (CA), [1998] EuLR 588.

32 *Courage*, *supra* note 15, para. 20, with references to Joined Cases C-6/90 and C-9/90, *Andrea Francovich et al. v. Italy*, [1991] ECR I-5357.

liability for the effectiveness of the law as such is evident, exactly as was the case with state liability in *Francovich*.[33] And finally, the Court dispelled any doubt as to its pronouncement:

> "*Indeed, the* existence *of such a right strengthens the working of the Union 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 [Union]."[34]

The enunciation of a Union right to damages and, by implication, of a principle of civil liability of individuals for breach of EU law, is a logical consequence of the Court's abundant case law on state liability, and reflects a more general principle of Union law that "*everyone is bound to make good loss or damage arising as a result of his conduct in breach of a legal duty*".[35] The extension of this principle to the liability of individuals makes it possible to speak of a system of civil liability for Union law infringements, [36] irrespective of their perpetrator.

2.2. *Manfredi*

After enunciating the basic principle of an EU law right to damages, the Court of Justice proceeded, in *Manfredi*, to deal further with the "constitutive" and "executive" conditions of that right.[37] If *Courage* was a *Francovich* type of case, *Manfredi* can be seen as the *Brasserie du Pêcheur/Factortame III* of individual civil liability.

This was a preliminary reference case from Italy, where insurance companies had been sued for damages by Italian consumers for prohibited cartel behaviour

---

33 *Ibid*, para. 26, very close to the text of para. 33 of *Francovich*.

34 *Ibid*, para. 27 (emphasis added), another text that can be read in parallel to para. 34 of *Francovich*.

35 See Edward & Robinson, 1997: 341, referring to para. 12 of AG Tesauro's Opinion in *Brasserie du Pêcheur/Factortame III*. In that passage the AG had reached the conclusion that *"in so far as at least the principle of state liability is part of the tradition of all the legal systems, it must be able to be applied also where the unlawful conduct consists of an infringement of a [Union] provision"* (para. 13 of AG's Opinion). The AG had started from the premise that the idea of state liability formed part of a more general principle of non-contractual liability (*neminem laedere*).

36 See also Drexl, 2003: 339.

37 See also De Smijter & O'Sullivan, 2006: 24, according to whom *"the judgment in Manfredi has now crystallised – and effectively harmonised – the law on a number of salient points"*.

previously condemned by the Italian competition authority. The Court of Justice was basically called to decide whether consumers enjoy a right to sue cartel members and claim damages for the harm suffered when there is a causal relationship between the agreement or concerted practice and the harm.[38]

The Court, building on *Courage*, and after making it clear that the basis for individual civil liability deriving from a violation of Article 101 TFEU indeed lies in Union law, seems to follow former Advocate General Van Gerven's scheme of "constitutive", "executive" and simple "procedural" conditions of the EU law right to damages. Thus, the Court makes a fundamental distinction between the "existence" and "exercise" of the right to damages. That the "existence" of the right is a matter of EU law is obvious from the fact that the Court solemnly reiterated the most important pronouncements of *Courage*.[39] In this context, it is also clear that the Court proceeded to define, as a matter of EU law, what Walter Van Gerven calls "constitutive" conditions of the right to damages:

> "*It follows that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article [101 TFEU].*"[40]

In other words, the right to damages is open (a) to "*any individual*" as long as there is (b) "*harm*", (c) a competition law violation, and (d) a "*causal*

38 The Court was also called to decide (a) whether the starting time of the limitation period for bringing an action for damages is the day on which the agreement or concerted practice was put in effect or the day when it came to an end; (b) whether a national court should also of its own motion award punitive damages to the injured third party, in order to make the compensable amount higher than the advantage gained by the infringing party and discourage the adoption of agreements or concerted practices prohibited under Art. 101 TFEU; (c) whether the nullity of agreements contrary to Art. 101 TFEU can be relied upon by third parties; and (d) whether EU law is in conflict with a national rule which provides that plaintiffs must bring their actions for damages for infringement of EU and national competition rules before a court other than that which usually has jurisdiction in actions for damages of similar value, thereby involving a considerable increase in costs and time. Another preliminary question sent to Luxembourg in this case related to the applicability of EU law to the anti-competitive conduct.

39 *Manfredi*, *supra* note 15, paras 60, 61, 63, 89-91, citing paras 25-27 of *Courage*. In particular, para. 91 of *Manfredi*, quoting para. 27 of *Courage*, stresses that "*the* existence *of such a right strengthens the working of the [Union] competition rules and discourages agreements or practices, 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 [Union]*" (emphasis added).

40 *Ibid*, para. 61.

relationship" between that harm and that violation.[41] In thus defining the EU law constitutive conditions of the right to damages, the Court has produced a broad rule of standing, which includes consumers and indirect purchasers, which means that national rules following more restrictive rules on standing are contrary to the constitutive conditions in EU law of the *Courage/Manfredi* right to damages.

To mark the distinction between the existence of the right and its constitutive conditions, governed by EU law, and its exercise and executive conditions, governed by national law, the Court stressed again that:

> "*any individual … can claim compensation for [harm causally related with an Article 101 TFEU violation, but] in the absence of [Union] rules governing the matter, it is for the domestic legal system of each Member State to prescribe the detailed rules governing the* exercise *of that right, including those on the application of the concept of 'causal relationship', provided that the principles of equivalence and effectiveness are observed.*"[42]

We submit that the Court refers here to the "executive" rules of the EU law right to damages. In Walter Van Gerven's scheme these are separate from purely procedural rules, which are again a matter for national law. They are also subject to a higher standard of control under an "adequacy test", rather than a mere "minimum effectiveness" or "non-impossibility" test, which may continue to apply for simple procedural rules.

Indeed, the Court in *Manfredi* makes a clear distinction in its analysis between specific questions pertaining to the causal relationship between harm and antitrust violation and the availability of punitive damages, both seen as "executive" conditions,[43] and questions on limitation of actions and competent national tribunals, both seen as "detailed procedural rules". In addition, the Court seems to share the former Advocate General's conviction

---

41 Compare also Case C-421/05, *City Motors Groep NV v. Citroën Belux NV*, [2007] ECR I-653, para. 33, which again refers to the constitutive conditions of the right to damages in the motor vehicle distribution context: "*In the event of a breach by a supplier of the condition for application of the block exemption set out in Article 3(4) of Regulation No 1400/2002, the national court must be in a position to draw all the necessary inferences, in accordance with national law, concerning both the validity of the agreement at issue with regard to Article [101 TFEU] and* compensation for any harm suffered by the distributor where there is a causal relationship between that harm and an agreement or practice prohibited under Article [101 TFEU]" (emphasis added).

42 *Manfredi*, *supra* note 15, paras 63-64, emphasis added.

43 *Ibid*, paras 64 and 92 *et seq*, as to causal relationship and punitive damages respectively.

that the former affect the very core of the exercise of Union law-based rights and should therefore be subject to a more stringent test concerning the EU law principle of effectiveness, while the latter can be subject to a more relaxed "non-impossibility" test. It is thus no surprise that in *Manfredi* the Court uses the "non-impossibility" language only in the context of mere procedural rules and not in the context of the "executive" conditions.[44] This means that questions such as causality, nature of harm and damages, and defences, which can be characterised as "executive" conditions, will be subject to a more demanding test of effectiveness/adequacy, while questions such as competence of courts, limitation periods and rules on proof, which are more "procedural" in nature, will be subject to a minimum effectiveness/non-practical impossibility test.

3. The Quest for EU Legislation: The Commission's White Paper of 2008

It is only in the aftermath of the Court of Justice's important pronouncements that the European Commission decided to go forward with the publication of its Green[45] and White[46] Papers in 2005 and 2008, respectively. These are both documents exploring the possibility and the need for a legislative measure at EU level, to enhance private antitrust enforcement.

The 2008 White Paper starts from the premise that the right to be compensated for harm caused by an antitrust violation is a right guaranteed by the Treaty itself, as the Court of Justice has stressed in *Courage* and *Manfredi*. The Commission is unequivocal: there are many references to "the establishment under [Union] law *of a right to compensation*", derived "*directly from [Union] law*" and to the fact that "*this* European law remedy *can as such not be refuted or conditioned by national legislation of any kind*".[47] There is also a clear distinction between the *existence* of the right, which is a matter of primary

44 Compare paras 64 and 92, which refer merely to effectiveness, with paras 71 and 78, which refer to effectiveness seen through the prism of "*rendering practically impossible or excessively difficult the exercise of rights conferred by [Union] law*".

45 Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2005) 672 final. The Green Paper is accompanied by a Staff Working Paper which sets out the various options more discursively: Commission Staff Working Paper, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules, SEC (2005) 1732.

46 Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2008) 165 final. The White Paper itself is a rather short document that in reality summarises the far more developed Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules, SEC (2008) 404.

47 Staff Working Paper, *supra* note 46, paras 308-309, emphasis added. *See also* section 1.1 of the White Paper.

EU law, and its *exercise*, which is determined by national law that the White Paper intends harmonising to a certain extent through secondary EU law.[48]

A fundamental quality of the White Paper is that it codifies and restates the existing *acquis communautaire* involving most aspects of the right to damages for EU competition law violations. The *Courage* and *Manfredi* rulings are naturally prominent, but there are also references to case law that deals with many other questions of remedies and procedures available at national level for the enforcement of Union law. Notwithstanding this *acquis communautaire* and the EU law basis of the right to damages, the White Paper recognises that there are various national legal and procedural hurdles and that therefore there is a need for a strong set of legislative measures to enhance private actions for damages. EU measures, a Regulation and/or a Directive, and certainly a Commission Notice on the quantification of damages, are seen as desirable in order to achieve (i) an effective minimum protection of victims, (ii) a level-playing field and (iii) greater legal certainty. The Commission speaks in effect of a "*combination of measures at [Union] and national level*".

The two basic objectives of damages actions, as perceived by the White Paper, are (a) full compensation for victims, which is presented as "*primary objective*" and (b) effectiveness of competition enforcement in Europe through increased deterrence, which presumably is seen as secondary objective.[49] The Commission also mentions as third objective the development of a competition culture among market participants and the increased awareness of the competition rules.[50]

The main measures and policy choices that the Commission intends to pursue can be summarised as follows:

- standing to sue for damages is recognised for all persons harmed by an EU competition law violation, including competitors, direct and indirect purchasers, and of course consumers;
- direct purchasers, in particular, should be able to rely on the rebuttable presumption that the illegal overcharge was passed on to them in its entirety ("offensive passing-on");

48 Staff Working Paper, *supra* note 46, para. 309.

49 This hierarchy may also explain the absence of proposals for more "aggressive" mechanisms, such as punitive damages. On the two objectives, see recently Nebbia, 2008.

50 Staff Working Paper, *supra* note 46, paras 14-15.

- at the same time, it will be open to defendants to prove that the plaintiff (e.g. a direct purchaser) has passed the illegal overcharge on to his customers; in other words, defensive passing-on should be permitted;
- collective redress should be possible through (i) representative actions by consumer associations, state bodies or trade associations, that are officially certified in the Member States, and (ii) opt-in collective claims for consumers and businesses;
- plaintiffs' access to evidence held by defendants should be made easier; thus the White Paper proposes in effect a certain relaxation of the "fact-pleading" system and the introduction of some elements of "notice-pleading" under the control of the judge, whereby national courts should have the power to order the litigants or third parties to disclose specific categories of relevant evidence;
- final infringement decisions issued by the Commission and by national competition authorities or final judgments on judicial review should be binding on national courts throughout the EU in follow-on civil actions;
- once the infringement has been established, liability for damages will be objective (strict), unless the infringer demonstrates that there is a genuinely excusable error (bearing that burden of proof);
- full compensation should be available, covering not just actual losses, but also lost profits and interest;
- there should be no Union measure on punitive damages;
- the limitation period should not start to run before the day a continuous or repeated infringement ceases, or before the victim can reasonably be expected to have knowledge of the infringement and of the resulting harm;
- for follow-on claims, there should be a new limitation period running for at least two years after an infringement decision has become final;
- corporate statements by leniency applicants (including unsuccessful ones) should not be discoverable, even after the adoption of a final decision;
- the immunity recipient's civil liability should be limited to claims by his direct and indirect contractual partners.

4. The Residual Role of National Laws

As already stressed, private antitrust enforcement in Europe refers to litigation before the national courts of the Member States of the European

Union. This means that, notwithstanding some basic principles which primary EU law provides for, recourse has to be had to the national laws for all detailed legal questions. At the same time, national law must always be applied in conformity with EU law and must be subject to the EU principles of effectiveness and equivalence-equality.

It is fair to say that the national legislative and jurisprudential attitudes have changed over the last years. Thus, whereas until the 1990s few national competition laws expressly mentioned the possibility of private antitrust enforcement and damages actions in particular,[51] the subsequent modernisation and decentralisation of EU competition law enforcement and the 2001 *Courage* ruling by the Court of Justice, led to important developments at national level. The UK and Germany completely overhauled their legislation and, among other reforms, introduced provisions aimed at enhancing private antitrust enforcement of national and EU competition law. Other recently amended or adopted national competition laws contained for the first time provisions on the availability of damages for violations of competition law. At the same time, there has been a recent surge of damages actions and awards.

To start with the UK, the Enterprise Act 2002 transformed the UK system from a purely administrative enforcement system to a hybrid one with the private and criminal enforcement limbs far more developed than anywhere else in Europe. Of particular interest for private enforcement, is the conferring on the UK Competition Appeal Tribunal (CAT) of jurisdiction to hear claims for damages in competition cases.[52] This procedure is thought to make better use of existing judicial resources, thus reducing the costs for the parties. Damages claims before the CAT presuppose the establishing by either the OFT or the European Commission that an infringement of competition law has occurred.[53]

---

51 S. 33 German Competition Act (GWB); s. 14(5)(b) Irish Competition Act of 2002; Art. 12(1)(b) Swiss Act on Cartels and Other Restraints of Competition (KartG) of 1995; Art. 33(1) Swedish Competition Act of 1993, as subsequently amended; Art. 18a Finnish Act on Competition Restrictions of 1992, as subsequently amended.

52 S. 47A UK Competition Act 1998, as subsequently amended.

53 The right to bring such a claim is without prejudice to the existing right to bring damages claims in the ordinary civil courts (i.e. in the Chancery Division of the High Court). It should also be mentioned that the CAT may at any stage of the proceedings, on the request of a party or of its own initiative, direct that a claim for damages be transferred to the Chancery Division of the High Court in England or the Court of Session in Scotland. See para. 48 Competition Appeal Tribunal Rules 2003, SI 2003/1372; Rule 8.7 CPR Practice Direction 30 – Transfer. The recent consultation document of the UK Department for Business Innovation & Skills of April 2012 aims at expanding the role of the CAT and at turning it to a major venue for competition actions by making it possible for it to hear not just follow-on claims.

Such a finding of infringement is binding and cannot be re-litigated.[54] Such actions must be filed with the CAT within a period of two years, beginning at the time of the public enforcer's final infringement decision or on the date when the cause of action accrued.[55] In addition, UK law provides for the possibility for ordinary civil courts to transfer to the CAT competition issues arising in private civil actions.[56] Then, section 58A of the UK Competition Act aims at facilitating follow-on civil actions for damages brought before the ordinary civil courts. It provides that findings of infringement of UK or EU competition law by the OFT (or by the CAT on appeal) bind the courts deciding on follow-on civil claims for damages. The UK system provides for another novelty: Section 47B allows claims for damages brought on behalf of consumers by representative "specified" bodies. These are not meant as US-style class actions, and the claim must specify the consumers on whose behalf it is brought.[57]

The latest amendment of the German Competition Act is another paradigm worth examining. German law has long-provided for antitrust damages actions, but the new section 33 GWB marks important progress, in that it provides a legal basis for damages claims for violation not only of German but also of EU competition law. The new provision also abandons the previous rather restrictive condition for standing, which was conferred only on persons within the "protective scope" of the statute, and stresses that any "*person affected*", including competitors and "*other market participants*" can sue for damages.[58] The law now also gives standing to associations for the promotion of commercial

54 A damages claim cannot be commenced while an infringement decision is on appeal or the time limit for the appeal has not yet expired, unless the CAT gives its permission (s. 47A(7), (8) UK Competition Act 1998, as subsequently amended). For recent cases on this point, see e.g. *Emerson Electric Co. et al. v. Morgan Crucible Company Ltd. et al.*, [2007] CAT 28; *Emerson Electric Co. et al. v. Morgan Crucible Company Ltd. et al.*, [2008] CAT 8; *BCL Old Co. Ltd. et al. v. BASF SE et al.*, [2009] CAT 29; *BCL Old Co. Ltd. et al. v. BASF SE et al.*, [2009] EWCA Civ 434.

55 S. 47A(7), (8) UK Competition Act 1998, as subsequently amended; para. 31 Competition Appeal Tribunal Rules 2003, SI 2003/1372. See also Rayment, 2005: 129 *et seq*.

56 Para. 49 Competition Appeal Tribunal Rules 2003, SI 2003/1372; Rule 8.3 Practice Direction – Transfer, supplementing CPR Part 30.

57 Para. 33 Competition Appeal Tribunal Rules 2003, SI 2003/1372. Collective claims can also be brought in England before the ordinary courts. Rules 19.6 to 19.15 Civil Procedure Rules (CPR) 1998, SI 1998/3132 distinguish, in particular, between representative claims and group litigation. See also CPR Practice Direction 19b– Group Litigation.

58 S. 33(1) GWB. See further Hempel, 2002: 38 *et seq*.; Miege, 2005: 18 *et seq*.; Bunte, 2006: 237 *et seq.*; Logemann, 2009: 222 *et seq*.

or independent professional interests, including consumer associations. In addition, the passing-on defence is restrained, though not completely banned.[59] Finally, German law goes even further than the UK law by conferring a binding effect not only on European Commission and *Bundeskartellamt*, but also on all other EU national competition authorities' infringement decisions. This binding effect is confined to follow-on civil litigation, basically aiming at offering incentives to claim damages from convicted cartelists.[60] Similar developments have taken place in other Member States, such as in in Bulgaria, the Czech Republic, Denmark, Hungary, and Italy.

Finally, there is now a growing mass of national cases, including awards for damages, establishing national precedents and dealing not only with the fundamental questions of the existence of a remedy but also with the more specific conditions for the exercise of the right to damages. Interestingly, it is not the case that most private actions are follow-on actions. At least in terms of final judgments, empirical data shows that the proportion of follow-on to stand-alone claims is finely balanced. Indeed, in some Member States, stand-alone outnumber follow-on cases. For example, in Italy, in the twenty years between 1990 and 2010, out of a total of 91 private enforcement rulings, 69 were in stand-alone and 22 in follow-on cases.[61]

IV. SPECIFIC ISSUES

1. Standing and Passing-on

The fact that EU primary law in the post-*Courage/Manfredi* era itself defines the constitutive conditions of the right to damages, has profound consequences for very important questions such as the rules on standing and the linked question of the passing-on defence.

In *Courage*, the Court had no difficulty in finding that Article 101 TFEU not only protected third-party competitors, in that case third-party beer suppliers foreclosed by a specific network of exclusive beer supply agreements,

59 S. 33(3) GWB.

60 S. 33(4) GWB. See also Article 88/B(6) of the Hungarian Competition Act. Compare also Article 35(1) of the Greek Competition Act (Law 3959/2011), which provides that the judgments of the administrative courts reviewing the Hellenic Competition Commission's decisions – but not the decisions themselves – have the force of *erga omnes res judicata* before the civil courts.

61 See Carpagnano 2011: 290.

but could also be relied upon by "*any individual*",[62] including co-contracting parties, in that case tenants. *Manfredi*, as we developed above, built on *Courage* and defined in detail the EU law constitutive condition of standing, explicitly recognising that consumers enjoy standing to sue for harm caused to them by anti-competitive conduct.[63] So, as a matter of the Treaty itself, EU law has a broad rule of standing.

As to the passing-on defence, while EU law has generally not been very receptive, particularly in cases involving the restitution of unduly paid taxes and levies,[64] it cannot be said that it is prohibited as a matter of EU law or that the mere existence of such a defence runs counter to the principle of effectiveness. Unlike in the US, where the passing-on defence is expressly prohibited at federal level by the *Hanover Shoe* line of judgments,[65] the Court of Justice's case law is more nuanced, preferring to refer to national law subject to the EU law limits of equivalence and effectiveness, while stressing that a general principle of prohibition of unjustified enrichment also exists under EU law.

Coming back to standing, many national laws in Europe contain restrictive rules on standing for competition law-related damages actions. In continental legal systems, the question of damages for competition law infringements has been more or less clear in jurisdictions following the unitary norm system of the French Civil Code (Article 1382), where the sweeping general nature of the national rule on civil liability allows for a liberal approach with regard to standing, but problems have existed in countries following the German doctrine of *Schutznorm*, where plaintiffs claiming damages have to belong to a group of persons whom the legislator intended to protect. In some other countries, notably Italy, the courts had difficulties in granting standing to certain persons, in particular consumers, because of a distinction made between subjective rights (*diritti soggettivi*) and lawful interests (*interessi legitimi*).

62 *Courage*, *supra* note 15, para. 26.

63 *Manfredi*, *supra* note 15, paras 60, 61, 63. Compare AG Mischo's Opinion in *Courage*, para. 38, stressing that "*the individuals who can benefit from such protection are, of course, primarily third parties, that is to say* consumers *and competitors who are adversely affected by a prohibited agreement*" (emphasis added).

64 See Opinion of AG Tesauro in Joined Cases C-192/95 to C-218/95, *Société Comateb and Others v. Directeur Général des Douanes et Droits Indirects*, [1997] ECR I-165, para. 21.

65 *Hanover Shoe v. United Shoe Machines Corp.*, 392 US 481 (1968).

According to this approach, the competition rules protected only the latter and consumers could not avail themselves of this protective scope.[66]

In Germany itself, until the latest amendment of the Competition Act, standing to sue for damages was conferred only on persons within the "protective scope" of the law. With regard to liability based on German competition law violations, the German courts tended to grant standing only to persons at whom the illegal activities were specifically directed.[67] For these reasons, as we already explained above, section 33(1) GWB, which now applies both to German and to EU competition law-based liability, relaxed the rules on standing by referring to "*affected persons*", including competitors and "*other market participants*". However, even under the more relaxed test, German courts have struggled with the question of standing because of the existence of a specific rule against the passing-on defence in the Competition Act (section 33(3) GWB). This rule led the courts to be rather reluctant to grant standing to indirect purchasers, bar some exceptional circumstances. The reason has invariably been the risk of unjust enrichment for claimants and multiple liability for defendants. The latter risk has actually led some German courts to innovative, if not impracticable, solutions, while attempting to reconcile the EU law requirements for a broad rule of standing with the German sensitivities. Thus, the Berlin Higher Regional Court, in the *Berliner Transportbeton* case, [68] recognised indirect purchaser standing, while eliminating the risk of multiple liability by considering direct and indirect purchasers as joint creditors (*Gesamtgläubiger*). The court, however, stopped short from providing a rule on contribution among the joint creditors.

In *Carbonless paper*, a claim for damages was brought against a member of a price-fixing cartel, following on from a 2001 decision by the Commission.[69] The Karlsruhe Higher Regional Court awarded damages to a savings bank acting on behalf of an indirect purchaser but, controversially, the judgment

66 Corte di Cassazione, 9.12.2002, n.° 17475, *Soc. Axa Assicurazioni v. Isvap and Larato*, 9 *Danno e Responsabilità* 390 (2003). Eventually, this ruling was reversed by the *Sezioni Unite* (a special chamber with an increased number of judges) of the Italian Supreme Court. See Corte di Cassazione, 4.2.2005, n.° 2207, *Compagnia Assicuratrice Unipol SpA v. Ricciarelli*, 11 *Danno e Responsabilità* 495 (2005).

67 See e.g. LG Mannheim, 11.7.2003, 7 O 326/02 (Kart) – *Vitaminkartell*, 106 GRUR 182 (2004); LG Mainz, 15.1.2004, 12 HK O 56/02 (Kart) – *Vitaminpreise*, 54 WuW 1179 (2004); LG Dortmund, 1.4.2004, 13 O 55/02 (Kart) – *Vitaminpreise*, 54 WuW 1182 (2004).

68 KG Berlin, 1.10.2009, 2 U 10/03 (Kart).

69 OLG Karlsruhe, 11.6.2010, 6 U 118/05 (Kart) (08).

strengthened the case of direct purchasers by restricting the passing-on defence. In so doing, it narrowed the chances for indirect claimants, as well as the circumstances under which they can seek redress. According to the court, such indirect purchasers can only pursue damages if they are customers of direct subsidiaries of the cartel members. However, this ruling was recently reversed by the German Supreme Court,[70] which held that indirect purchasers, who have acquired goods at an inflated price from a company which has itself been the victim of a price-fixing cartel, can bring damages claims against members of the cartel. At the same time, cartel members may invoke the passing-on defence, by pointing out that the claimant has passed on the overcharge to its customers and was therefore not exposed to the full "cost" of the cartel. In other words, the only meaning that can now be given to section 33(3) GWB is that, in principle, the passing-on defence is available, but the burden of proving the "passing on" of costs down the chain will have to be borne by the defendant.

In France, on the contrary, where standing has never been an issue, the courts fully recognise the passing-on defence. A 2010 ruling of the French Supreme Court actually reversed an appellate judgment for failure to assess whether the claimant had fully or partly passed on to its clients the overcharge resulting from the lysine cartel. Such passing-on would have amounted, according to the Supreme Court, to unjust enrichment. It is notable that the court's judgment seems to place the burden of proof on the claimant and has been criticised for viewing the passing-on question only as a shield,[71] unlike the 2008 Commission White Paper, which proposes the admissibility of the passing-on defence but stresses that the corresponding burden of proof must be borne by the defendant. This is not the first time that a French court admitted the passing-on defence. In the *Vitamins* litigation, the Nanterre and Paris Commercial Courts[72] found that direct purchasers of vitamins passed or could have passed the cartel overcharge on to their customers. Of the two judgments, the first one received a lot of criticism because the court adduced that there was a pass-on from Commission statements that the cartel harmed consumers.

On the basis of the above, it is no surprise that the European Commission's White Paper advocates a broad rule of standing, covering also indirect

70 BGH, 28.6.2011 – KZR 75/10.

71 Cass.Com., 15.6.2010, n.° 09-15816.

72 T.Com. Nanterre, 11.5.2006, n.° RG 2004F02643, *Arkopharma v. Roche and Hoffmann La Roche*; T.Com. Paris, 26.1.2007, n.° RG 2003/04804, *Laboratoires Juva v. Hoffmann La Roche et al.*, respectively.

purchasers. At the same time, the White Paper proposes the retention of the "passing-on defence", presumably in order not to undermine its broad standing stance. Thus, in Europe, the solution will be the opposite from the US: both direct and indirect purchasers have standing to sue and at the same time the passing-on defence is available. Allowing the passing-on defence is a logical consequence of the broad rule of standing, otherwise, as the White Paper accepts, there would be a risk of unjust enrichment of those purchasers that passed on the illegal overcharge to their customers and of multiple compensation of the overcharge.[73] Finally, since difficulties also arise when the indirect purchaser invokes the passing-on of the illegal overcharge as a basis of his claim ("offensive passing-on"), the White Paper proposes the introduction of a rebuttable presumption that the overcharge has indeed been fully passed on to the plaintiff – indirect purchaser.

2. Causation

In *Manfredi*, the Court stated that it is for the legal system of each Member State to prescribe the detailed rules governing the existence of a causal link between an antitrust infringement and the harm suffered, provided that the principles of equivalence and effectiveness are observed:

> "*in the absence of [EU] rules governing the matter, it is for the domestic legal system of each Member State to prescribe the detailed rules governing the exercise of [the] right [to damages], including those on the application of the concept of 'causal relationship', provided that the principles of equivalence and effectiveness are observed*."[74]

It is worth-noting that in most of the cases where damages actions are brought before national courts, the plaintiff encounters grave problems in proving the causal link between the damage and the unlawful conduct. The most acute problem lies in determining lost profits (*lucrum cessans*), i.e. whether such losses are due to the anti-competitive practice or to external conjectural economic factors. Likewise, it is also difficult to prove causation in actions

73 Staff Working Paper, *supra* note 46, para. 210. At the same time, the White Paper stresses that the standard of proof for the passing-on defence should not be lower than the claimant's standard to prove the damage. Under this model, the plaintiff must prove that he has suffered loss, but it is open to the defendant to prove that the plaintiff mitigated the loss by passing on the whole or part of the overcharge to downstream purchasers.

74 *Manfredi*, *supra* note 15, para. 64.

brought by consumers. This is so because the causal link between the anti-competitive conduct and the damage suffered by the end-consumer may be distant and tenuous.

National laws employ various notions in dealing with causation, but they all tend to produce similar outcomes. English law employs notions of foreseeability and remoteness and provides that the plaintiff bears the burden of proving that the defendant's unlawful conduct caused the harm and is the predominant cause of the plaintiff's loss. Other national laws follow similar notions, depending on the legal tradition to which they belong. By way of example, modern German civil law is based on three theories: the equivalent causation theory (*causa adequata*) referring to the normal course of events, the adequate causation theory resembling the English foreseeability notion, and the theory of imputation, referring to the protective scope of the law (*Schutzzweck*).[75] According to the latter theory, in order to establish a causal link between the damage and the harmful event, one must refer to the purpose of the rule violated, and all possible consequences that are not covered by the protective scope of that rule must be eliminated.[76]

In *Arkin*, a case concerning liner conferences and the alleged violation of Articles 101 and 102 TFEU, the English High Court found that the right test for causation was whether the breach of duty was the dominant or effective cause of the loss. On the basis of that test, the court was required to consider whether the claimant was the author of its own misfortune by seeking to stay in a loss-making market.[77] In the end, the court decided that the plaintiff's own irrational pricing policy was the predominant cause of his business failure. Thus, the conduct of a plaintiff who continues trading, although he knows that his business is evaporating, may take the form of contributory fault, break the chain of causation and thus exclude the defendant's liability.

In another case, a Swedish court struggled with establishing causation and quantifying harm caused by an exclusionary abuse.[78] In proceedings brought before the Stockholm District Court by competitors of VPC, the central securities depository in Sweden, the claimants argued that VPC's refusal to supply them with full CD-ROM copies of share registers constituted an abuse

75 See *inter alia* Kremer, 2003: 220-221.

76 See Mestmäcker, 2001: 235.

77 *Arkin v. Borchard Lines Ltd. et al. (IV)* (QB (Com.Ct.)), [2003] EWHC 687.

78 Stockholm District Court, 20.11.2008, Cases n.° T 32799-05 and T 34227-05.

of a dominant position and that VPC should be ordered to pay damages. The court agreed that VPC had abused its dominant position, but awarded damages for half of the amount claimed, since full proof had not been presented by the claimants with respect to the quantum of their damages. For example, in relation to rental and employee costs, the court considered that it could not be excluded that office space and staff could have been used by other parts of the claimants' business that were not affected by the abuse. Similarly, because the economy as a whole was in recession during the period when the abuse took place, the claimants were unable to precisely identify which part of the losses were the result of the defendant's abusive conduct, and which part was caused by the general economic downturn.

3. Characterisation of damages

In *Manfredi*, the Court of Justice made clear that victims of EU competition law infringements are entitled to full compensation of the harm they have suffered:

> "*It follows from the principle of effectiveness and the right of any individual to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (damnum emergens) but also for loss of profit (lucrum cessans) plus interest … Total exclusion of loss of profit as a head of damage for which compensation may be awarded cannot be accepted in the case of a breach of Community law since, especially in the context of economic or commercial litigation, such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible … As to the payment of interest, ... an award made in accordance with the applicable national rules constitutes an essential component of compensation.*"[79]

EU competition law does not, however, require national courts to award punitive damages, unless such damages may be awarded pursuant to similar actions founded on the basis of national law.[80]

---

79 *Manfredi*, *supra* note 15, paras 95-97. On the requirement to include compensatory interest in the damages award, see also paras 122-124 of the Commission's Staff Working Paper, *supra* note 46.

80 *Manfredi*, *supra* note 15, para. 92. At the same time, the Court of Justice in *Manfredi* made clear that the EU could theoretically proceed to adopt legislation introducing punitive damages, if it so wished.

When the *Manfredi* ruling was referred back to the national court, the Justice of the Peace of a small Southern Italian city, followed an approach based on a mixture of equity and deterrence.[81] This damages claim followed on from a 2000 decision by the Italian competition authority, which found that the members of a car insurance cartel had collectively raised their premiums by 20%. In that decision, the authority had used the "yardstick method" in calculating the cartel overcharge by comparing the prices in the cartelised Italian market with the average European prices in other European (non-cartelised) markets. In support of his damages claim, the claimant relied on that finding. The court, adjudicating on the basis of equity, considered that the Italian competition authority's finding as to the 20% overcharge amounted to a "simple presumption" and that the defendant had failed to rebut it. The court went further than full compensation by awarding the claimant double damages in order to increase deterrence and to skim off the illegal profits made by the defendant as a result of the cartel.

On the other hand, in *Devenish*, the English High Court decided, as a preliminary issue, that the *non bis in idem* principle precludes an award of exemplary damages in a case in which the defendants have already been fined or are successful immunity recipients. At the same time, the court held that a restitutionary award, i.e. gain-based damages, was not available for competition law-based torts. The court also rejected the claim for an account of profits, which is a remedy aimed at stripping a wrongdoer's profits.[82] On appeal, the Court of Appeal upheld the judgment and did not consider that the principle of effectiveness of EU law dictated a different result.[83]

4. Quantification of harm

In *Manfredi*, the Court of Justice held that

> "*in the absence of [EU] rules governing the matter, it is for the domestic legal system of each Member State to set the criteria for determining the extent of the damages, provided that the principles of equivalence and effectiveness are observed*".[84]

81 Giudice di Pace di Bitonto, 21.5.2007, *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA*.

82 *Devenish Nutrition Ltd et al. v. Sanofi-Aventis SA (France) et al.,* [2007] EWHC 2394 (ChD).

83 *Devenish Nutrition Ltd et al. v. Sanofi-Aventis SA (France) et al.,* [2008] EWCA Civ 1086.

84 *Manfredi, supra* note 15, para. 92.

A national court cannot therefore refuse to award damages simply because a claimant is unable sufficiently to quantify the amount of the harm it has suffered. In order to assist the Commission in the formulation of guidance to be provided to national courts on the quantification of damages, a study was commissioned and published on DG Competition's website in January 2010.[85] Then, in June 2011, the Commission held a public consultation and published a Draft Guidance Paper on quantifying harm in actions for damages based on breaches of the EU antitrust rules.[86]

National courts have not very often reached the stage of quantifying the harm in private antitrust enforcement cases. There have been many cases which were settled.[87] At the same time, there are examples where the national courts established the liability but left the question of quantification of harm to be decided at a later stage, assuming that the parties would then conclude a settlement.[88]

Claimants often find it difficult precisely to quantify the harm they have suffered as a result of an infringement of the EU competition rules due to a number of factors, including evidentiary burdens, lack of access to data, and/or the general difficulty in producing robust estimations of damage. This can be quite a demanding procedure, as both the 2009 Study and the 2011 Draft Guidance Paper show. It is necessary to rely on economic experts, but then again the whole exercise must be very rigorous and avoid being based only on theoretical models. These difficulties are exemplified in the Spanish *Antena 3* case, where the Madrid Court of First Instance partially accepted Antena 3's claims and awarded EUR 25 million in damages,[89] on the basis of an expert's report submitted by Antena 3. The judgment, however, was subsequently

85 Oxera, Komninos *et al*., 2009.

86 DG-Competition Draft Guidance Paper, Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, Public Consultation, Brussels, June 2011.

87 For example, at least 4 cases brought before the UK Competition Appeal Tribunal under ss. 47A and 47B UK Competition Act 1998 have been settled: Case 1060/5/7/06, *Healthcare at Home v. Genzyme Ltd.*; Case 1078/7/9/07, *The Consumers Association v. JJB Sports plc*; Case 1088/5/7/07, *ME Burgess, JJ Burgess and SJ Burgess (trading as JJ Burgess & Sons) v. W Austin & Sons (Stevenage) Ltd. and Harwood Park Crematorium Ltd.*; Case 1108/5/7/08, *N J and D M Wilson v. Lancing College Ltd.*

88 Audiencia Provincial Girona, 16.4.2002.

89 Juzgado de lo Mercantil nº 5 de Madrid, 11.11.2005, 36/2005.

overturned by the Madrid Court of Appeal,[90] because the Antena 3 experts' quantification of the damage was flawed. The court considered that Antena 3's loss of profit must be proved with rigour and that it was unacceptable to award damages where proof of such loss is based on a theoretical expert report that runs counter to reality.

Interestingly, there have been quite a few awards of damages in exclusionary conduct cases. This seems to contradict the commonly held view that it is easier to quantify the harm in exploitative (e.g. cartels) than in exclusionary cases. Nevertheless, difficulties remain with regard to compensation of lost profits. Thus, in *Verimedia*, a French case, a competitor sought damages following an exclusionary agreement.[91] The claim followed on from a 1998 decision of the then French Competition Council, which found that the defendants had voluntarily delayed the communication of information to the claimant necessary for it to conduct its activities in the market for media services. In its claim, Verimedia sought to recover damages as a result of loss of clientele. The Versailles Court of Appeal considered that, while the claimant was entitled to recover damages as a result of its loss of clientele, the quantum of those damages should be reduced due to the claimant's lack of knowledge of the business area in which it was starting up, and the lack of precision of certain of its orders. The court therefore compensated the claimant only for the lost opportunity to penetrate the market more quickly. Moreover, the court rejected the claim for damage resulting from the difference between the claimant's expected business plan and its actual financial results, considering that since loss of clientele and the non-attainment of expected profits are one and the same loss, they can be compensated only once.

In *INAZ Paghe*, an Italian case, INAZ sought to recover damages for the harm suffered as a result of the National Association of Employment Consultants' collective boycott of its software packages.[92] In its judgment, the Milan Court of Appeal awarded damages, after applying a "but for" test. But the court stopped there. While INAZ was able to show that, prior to the boycott, its business was growing at a rate of more than 10% per annum and

90 Audiencia Provincial Madrid, 18.12.2006; upheld by Tribunal Supremo, 14.4.2009. See further Hitchings, 2010: 29-31.

91 CA Versailles, 12ème Ch. Sect. 2, 24.6.2004, n.° 2/7434, *SA Verimedia v. SA Mediametrie, SA Secodip and GIE Audipub*.

92 Corte d'Appello di Milano, 10.12.2004, *INAZ Paghe srl v. Associazione Nazionale dei Consulenti del Lavoro*.

that this increase had suddenly ceased at the time of the boycott, the court considered that it could not be sure that this growth would have continued at a similar rate.

An exclusionary case is also the first instance where a UK court granted damages. This was based on previous infringement decisions by the OFT in an abuse of dominance case concerning margin squeeze and rebates in the pharmaceutical sector. While the case was still pending before the CAT, the court awarded "interim damages" for an amount of £2 million.[93] That represented, in the court's view, roughly 70% of the likely final damages award. The case was then settled and no final judgment was rendered.

In exploitative cases, mainly cartels, a first barrier to cross, in quantifying the harm, is to prove that the cartel actually produced an overcharge. Three recent cases in Germany discuss this question. In the *Vitamins* case, the Dortmund Regional Court applied the *prima facie* rule that a market price is generally lower than a cartel price.[94] In *Berliner Transportbeton*, the German Supreme Court (BGH), which was deciding on the appeals from the public enforcement decision of the *Bundeskartellamt*, stated that the longer is the cartel's duration and the greater its geographic area, the higher should be the threshold for showing that a cartel did not accrue any economic benefit from its activity.[95] The court thus concluded that prices in the cartel were likely to be higher than in a competitive market. Then, on the civil side of this case, the Berlin Higher Regional Court[96] held that there is a *prima facie* evidence that any quota cartel has had an anticompetitive and thus a price-enhancing effect. Furthermore, the court held that it can be assumed that the agreement of setting up a cartel is typically put into practice by its members. In other words, in both of these questions the defendant carries the burden to prove the opposite.

The latter principle has drawn some criticism because it is possible that a cartel was ineffective and hence there was no overcharge. There may also be decisions by competition authorities concerning agreements that infringe Article 101 TFEU or equivalent national provisions "by object" but may have never been implemented. In these cases the overcharge may also be negligible

93 *Healthcare at Home Ltd. v. Genzyme Ltd.*, [2006] CAT 29.

94 LG Dortmund, 1.4.2004, 0 55/ 02 (Kart).

95 BGH, 28.6.2005 – KRB 2/05.

96 KG, 1.10.2009, 2 U 10/03 (Kart.).

or zero.[97] Even on a cartelised market, price increases might also be explained by e.g. an unexpected increase in demand, as the Mannheim Regional Court has, indeed, pointed out in the *Carbonless paper* case.[98]

5. Binding Effect of Infringement Decisions

Notwithstanding their substantive complementarity, private and public enforcement remain institutionally independent of each other.[99] The independence of the two models means that in principle there is no hierarchical relationship between them. Advocate General Mazák's Opinion in *Pfleiderer* makes this clear.[100] Indeed, introducing a rule of primacy would be problematic because it would undermine the role of courts as enforcers of equal standing. In the US, primacy of public over private antitrust enforcement and deference to the public enforcer has never been accepted by the courts as a valid principle.[101]

The fact that, in Europe, the Court of Justice appears to have entrusted the Commission with a certain primacy over national proceedings and courts, does not contradict the principle of independence.[102] This "primacy" is not one of the Commission, as competition *authority*, over civil *courts*, but rather of the Commission, as *supranational* EU organ, over *national* courts.[103] In addition, this principle of supremacy does not mean that a national court is widely prevented from employing reasoning which could be inconsistent with that

97 See Oxera, Komninos *et al*., 2009: 88. This is also recognised by the Court of Justice in *Prym*, where it was held there can be no *"presumption that the implementation of the cartel has created an effect on the market"* and that *"where the Commission considers it appropriate for the purposes of calculating the fine to take that optional element – the actual impact of the infringement on the market – into account, it cannot just put forward a mere presumption but (...) must provide specific, credible and adequate evidence with which to assess what actual influence the infringement may have had on competition in that market"* (Case C-534/07 P, *William Prym GmbH & Co. KG v. Commission*, [2009] ECR I-7415, paras 80 and 82).

98 LG Mannheim, 29.4.2005, 22 O 74/04 (Kart).

99 See further Komninos, 2008: 15 *et seq*.

100 *Pfleiderer*, *supra* note 16, para. 40 of the Opinion: "*I consider that Regulation No 1/2003 and the case-law of the Court have not established any de jure hierarchy or order of priority between public enforcement of EU competition law and private actions for damages*."

101 See Jones, 2003: 99.

102 Case C-344/98, *Masterfoods Ltd. v. HB Ice Cream Ltd.*, [2000] ECR I-11369. Art. 16(1) of Regulation 1/2003 has adopted verbatim the *Masterfoods* case law and states that national courts *"cannot take decisions running counter to the decision adopted by the Commission"* or which *"would conflict with a decision contemplated by the Commission in proceedings it has initiated"*.

103 See also Paulis & Gauer, 2003: 69.

used by the European Commission in a decision, *a fortiori* a decision which concerns different facts. Indeed, according to a more correct view, a real conflict between a Commission decision and a national court judgment would happen only if the latter were to prevent compliance by the addressee of a Commission decision with the operative part of that decision. The 2008 FIDE Community report expresses this rationale in the following terms:

> "*The Commission's reasoning leading it to a particular decision, including its interpretation of Article [101] or Article [102] and its findings of fact, are clearly not 'binding' as such. The addition to the Community* legal *order that Commission decisions represent is not a particular interpretation of Article [101] or Article [102], or its findings of fact. It is in the operative part of the decision that specific provisions are found, creating legal effects: the obligation to pay a fine, the duty to conform to an order to cease certain behaviour or to take certain positive action. This is the part of the decision that becomes part of [Union] law and is vested with supremacy as long as the decision stands.*"[104]

Thus, a nuanced principle of supremacy does not call into question the principle of independence of private vis-à-vis public antitrust enforcement, precisely because of the specific characteristics of EU law and its supranational nature.

However, the reality is that some national laws (a minority among the 27 Member States) have introduced specific provisions on the binding effect of national (or EU) infringement decisions on civil follow-on damages litigation. At the same time, the introduction of such a binding effect is also one of the proposals of the Commission's White Paper.[105]

Conferring a general binding effect on all administrative agency findings would unsettle the fine relationship and balance between private and public enforcement. Aside from concerns over separation of powers and judicial independence, an unqualified binding effect would essentially subjugate private to public enforcement; it would also withdraw from the ambit of national civil courts a substantial part of the competition law disputes, in particular those referring to the infringement of the antitrust norm, thus undermining the role of courts as enforcers of equal standing. Allowing the courts to be fully involved in the application of substantive competition law would enrich

104 Gippini-Fournier, 2008: 471. See also Komninos, 2007: 1397 *et seq*.

105 Staff Working Paper, *supra* note 46, para. 143 *et seq*.

national litigation and national courts would remain active players in the application and enforcement of the Treaty competition rules and would not turned to mere assessors of damages.

It may also make life a bit more difficult for competition authorities, which might feel restrained in their action, if they knew that they decide not only for themselves and the administrative proceedings, but also for the judge and the civil proceeding. For example, an authority might shy away from including broad statements in its decisions about harm to the economy caused by a specific cartel, which may be a good practice in term of advocacy and raising consumers' awareness, for fear that such statements might be "interpreted" as a binding calculation of the damage caused to specific claimants in a follow-on civil proceeding.

For this reason, a more nuanced approach should be followed in interpreting rules on supremacy or binding effect, and the limited national case law supports this. Thus, in *Crehan*,[106] a case decided on appeal from the High Court,[107] the English Court of Appeal was confronted with the effect that past European Commission decisions had on a civil case where the facts were *similar* but not *identical*. The Commission in its past decisions, which were considered to be relevant to the facts of the civil case at hand, had found that the cumulative networks of the lease agreements between certain beer suppliers and pub tenants contributed to the foreclosure of the UK on-trade beer market, thus falling foul of Article 101(1) TFEU. In *Crehan* the English courts had to identify whether the cumulative effect of several similar networks of beer distribution agreements foreclosed the UK market. The Court of Appeal reversed the High Court findings that a beer tie imposed on a pub tenant had not infringed Article 101 TFEU and held that the High Court judge should have followed the European Commission's findings in similar cases. It was the first time that the English Court of Appeal had awarded damages for breach of competition law.

This was not, however, the last episode and the then House of Lords overturned the Court of Appeal and found that the High Court judgment should be restored.[108] The House of Lords referred to the Court of Justice case law on conflicts between decisions of the Commission and national courts

106 *Bernard Crehan v. Inntrepreneur Pub Co. CPC* (CA), [2004] EWCA Civ 637.

107 *Crehan v. Inntrepreneur Pub Company et al.* (Ch.D), [2003] EWHC 1510.

108 *Inntrepreneur Pub Company (CPC) et al. v. Crehan* (HL), [2006] UKHL 38.

and followed a narrower concept of conflict, holding that there was no conflict between the Commission decisions and the High Court's finding that the agreements did not infringe Article 101(1) TFEU. According to the House of Lords, whilst the court should respect the Commission's expert analysis, Commission decisions are ultimately only part of the admissible evidence which the court must take into account. In other words, a national court is not required to accord full deference to the reasoning of past Commission decisions but is merely precluded from reaching a different result than the Commission in the operative part of a specific decision which essentially deals with the same case.[109]

Similar is the recent *Enron* case, where the UK Office of Rail Regulation had found that EWS was in breach of Article 102 TFEU for abusing its dominant position, by charging Enron discriminatory prices for access to its rail freight services without having any objective justification. In a follow-on action, the CAT held that there was no liability in damages for lack of causation.[110] On appeal, the English Court of Appeal ruled that tribunals overseeing damage claims are bound by the facts contained in an antitrust decision, but stressed that these have to be clear statements and not "*stray phrases*".[111] In that case, the courts accepted that they were bound by the regulator's findings with regard to antitrust liability but that the question of civil liability was open.

6. Collective Claims – Class Actions

The introduction of US-style class actions does not find favour in Europe and has been one of the main points of controversy around the European Commission's legislative proposals in this area. At the same time, some Member States recognise the need for the law to make possible a degree

109 See Notice on the cooperation 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, para. 8, emphasis added, which states that "*the application of Articles [101] and [102 TFEU] by the Commission* in a specific case *binds the national courts when they apply [EU] competition rules* in the same case *in parallel with or subsequent to the Commission*". The same view is expressed in the Commission's article-by-article Explanatory Memorandum to the 2000 draft of Regulation 1/2003, under Art. 16, "*the potential for conflict depends on the operative part of the Commission decision and the facts on which it is based*" (Commission Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 ("Regulation implementing Articles 81 and 82 of the Treaty"), COM(2000) 582 final, OJ [2000] C 365E/284). See also Dalheimer, 2005: 120; Klees, 2005: 300-301.

110 *Enron Coal Services Ltd. v. English Welsh & Scottish Railway Ltd.*, [2009] CAT 36.

111 *Enron Coal Services Ltd. v. English Welsh & Scottish Railway Ltd.*, [2011] EWCA Civ 2.

of aggregation of claims and have recently introduced legislation providing for opt-in class action possibilities. However, most Member States still lack specific legislative bases for such types of collective claims.

In the UK, parties have tried, at times successfully,[112] to rely on existing civil procedural mechanisms, such as the Group Litigation Orders (GLOs). GLOs are most often used in mass tort personal injury cases and financial loss cases and are an "opt in procedure" publicised through the England and Wales Law Society. Then, recently, the English Court of Appeal rejected the attempt to use Rule 19.6 of the English Civil Procedure Rules to claim damages on behalf of all direct and indirect purchasers of air freight services from BA, without having identified and requested consent from all affected parties. Rule 19.6 allows representative actions where the party bringing the claim and each party in the represented class, has the "*same interest*" in the claim, but the court thought that the claimants were abusing the law and attempting to introduce from the back door an opt-out class action model.[113]

The absence of class actions and collective relief at EU or national level has not, however, stood in the way of claimants joining their claims in national proceedings, using various mechanisms that the national laws allow for. Thus, a mechanism which has successfully been used to aggregate claims is the CDC model, where a specific business organisation (CDC) acquires the claims by customers of cartel members and then brings a bundled claim in its own name and on its own account. At the same time, CDC ensures that a part of the damages recovered will be transferred to the cartel victims. This model has attracted criticism, yet national courts, such as the Higher Regional Court of Düsseldorf, have considered it legal and the corresponding bundled claims admissible.[114] Then, in Slovenia, in 2010, a civil society was created to seek damages for some 75, 000 Slovenian households from five electricity distributors that were condemned by the national competition authority for a violation of the competition rules, because they had simultaneously announced an increase in retail electricity prices for households.[115] Similarly,

112 See Holmes, *e-Competitions*, No. 36124, www.concurrences.com.

113 *Emerald Supplies Ltd. and Southern Glass House Produce Ltd. v. British Airways plc*, [2010] EWCA Civ 1284.

114 OLG Düsseldorf, 14.5.2008, VI U 14/07 (Kart).

115 In that case, the electricity distributors were given a notice for voluntary repayment of the overcharge and, eventually, the Slovenian consumers were given credit notes corresponding to the overcharge that each household had paid.

claimants have used "special purpose vehicles" to bring collective claims in the Netherlands.

The absence of collective relief mechanisms has led the Commission to propose EU measures in that area, which has raised many reactions. The proposal is cautious: no opt-out class actions are envisaged. Indeed, the White Paper itself conspicuously avoids using the term "class actions", even in their opt-in form, because of the negative connotations of that term for Europeans.[116] Instead, it speaks of "representative" and "collective" actions. "Representative actions", on the one hand, are brought by qualified entities, in particular consumer associations but also trade associations, that are either (a) officially designated in advance by Member States to bring representative actions for damages on behalf of identified or identifiable victims, or (b) certified on an *ad hoc* basis by the public authorities of a Member State for a particular antitrust infringement.[117] According to the Commission,

> "*a representative action for damages is an action brought by a natural or legal person on behalf of two or more individuals or businesses who are not themselves party to the action, and aimed at obtaining damages for the individual harm caused to the interests of all those represented (and not to the representative entity)*".[118]

"Collective actions", on the other hand, are opt-in mechanisms whereby the victims expressly decide to combine their individual claims in one single action. The White Paper sees such actions as quite attractive in terms of a cost-benefit analysis, since it allows the victims to share the costs but be compensated for the integral part of their harm. Both representative and collective actions would be mutually complementary means of collective redress.[119]

---

116 In US class actions, one or more persons belonging to a broad class of persons that have been harmed by anti-competitive practices bring an action on behalf of the unidentified class of persons, although the former might not have asked for the permission of those persons individually. An injured party is thus assumed to be included in the class unless he chooses not to be (opt-out). The judgment, however, has *res judicata* effect for all members of the class, even for those who did not take part in the process, after some formalities are seen to.

117 In the latter case, the White Paper advocates a cautious approach: certification should be limited to entities whose primary task is to protect the defined interests of their members, other than by pursuing damages claims and which give sufficient assurance that abusive litigation is avoided (Staff Working Paper, *supra* note 46, para. 53).

118 *Ibid*, para. 49.

119 *Ibid*, para. 60.

7. Access to evidence

Civil antitrust litigation in Europe is based on the adversarial system. This means that civil courts rely on the information provided by the parties. In principle, there is no provision in EU law which requires national courts to undertake an investigation of their own motion for the purpose of obtaining the legal and factual elements necessary to assess the legality of certain conduct with EU law, where they do not have such elements available to them. The powers of the national courts are determined rather by national procedural law, and civil law is characterised by the principle that it is for the parties to take the initiative to submit all relevant facts on which the court must then base its decision.[120]

At the same time, as far as access to evidence is concerned, there are fundamental differences between common law (in particular the US) and civil law systems.[121] In common law jurisdictions based on "notice pleading", discovery is much more substantial. There, the plaintiff must only give the defendant notice of the nature of his claim and this will be enough for the former to request discovery. In civil law jurisdictions (this is also the case in English law), on the other hand, civil procedure is based on the system of "fact pleading", which means that parties must set out in reasonable detail the relevant facts of their case and describe the specific evidence to be offered in support of their allegations. There is generally no pre-trial discovery and the most a plaintiff can hope to attain is to persuade the court to order the production of certain evidence.

However, this does not mean that the EU principle of effectiveness may not impose on national judges a more pro-active attitude in appropriate cases. Indeed, the Court of Justice has recognised that national courts may be under a duty to examine, even of their own motion, the compatibility of certain behaviour with EU law.[122] Then, unduly restrictive national rules of evidence can always be set aside by EU law, if they make the exercise of EU rights practically impossible or excessively difficult. There is a long line of case law dealing with this matter in particular in the broad area of repayment by the State of charges levied in breach of Union law. Thus, presumptions or rules of

120 Case C-137/08, *VB Pénzügyi Lízing Zrt. v. Ferenc Schneider*, Opinion of AG Trstenjak, not yet reported, para. 110.

121 See Riley, 2005: 383-384.

122 See generally Komninos, 2008: 221-225, with references to EU case law.

evidence intended to place upon the taxpayer the burden of establishing that the charges unduly paid have not been passed on to other persons or special limitations concerning the form of the evidence to be adduced, such as the exclusion of any kind of evidence other than documentary evidence, have been considered incompatible with EU law.[123] The Court of Justice has also held that national rules on the burden of proof in Article 102 TFEU cases cannot render virtually impossible or excessively difficult the exercise of rights conferred by that provision.[124]

In addition, the principle of effectiveness of EU law may go as far as imposing on national courts a pro-active use of all procedures available to them under national law, including that of ordering necessary measures of inquiry, in particular the production by one of the parties or a third party of a particular document.[125]

In that context, one of the most groundbreaking proposals of the European Commission's White Paper is to give the courts increased powers to order disclosure. The White Paper stresses that competition cases are particularly fact-intensive and that they are characterised by "*a very asymmetric distribution of the available information and the necessary evidence: it is often very difficult for claimants to produce the required evidence, since many of the relevant facts are in the possession of the defendant or of third persons and are often not known to claimants in sufficient detail*".[126] For those reasons, the White Paper in effect proposes a certain departure from the "fact pleading" system and advocates a greater role for the courts to order the defendant to reveal the evidence in his possession, including "*categories of relevant evidence*", which is essential for the plaintiffs to prove their case for damages. The conditions for a disclosure order are that the plaintiff has:

123 See e.g. Case 199/82, *Amministrazione delle Finanze dello Stato v. San Giorgio*, [1983] ECR 3595 para. 14; Case C-343/96, *Dilexport Srl v. Amministrazione delle Finanze dello Stato*, [1999] ECR I-579, para. 48.

124 Case C-242/95, *GT-Link A/S v. De Danske Statsbaner*, [1997] ECR I-4349, paras 22-27; Case C-340/99, *TNT Traco SpA v. Poste Italiane SpA et al.*, [2001] ECR I-4109, para. 60. See also Joined Cases C-427/93, C-429/93 and C-436/93, *Bristol-Myers Squibb et al. v. Paranova A/S*, [1996] ECR I-3457, Opinion of AG Jacobs, paras 102-103; Case C-276/01, *Proceedings against Joachim Steffensen*, [2003] ECR I-3735, paras 62-63.

125 Case C-526/04, *Laboratoires Boiron SA v. Union de recouvrement des cotisations de sécurité sociale et d'allocations familiales (Urssaf) de Lyon*, [2006] ECR I-7529, para. 55.

126 Staff Working Paper, *supra* note 46, paras 65-66.

- presented all the facts and means of evidence that are reasonably available to him, provided that these show plausible grounds to suspect that he suffered harm as a result of an infringement of competition rules by the defendant;
- shown to the satisfaction of the court that he is unable, applying all efforts that can reasonably be expected, otherwise to produce the requested evidence;
- specified sufficiently precise categories of evidence to be disclosed; and
- satisfied the court that the envisaged disclosure measure is both relevant to the case and necessary and proportionate.

In addition, discovery should exceptionally be ordered not only *inter partes* but also against third parties under a more stringent test of proportionality and only if the information is not available from the litigants.[127]

Although the White Paper is eager to present the proposals as part of the "fact pleading" system, it is fair to say that these specific measures constitute in effect the introduction of some elements of "notice pleading", under the control of the courts, which will have a margin of appreciation and will have the duty to verify, even *ex officio*, whether the envisaged discovery is relevant to the case as well as necessary and proportionate.[128]

8. Private Actions and the Leniency Programme: The Problem of Discovery of Corporate Statements

A serious question that has recently tarnished EU competition law enforcement is the discoverability in civil proceedings for damages of corporate statements, i.e. of statements submitted to the Commission in the context of a leniency application.[129]

First, private litigants have sought discovery of such corporate statements in US courts.[130] The problem was that since leniency applicants had to produce written corporate statements for the Commission, such documents fell under Rule 26 of the US Federal Rules of Civil Procedure and were thus fully

127 *Ibid*, paras 122-124.

128 *Ibid*, para. 107. The White Paper also takes into account the necessity to allow some degree of protection to business secrets and other confidential information. The courts should therefore balance the above against the victims' right to be compensated under a proportionality test (*ibid*, para. 116).

129 Commission Notice on immunity from fines and reduction of fines in cartel cases (Leniency Notice), OJ [2006] C 298/17.

130 See generally Petrasincu, 2011: 361 *et seq*.

discoverable. The Commission viewed this as a serious risk for the effectiveness of its leniency programme and, as a result, introduced the possibility to make oral statements.[131] Such oral statements made by leniency applicants are routinely recorded by the Commission, transcribed and signed by the leniency applicants. They are intended to be short and exclude business secrets and confidential information, to avoid the need for editing.

Then, claimants have sought to obtain such information directly from the Commission or from the national competition authorities. As far as the former is concerned, under Article 27(2) of Regulation 1/2003 and Article 15(1) of Regulation 773/2004, [132] the Commission is required to grant access to the file only to the parties to whom it has addressed a Statement of Objections. Neither Regulation 1/2003 nor Regulation 773/2004 therefore foresees a general right of access to the Commission's file for third parties. However, third parties, in particular claimants, have attempted to obtain access to certain information in a Commission file under the general right of public access to documents of the European institutions, established by Regulation 1049/2001.[133] That Regulation provides that, subject to certain exceptions, any EU citizen or natural or legal person residing, or having its registered office, in a Member State, has a right of access to documents drawn up/received by/ in the possession of the Commission.

Moreover, according to Article 4 of the Regulation, access may be refused by the Commission only where disclosure would undermine the protection of

- the public interest as public security, defence and military matters, international relations and the financial, monetary or economic policy of the Union or a Member State (Article 4(1)(a));
- privacy and the integrity of the individual, in particular in accordance with EU legislation regarding the protection of personal data (Article 4(1)(b));
- commercial interests, including intellectual property (Article 4(2), first indent);
- court proceedings and legal advice (Article 4(2), second indent);

131 Leniency Notice, *supra* note 129, para. 32.

132 Commission Regulation 773/2004/EC of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ [2004] L 123/18, as amended by Commission Regulation 1792/2006 of 23 October 2006, OJ [2006] L 362/1, and by Commission Regulation 622/2008 of 30 June 2008, OJ [2008] L 171/3.

133 Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ [2001] L 145/43.

- the purpose of inspections, investigations and audits (Article 4(2), third indent); and
- the institution's decision-making process (Article 4(3)).

In that regard, the Commission has sought to resist disclosure of information contained in its case files in competition cases, particularly of leniency-related documents, under Article 4(2), third indent of Regulation 1049/2001. However, the case law of the EU courts has not always been favourable to it,[134] suggesting that once a decision is adopted, or even before the adoption of the decision but well after the investigative stage, the Commission may have to grant access to leniency-related or other documents.

Most recently, the General Court decided that the Commission had wrongly refused to disclose the cartel investigation's index of contents to the Cartel Damage Claims (CDC) group, which specialises in conducting damage claim lawsuits against cartel members in Europe.[135] The Commission's approach was that some information contained in the statement of contents, taken together with other information revealed in the non-confidential version of the decision, could lead undertakings damaged by the cartel to consider that certain documents listed in the statement of contents might contain further incriminating evidence and therefore, to bring actions for damages. The Court, however, did not use the same angle, to look at the matter:

> "*[E]ven if the fact that actions for damages were brought against a company could undoubtedly cause high costs to be incurred, even if only in terms of legal costs, and even if the actions were subsequently dismissed as unfounded, the fact remains that the interest of a company which took part in a cartel in avoiding such actions cannot be regarded as a commercial interest and, in any event, does not constitute an interest deserving of protection, having regard, in particular, to the fact that any individual has the right to claim damages for loss caused to him by conduct which is liable to restrict or distort competition.*"[136]

134 Case T-2/03, *Verein für Konsumenteninformation v. Commission*, [2005] ECR II-1121, para. 65 *et seq.*; Case T-403/05, *MyTravel Group plc v. Commission*, [2008] ECR II-2027, paras 71 and 72; Joined Cases T-391/03 and T-70/04, *Yves Franchet and Daniel Byk v. Commission*, [2006] ECR II-2023, para. 105.

135 See above.

136 Case T-437/08, *CDC Hydrogene Peroxide Cartel Damage Claims v. Commission*, Judgment of 15 December 2011, not yet reported, para. 49, with references to *Courage* and *Manfredi*.

The tension between private antitrust enforcement and the effectiveness of leniency programmes was eventually addressed by the recent *Pfleiderer* ruling of the Court of Justice.[137] The Court offered the Commission and national competition authorities support in their approach to resist or limit access to such evidence by civil claimants, when the effectiveness of their leniency programmes is at stake. But, at the same time, the Court did not give a ready-to-use solution to follow in the balancing of the two objectives at stake. According to the Court of Justice, only the EU legislator could do this.

In the specific case, the *Bundeskartellamt* had imposed fines on the three largest European producers of decor paper and on five individuals personally responsible for price-fixing agreements and agreements on capacity closure. Pfleiderer, a purchaser of decor paper, brought an action for damages against the producers of decor paper, from which it stated it had purchased goods. In order to prepare for the civil proceedings, it applied to the *Bundeskartellamt* for comprehensive access to the files relating to the cartel proceedings. After Pfleiderer received a version of the three decisions imposing fines, from which identifying information had been removed, and a list indicating the evidence collected in a search, it expressly requested, by way of a second application, access also to the leniency applications, the documents voluntarily transmitted by the immunity recipients and the evidence collected. The authority informed the claimant that it intended to accede to that request only in part and to limit access to the file to a version from which confidential business information, internal documents, the corporate statements themselves and documents provided by the applicants had been removed. On appeal, the referring court sent a number of questions to the Court of Justice, having essentially to do with the broader question of providing access to leniency-related documents by claimants in follow-on civil proceedings.

The Court of Justice, reminded, first of all, that neither the EU Leniency Notice, nor the ECN Notice,[138] nor the ECN Model Leniency Programme[139] bind the authorities and courts of the Member States, due to their soft law nature.[140] Then, the Court, preferred to give a judgment of principle and not to offer a list of discoverable and non-discoverable evidence, as Advocate

137 *Pfleiderer, supra* note 16.

138 Commission Notice on cooperation within the Network of Competition Authorities, OJ [2004] C 101/43.

139 http://ec.europa.eu/competition/ecn/model_leniency_en.pdf.

140 *Pfleiderer, supra* note 16, paras 21-23.

General Mazák had proposed in his Opinion.[141] Since this was a matter, for which no Union legislation was in existence, it fell under the competence of the Member States. Therefore, the Court probably felt that it was impossible or – at least – inelegant for itself to arrive at a specific rule of discoverability. Its reliance, however, on the general principle of effectiveness[142] leaves no doubts:

> "*[L]eniency programmes are useful tools if efforts to uncover and bring to an end infringements of competition rules are to be effective and serve, therefore, the objective of effective application of Articles 101 TFEU and 102 TFEU. The effectiveness of those programmes could, however, be compromised if documents relating to a leniency procedure were disclosed to persons wishing to bring an action for damages ... [Therefore,] [t]he view can reasonably be taken that a person involved in an infringement of competition law, faced with the possibility of such disclosure, would be deterred from taking the opportunity offered by such leniency programmes, particularly when, pursuant to Articles 11 and 12 of Regulation No 1/2003, the Commission and the national competition authorities might exchange information which that person has voluntarily provided.*"[143]

Then, after repeating the *Courage* and *Manfredi* well-known text as to the important role of private antitrust enforcement in Europe,[144] the Court ruled that a balancing exercise is here necessary. This should be conducted by the national courts only on an *ad hoc* basis, taking into account the above principles and the overall circumstances of each case. This is what happened before the referring court. The Bonn District Court granted access to a non-confidential version of the file, with the exception of internal records and the corporate statements made by the leniency applicants. The court stressed the significance of the leniency programme and the risks for its effectiveness, if access was granted to corporate statements. This was so because the attractiveness of leniency programmes would suffer considerably if potential leniency applicants had to fear the disclosure of corporate statements to third parties who claimed to have suffered damages. The court also stressed that the *Bundeskartellamt*

141 AG Mazák proposed that a distinction be made between the corporate statements themselves, which are put together for the specific purpose of the leniency application and should not be discoverable, and "*all other pre-existing documents submitted by a leniency applicant in the course of a leniency procedure*", which should be discoverable (Opinion, paras 43-47).

142 *Pfleiderer*, *supra* note 16, para. 24.

143 *Ibid*, paras 25-27.

144 *Ibid*, paras 28-29.

had a duty to protect the leniency applicants' legitimate expectations that the information provided in the corporate statements is highly confidential.

As a result of these tribulations, the European Commission seems set to propose EU legislation to deal with the specific question of the protection of leniency-related materials from being disclosed in civil proceedings for damages. Such legislative proposals should be expected within 2012.

Apart from cartel proceedings, where disclosure is usually targeted at leniency-related documents, recently plaintiffs have also sought to obtain access to documents held by competition authorities in non-cartel cases. For example, Ma Liste de Courses (MLDC), an online discount coupon processor had initially submitted a complaint before the French Competition Authority against two rival companies, HighCo and Sogec, for setting a standard for online coupons without consulting other companies, such as MLDC. The *Autorité* decided to accept commitments offered by the two undertakings, to remove competition concerns, however, MLDC subsequently introduced an action for damages for the harm it had suffered during the period the allegedly anti-competitive conduct was at place. In so doing, MLDC sought non-confidential versions of all written and oral statements gathered by the national authority during its investigation, including the parties' and third parties' written observations, minutes of hearings, replies to questionnaires and several other documents on the administrative file. The French court decided that disclosure was justified, bearing in mind that the plaintiff only sought access to non-confidential versions of such documents.[145] This is an interesting case showing that claimants may be more successful in their requests for discovery in cases not involving a cartel leniency programme. Indeed, it may be argued that the public policy concerns to resist such disclosure recedes in cases of commitments decisions which, in terms of competition enforcement, do not mean as much as the leniency programmes.[146]

9. Co-operation with the Commission

Regulation 1/2003 establishes a number of mechanisms of cooperation between national courts and the Commission. These are built on the principle

145 T.Com. Paris, 24.8.2011, n.° RG 2011014911, *SAS Ma liste de courses v. Ste HighCo 3.0 et al*.

146 For the converse case, where the plaintiff objects to the defendants' use of documents from the administrative file in a civil follow-on proceeding for damages, see T.Com. Paris, 8.11.2011, n.° RG 2010073867, *SAS Outremer Telecom v. SA Orange Caraïbe and SA France Telecom*.

of loyal cooperation contained in Article 4(3) TEU and aim to promote the coherent application of the EU competition rules. The Commission has also issued a Notice on cooperation with national courts.[147] The mechanisms of cooperation provided for in Regulation 1/2003 and expounded in the Cooperation Notice are uniformly available to all national courts around the EU. They are thus no longer dependent on national procedural laws or practices. Furthermore, Regulation 1/2003 is directly effective and does not require any implementing measures in the national legal orders.[148]

The basic measures of dialogue and co-operation that the new modernised EU framework has put in place are (a) the right of the national courts to seek the European Commission's opinion, (b) the duty of the European Commission to transmit information to national courts, and (c) the *amicus curiae* mechanism.

Thus, when called upon to apply the EU competition rules to a case pending before it, a national court may first seek guidance in the case law of the EU courts or in Commission regulations, decisions, notices and guidelines applying Articles 101 and 102 TFEU. Where these tools do not offer sufficient guidance, the national court may also ask the Commission for its opinion on questions concerning the application of the EU competition rules. It may do so in writing or electronically.

As of 31 March 2009, the Commission had issued opinions on 18 occasions[149] and the Report on the Functioning of Regulation 1/2003 provides a description of the issues covered by some of these opinions.[150] The Commission has also published four examples of opinions given on the website of the Directorate General for Competition.[151] The few cases that have become public so far show that the co-operation has been a success. As the Commission had promised when it set this mechanism in motion in 2004, it has always limited itself to providing the national court with the factual information or the economic

147 *Supra* note 109.

148 See among others Hirsch, 2003: 241; Wils, 2004:12.

149 Five to Belgium courts, nine to Spanish courts, one to a Lithuanian court, one to a Dutch court and two to Swedish courts.

150 Commission Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003 (SEC(2009) 574 final, 29.4.2009), paras 278 to 281.

151 http://ec.europa.eu/competition/court/antitrust_requests.html#opinion.

or legal clarification asked for, without considering the merits of the case pending before it.

In order to maintain its own independence, the Commission does not hear any of the parties before giving its opinion to the national court. Moreover, the Commission informs the national court if it has been contacted by any of the parties in the case pending before the court on issues which are raised before the national court, independently of whether these contacts took place before or after the national court's request for cooperation.[152] The co-operation procedure may raise certain concerns relating to due process, since the Commission's opinion will be transmitted without the parties being heard,[153] and the court might follow it without giving the parties an effective opportunity to contradict it. However, as the rules stand, the Commission is not under an obligation to communicate its submissions to the parties, or to base them on the evidence before the court.[154]

As for the duty of the European Commission to transmit information to national courts, under Article 15(1) of Regulation 1/2003, a national court may ask the Commission (a) for documents in its possession, (b) for information of a procedural nature to enable it to discover whether a case is pending before the Commission, whether the Commission has initiated a procedure or whether it has already taken a position, and (c) when the Commission is likely to take a decision so as to be able to determine whether to stay proceedings or whether interim measures should be adopted. There are, however, certain limits to the co-operation procedure between the Commission and national courts.

One limit relates to the protection of professional and business secrets. While the Co-operation Notice attempts to reconcile the various conflicting interests by leaving it up to national courts whether to request information covered by professional secrecy, it does provide for certain safeguards. Before transmitting information covered by professional secrecy to a national court, the Commission reminds the court of its obligation under EU law to uphold the rights which Article 339 TFEU confers on natural and legal persons and it asks the national court whether it can guarantee the protection of the confidentiality of the information and business secrets. If the national court cannot offer such a guarantee, the Commission must not transmit the

152 *Supra* note 109, para. 19.

153 *Ibid*, paras 19 and 30.

154 See in this respect the critical comments by Gilliams, 2003:462.

information covered by professional secrecy.[155] The Commission has opted for this specific kind of dialogue with the national courts based on a combined reading of Articles 4(3) TEU and 339 TFEU.[156] This is in line with the ruling of the General Court in *Postbank*.[157]

The Commission may also refuse to transmit information to national courts where this is necessary in order to "*safeguard the interests of the [EU] or to avoid any interference with its functioning and independence, in particular by jeopardizing the accomplishment of the tasks entrusted to it*".[158] This is intended to include correspondence between the Commission and national competition authorities in the framework of the European Competition Network. Finally, as we saw above, the protection of leniency-related material is another limit on the information that the Commission can provide to national courts. The Commission states in the Co-operation Notice that it will only disclose such information to national courts with the leniency applicant's consent,[159] as disclosure may prejudice the effective enforcement of EU competition law by the Commission since it could frustrate the aim of making detection of hardcore restrictions of competition easier by discouraging companies from seeking leniency.[160] Private litigants therefore have to rely solely on discovery in the context of the civil proceedings, or content themselves with either non-leniency-related evidence held by the Commission or final infringement decisions.

Coming now to the Commission's role as *amicus curiae* pursuant to Article 15(3) of Regulation 1/2003, it is fair to say that this new mechanism had raised a lot of interest during the modernisation discussions. Experience so far is positive and the Commission has recently started to publish its *amicus curiae* observations on its website.[161]

---

155 See Case C-2/88 Imm, *J. J. Zwartveld and Others*, [1990] ECR I-4405, paras 10 and 11.

156 *Supra* note 109, paras 23 to 25.

157 Case T-353/94, *Postbank NV v. Commission*, [1996] ECR II-921, para. 69.

158 *Supra* note 109, para. 26.

159 *Ibid*, paragraph 26. See also Leniency Notice, *supra* note 129, paras 32 and 33: "*The Commission considers that normally disclosure, at any time, of documents received in the context of this notice would undermine the protection of the purpose of inspections and investigations within the meaning of Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council*".

160 See above.

161 http://ec.europa.eu/competition/court/antitrust_requests.html#amicus. National courts have given the Commission permission to publish only five of these opinions. Apart from these five cases, the Commission

The third sentence of Article 15(3) of Regulation 1/2003 grants the Commission, acting on its own initiative, the power to submit written observations to national courts "*where the coherent application of Article [101 or 102] of the Treaty so require*". In such circumstances, the Commission limits its observations to an economic and legal analysis of the facts underlying the case pending before the national court. The Commission has the power to submit written observations on its own initiative, but the making of oral observations is subject to the national court's permission. Although the Commission is not a party to the national proceedings, but is supposed to act as an objective, neutral and independent expert, its role raises certain due process concerns, due to the fact that certain national judges may unquestionably accept the Commission's statements, without giving the parties the opportunity to effectively contradict them.

The *Inspecteur van de Belastingdienst* case[162] was the first time that the Court of Justice was asked to rule on the conditions under which the Commission can submit written observations before the national courts under Article 15(3) of Regulation 1/2003. The question that arose was whether the scope of the Commission's power to submit observations under Article 15(3) of Regulation 1/2003 is limited to the strict context of the application of Articles 101 and 102 TFEU by national courts or whether it also covers the situation where, by submitting written observations to a national court, the Commission wishes to ensure the coherent application of the effects of one of its own decisions under Article 101 TFEU. The Dutch court which referred the case to the Court, noted, that the case before it did not concern the application of Articles 101 and 102 TFEU but rather a totally different issue, namely the tax deductibility of fines. However, in its judgment, the Court held that the power afforded to the Commission to submit written observations under Article 15(3) to national courts is not limited to the strict context of the application of Articles 101 and 102 TFEU by the national courts but rather is linked to the coherent application of Articles 101 and 102 TFEU. That condition may be fulfilled even

submitted, in 2006, written observations to the Court of Appeal of Paris in the *Garage Gremeau* case, concerning the interpretation of the concept of quantitative selective distribution under Commission Regulation 1400/2002 of 31 July 2002 on the Application of Article 81(3) of the Treaty to Categories of Vertical Agreements and Concerted Practices in the Motor Vehicle Sector, OJ [2002] L 203/30. In addition, in February 2010, the Commission submitted written observations to the Irish High Court in the *Irish Beef* case, regarding whether an agreement among Ireland's major beef producers to reduce capacity by 25% could be justified under Article 101(3) TFEU.

162 Case C-429/07, *Inspecteur van de Belastingdienst v. X BV*, [2009] ECR I-4833.

if proceedings do not pertain to issues relating to the application of Articles 101 and 102 TFEU.[163] For the Court, "*the effectiveness of the penalties imposed by the national or [EU] competition authorities on the basis of Article [103(2)(a) TFEU] is [...] a condition for the coherent application of Articles [101 and 102 TFEU]*".[164]

V. CONCLUSIONS

It is clear that private actions in Europe have taken off. National courts no longer deal with the question whether there is a remedy for victims of anti-competitive conduct, but rather they must now rule on a series of important questions. As a result, an interesting body of national case laws is taking shape. Broadly speaking, the national courts are confronted with the same problems, have similar concerns and respond to the latter in similar ways. At the same time, the various national cases show that there may be questions necessitating specific legislative measures at Union level. Certainly, the interaction of civil proceedings with administrative leniency programmes is one of these areas.

163 *Ibid*, para. 30.

164 *Ibid*, para. 37.

REFERENCES

Bourgeois

1994 "EC Competition Law and Member State Courts", in: Hawk (ed.), *Antitrust in a Global Economy 1993*, *Annual Proceedings of the Fordham Corporate Law Institute*, New York/Deventer: Juris Publishing, pp. 475-496.

Bunte, H.-J.

2006 *Langen & Bunte Kommentar zum deutschen und europäischen Kartellrecht*, Vol. I, *Deutsches Kartellrecht*, Munich: Luchterhand: pp. 227-245.

Canivet

1997 "The Responsibility of the Judiciary in the Implementation of Competition Policy", in: *Judicial Enforcement of Competition Law*, Committee on Competition Law and Policy, OECD, Paris, pp. 21-26.

Carpagnano

2011 "Vent'anni di applicazione giudiziale delle regole di concorrenza in Italia: 1990-2010", *Concorrenza e Mercato* 283, pp. 283-304.

Craig, P. P.

2006 *EU Administrative Law*, *Collected Courses of the Academy of European Law*, Vol. XVI/1, Oxford: OUP.

Dalheimer

2005 "Art. 16", in: Dalheimer, Feddersen & Miersch (eds), *EU-Kartellverfahrensverordnung*, *Kommentar zur VO 1/2003*, Munich: C.H. Beck, pp. 118-122.

De Smijter & O'Sullivan

2006 "The *Manfredi* Judgment of the ECJ and How It Relates to the Commission's Initiative on EC Antitrust Damages Actions", 2006-3, *EC Competition Policy Newsletter,* pp. 23-26.

Drexl

2003 "Do We Need 'Courage' for International Antitrust Law? Choosing between Supranational and International Law Principles of Enforcement", in: Drexl (ed.), *The Future of Transnational Antitrust – From Comparative to Common Competition Law*, Berne/The Hague/London/New York: Kluwer, pp. 311-341.

Edward & Robinson

1997 "Is there a Place for Private Law Principles in Community Law?", in: Heukels & McDonnell (eds.), *The Action for Damages in Community Law*, The Hague/London/Boston: Kluwer, pp. 339-349.

Gilliams
2003 "Modernisation: From Policy to Practice", 28 ELRev., pp. 451-474.
Gippini-Fournier
2008 "Institutional Report: The Modernisation of European Competition Law: First Experiences with Regulation 1/2003", in: Koeck & Karollus (eds.), *The Modernisation of European Competition Law*, *Initial Experiences with Regulation 1/2003*, Vienna: Nomos – Facultas, pp. 375-483.
Harding, C. & Joshua, J.
2003 *Regulating Cartels in Europe*, *A Study of Legal Control of Economic Delinquency,* Oxford: OUP.
Hawk
1997 "The Role of the Judge – Working Paper II", in: Ehlermann & Laudati (eds.), *European Competition Law Annual 1996*:, The Hague/Boston/London: Kluwer, pp. 335-341.
Hempel R.
2002 *Privater Rechtsschutz im Kartellrecht*, *Eine rechtsvergleichende Analyse*, Baden-Baden: Nomos.
Hitchings
2010 "Private Enforcement in Spain", 3 GCLR, pp. 28-40.
Hirsch
2003 "Anwendung der Kartellverfahrensordnung (EG) Nr. 1/2003 durch nationale Gerichte", 1 ZWeR, pp. 233-254.
Hodges
2011 "European Competition Enforcement Policy: Integrating Restitution and Behaviour Control – An Integrated Enforcement Policy, Involving Public and Private Enforcement with ADR", 34 *World Competition,* pp. 383-396.
Jones
2003 "A New Dawn for Private Competition Law Remedies in Europe? Reflections from the US", in: Ehlermann & Atanasiu (eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law,* Oxford/Portland: Hart, pp. 95-108.
Klees, A.
2005 *Europäisches Kartellverfahrensrecht mit Fusionskontrollverfahren*, Cologne/Berlin/Munich: Carl Heymanns.
Komninos, A.P.
2007 "Effect of Commission Decisions on Private Antitrust Litigation: Setting the Story Straight", 44 CMLRev., pp. 1387-1428.

2008 *EC Private Antitrust Enforcement*, *Decentralised Application of EC Competition Law by National Courts,* Oxford/Portland: Hart Publishing.

Kremer

2003 "Liability for Breach of European Community Law: An Analysis of the New Remedy in the Light of English and German Law", 22 YEL, pp. 203-247.

Logemann, H.P.

2009 *Der kartellrechtliche Schadensersatz*, *Die zivilrechtliche Haftung bei Verstößen gegen das deutsche und europäische Kartellrecht nach Ergehen der VO (EG) Nr. 1/2003 und der 7. GWB-Novelle*, Berlin: Duncker & Humblot.

Mestmäcker

2001 "The Modernisation of EC Antitrust Policy: Constitutional Challenge or Administrative Convenience?", in: Ehlermann & Atanasiu (eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy*, Oxford/Portland: Hart, pp. 223-240.

Miege

2005 "Modernisation and Enforcement Pluralism – The Role of Private Enforcement of Competition Law in the EU and the German Attempts in the 7th Amendment of the GWB", Paper Presented in the Conference Organised by the Amsterdam Center for Law and Economics on Remedies and Sanctions in Competition Policy (Amsterdam, 17-18 February 2005).

Nebbia

2008 "Damages Actions for the Infringement of EC Competition Law: Compensation or Deterrence?", 33 ELRev., pp. 23-43.

Oxera, Komninos *et al* .

2009 *Quantifying antitrust damages*, *Towards non-binding guidance for courts, Study prepared for the European Commission*, December 2009, available at: http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf.

Paulis & Gauer

2003 "La réforme des règles d'application des articles 81 et 82 du Traité", 11 JdT (Eur.), pp. 65-73.

Petrasincu

2011 "Discovery Revisited – The Impact of the US Discovery Rules on the European Commission's Leniency Programme", 32 ECLR, pp. 356-368.

Pliakos, A.D.

1997 *Le principe général de la protection juridictionnelle efficace en droit communautaire,* Athens/Brussels: Sakkoulas – Bruylant.

Rayment
2005 "Practice and Procedure before the Competition Appeal Tribunal", in: Ward & Smith (eds), *Competition Litigation in the UK*, London: Sweet & Maxwell pp. 88-173.

Reich
2007 "Horizontal Liability in EC Law: Hybridization of Remedies for Compensation in Case of Breaches of EC Rights", 44 CMLRev., pp. 705-742.

Riley
2005 "Beyond Leniency: Enhancing Enforcement in EC Antitrust Law", 28 *World Competition,* pp. 377-400.

Rincazaux
2002 "Les autorités de la concurrence doivent-elles être autorisées à intervenir dans les procédures relatives à des problèmes de concurrence, plus particulièrement lorsqu'elles sont menées devant les juridictions ordinaires ? Dans l'affirmative, quel devrait être le fondement de leur pouvoir d'intervention ? Rapport international", LIDC Questions 2001/2002.

Temple Lang
2001 "The Duties of Cooperation of National Authorities and Courts under Article 10 EC: Two More Reflexions", 26 ELRev., pp. 84-93.

Van Gerven
2000 "Of Rights, Remedies and Procedures", 37 CMLRev., pp. 501-536.

Wils
2004 "Regulation 1/2003: A Reminder of the Main Issues", in: Geradin (ed.), *Modernisation and Enlargement: Two Major Challenges for EC Competition Law*, Antwerp/Oxford: Intersentia, pp. 9-81.