

Damages Actions for Breach of the EC Antitrust Rules: The European Commission's Green Paper

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Introduction

The European Commission ("Commission") published its Green Paper and accompanying Commission Staff Working Paper² on December 19, 2005. The Green Paper sets forth a number of options for facilitating actions for damages in the national courts of the European Union ("EU") where loss has been suffered as a result of an infringement of the EC antitrust rules. The Commission invited comments on the Green Paper and the questions and options which it puts forward by April 21, 2006.³ This article explores the background to the Green Paper, outlines the options identified by the Commission, examines the Commission's reliance on existing European law and precedent to support the direction of the Green Paper and reviews a number of the more important issues which will attract comment and debate in the consultation and beyond.

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1 Commission Green Paper: Damages actions for breach of the EC antitrust rules, SEC (2005) 1732.

2 Commission Staff Working Paper—Annex to the Green Paper; Damages actions for breach of the Antitrust rules; COM (2005) 672 final.

3 comp-damages-actions.cec.eu.int, or post to European Commission, Directorate-General for Competition, Unit A1-Antitrust policy and strategic support, Review of damages actions for breach of EC antitrust rules, B-1049 Brussels.

Background

From the adoption in 1962 of the first procedural regulation implementing Arts 85 and 86 of the EC Treaty (now Arts 81 and 82 EC)⁴ until its replacement by the Modernisation Regulation⁵ in 2003, the Commission played the leading role in the application of the competition rules and the development of competition policy. The enlargement of the EU on May 1, 2004 and the parallel need to ensure that the competition rules would increasingly be applied by national competition authorities ("NCAs") and national courts has focused attention on the resources available at EU and national levels for public enforcement. There is a general recognition that public enforcement by the Commission and the NCAs should be supplemented by private enforcement by undertakings and individuals through civil litigation in the national courts. Such litigation may entail applications for injunctive relief as well as actions for damages. The Green Paper focuses on the latter.

The Commission considers that, after nearly half a century of policy development and administrative enforcement by the Commission itself and judicial rulings by the European Court of Justice ("ECJ") and, more recently, the Court of First Instance ("CFI"), European competition law is sufficiently clear in a number of areas for undertakings and individuals to enforce their rights, in the same way that they would enforce their rights in other areas of the law, before the national courts and, where they exist, specialist tribunals like the Competition Appeal Tribunal in the United Kingdom. The Commission intends to devote its limited resources to the development of competition policy, for example, in relation to the analysis of exclusionary abuses under Art.82 EC,⁶ and to those cases which are best handled through the application of the Commission's EU-wide powers of investigation. Such cases will include investigation of infringements with an international scope beyond the boundaries of the EU when the Commission co-ordinates with other antitrust agencies, for example the US Department of Justice and the Japanese Fair Trade Commission to name but two. Encouragement has therefore been given

4 Council Regulation 17/62 First Regulation implementing Arts 85 and 86 of the Treaty, [1962] O.J. L13/204.

5 Council Regulation 1/2003 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty, [2002] O.J. L1/1.

6 DG Competition discussion paper on the application of Art.82 of the Treaty to exclusionary abuses, December 2005.

to undertakings and individuals to turn to the national courts rather than to the Commission in circumstances where a national court would be equally well placed (and, perhaps, better placed given the remedies available to it) to hear the claim and adjudicate. Accordingly, the Commission's Staff has indicated that the Commission will not normally entertain complaints the subject-matter of which does not raise novel and important policy issues or issues of efficiency in enforcement at EU level and in respect of which EC law and the policy of the Commission are clear. Thus, for example, the Commission would expect disputes relating to the application of the Technology Transfer Block Exemption⁷ to a licence agreement to be litigated in a national court and not resolved by Commission action. The Commission's determination to allocate its own resources in an efficient manner is mirrored by policy statements of NCAs at the national level.⁸

It is against this background that the Green Paper and the options contained in it should be reviewed and assessed. Private enforcement is seen as a complement to public enforcement. The Commissioner for Competition has stressed on several occasions that the Commission is interested in fostering a "competition culture" rather than a "litigation culture".⁹ This phraseology reflects the words of her predecessor, Commissioner Monti, when he addressed a gathering of the International Bar Association at Fiesole in the autumn of 2004 and referred to the need, whilst facilitating private enforcement, to avoid the "excesses" of certain other jurisdictions.¹⁰ This was a diplomatic, if thinly veiled, reference to a prevalent view in a number of European capitals, including Brussels, and amongst many practitioners in Europe that a combination of features of US private antitrust litigation leads

to excesses. In particular, there are instances of unmeritorious claims which defendants feel compelled to settle, notwithstanding the confidence they have in the merits of their defence, given the potential consequences of an adverse judgment. Some of these issues are explored in more detail later in this article.

A preliminary question is whether it is now clear that infringement of the EC antitrust rules gives rise to rights which undertakings and individuals may enforce in national courts. The answer is that it does as is clear, for example, from the judgment of the ECJ on a reference from the English Court of Appeal in *Crehan*¹¹: the ECJ held that Arts 81 and 82 EC have direct effect in relation to individuals and create rights which national courts must safeguard.

The question then arose whether claims to enforce such rights were in practice being brought before national courts and, if not or if only to a limited extent, what explanation could be given. A study was commissioned on the conditions for claims for damages in case of infringement of EC antitrust rules in the 25 Member States. The Comparative Study¹² presented a picture of "total underdevelopment" and analysed, Member State by Member State, the obstacles to private actions for damages.

The Green Paper states that its purpose is to identify the main obstacles to a more efficient system of damages and to set out different options for further reflection and possible action to improve the conditions both for follow-on actions (i.e. cases in which the claimant relies on a decision of the Commission or an NCA which finds an infringement to have been committed) and stand-alone actions (i.e. cases in which the claimant seeks to prove the infringement without the benefit of a decision of the Commission or an NCA). The significance of both follow-on and stand-alone actions for the achievement of the Commission's goal of supplementing public enforcement through private enforcement is addressed later in this article.

The options

In order to assess the options set out in the Green Paper, it is necessary to review the essential findings of the

⁷ Commission Regulation 772/2004 on the application of Art.81(3) to categories of technology transfer agreements, [2004] O.J. L123/11.

⁸ See, for example, keynote speech by the Chairman of the Office of Fair Trading, to IBC United Kingdom Competition Law Conference, London, December 1, 2005.

⁹ Commissioner for Competition, Nellie Kroes, "Enhancing Actions for Damages for Breach of Competition Rules in Europe", Dinner Speech at the Harvard Club, New York, September 22, 2005, and "Damages Actions for Breaches of EU Competition Rules: Realities and Potentials", opening speech at the conference "*La réparation du préjudice causé par une pratique anti-concurrentielle en France et à l'étranger: bilan et perspectives*", Cour de Cassation, Paris, October 17, 2005.

¹⁰ Commissioner for Competition, Mario Monti, "Private litigation as a key complement to public enforcement of competition rules and the first conclusions on the implementation of the new Merger Regulation", IBA—8th Annual Competition Conference, Fiesole, September 17, 2004.

¹¹ *Crehan v Innentrepreneur Pub Company* [2004] EWCA Civ 637. Case C-453/99, *Courage v Crehan* [2001] E.C.R. I-6297 at [26] and [27].

¹² The study is available on the Commission's website at: www.europa.eu.int.

Comparative Study and the Commission's analysis of them. The Commission identifies the following "main issues": (1) access to evidence; (2) whether there should be a fault requirement in addition to the need for the claimant to prove the infringement, the causal link between it and the loss for which damages are claimed and the quantum of the damages; (3) damages: how they should be defined and calculated; (4) the standing of different categories of potential claimant (e.g. direct and indirect purchasers) and the linked issue of the passing-on defence; (5) the need to ensure that the rights of consumers and purchasers with small claims are protected; (6) whether there should be special rules to reduce the cost risk for the claimant (to incentivise the bringing of damages actions); (7) the co-ordination of public and private enforcement: in essence whether proposals to facilitate actions for damages can be rendered compatible with the policy of the Commission and nearly all NCAs of encouraging participants in cartels to "blow the whistle" on their fellow cartel members and thereby benefit from leniency with regard to the imposition of fines whilst remaining at risk of actions for damages; (8) jurisdiction and applicable law; and (9) a small number of other issues, including, in relation to expert witnesses, limitation periods and the possible clarification of the legal requirement of causation to facilitate damages actions.

Examination of these issues should also proceed in the knowledge that the civil law and common law traditions of civil litigation differ in important respects and that the introduction of certain options would require greater adjustment of the rules governing civil litigation in the civil law jurisdictions than would be the case in the common law jurisdictions (Ireland and the United Kingdom). Moreover, the prospect of introducing special rules applicable to actions for damages for infringement of the EC antitrust rules raises general policy questions, including whether the public policy considerations which are relevant to the enforcement of antitrust law merit and justify separate and distinct treatment for civil claims falling into this category compared with claims arising in other important areas (for example environmental protection or civil fraud).

The Commission is sensitive to these wider issues and does not, in the Green Paper, seek to address the means by which it would promote or introduce specific options following the consultation. There is no discussion, for example, of the possibility of legislation at Community or national level or whether the Commission's overall objectives would be achieved through the adoption of

guidelines for national judges including codes of best practice in handling private claims for damages in competition law cases. Discussion of modalities will take place at the next stage after the Commission's review of the input received in the consultation.

Before considering individual options and the issues which surround them, it is perhaps helpful to examine the so-called excesses of the US system for private antitrust litigation since awareness of these matters has informed the Commission's formulation of the options set out in the Green Paper.

In the United States, the Clayton Act¹³ authorises private persons and entities injured by violations of the antitrust laws to sue and "recover threefold the damages by him sustained". The Clayton Act gives standing to "any person who is injured in his business or property by reason of anything forbidden by the antitrust laws".¹⁴ The plaintiff has the burden of proving the fact of his injury. Having done so, the quantum of damages may be determined on the basis of a "just and reasonable estimate" as long as it is not based "upon speculation or guesswork".¹⁵ This aspect of proof of injury and damages under US law may well have inspired the consideration given by the Commission to the possible need to clarify the requirement of causation.¹⁶ The US system is designed to ensure that a plaintiff who has satisfied the legal test to prove the fact of injury is not defeated in his claim by the difficulties which can exist in quantifying damages. The issues of causation and quantification are closely linked.

In the US system, the proof of the quantum of damages, in a price fixing case for example, typically starts with evidence of the price which would have been paid "but for" the conspiracy. The "overcharge" is calculated by taking the difference between the price which the plaintiff paid and the "but for" price and multiplying it by the volume purchased. This figure is then trebled. The successful plaintiff is also entitled to collect "a reasonable attorney's fee"¹⁷; this is an exception to the general rule in US civil litigation that each party bear the cost of its lawyers.

Liability for (treble) damages is also joint and several: one cartel member can be held liable for the damage caused by each of the other cartel members and a plaintiff need not bring a claim against all of them. The US system

¹³ The Clayton Act of 1914, 15 U.S.C. §15.

¹⁴ *ibid.*

¹⁵ *Bigelow v RKO Radio Pictures*, 327 U.S. 251, 264-65 (1946).

¹⁶ Commission Green Paper, SEC (2005) 1732, Question N, p.11.

¹⁷ The Clayton Act of 1914, 15 U.S.C. s.15.

also permits single or several plaintiffs to sue on their own behalf and on behalf of others who are similarly situated but have not yet brought a claim. The “class action” procedure stipulates that the court must certify that certain requirements are satisfied and determine the members of the “class”. Members of the class once so determined may opt out but are otherwise bound by any eventual judgment or settlement.

Treble damages actions in the United States are typically brought as class actions, often with separate actions brought by larger purchasers who opt out of the class. A class action might be brought against one or more but not all of the cartelists but nevertheless in respect of all losses resulting from purchases from other members of the cartel who, for whatever reason, are not sued. The defendant(s) may not sue other cartelists to recover their share of liability unless they have entered into an agreement to share liability. The existence of joint and several liability and class actions may therefore significantly increase a defendant’s individual liability and affords the plaintiff’s lawyers a considerable degree of leverage to encourage defendants to settle early rather than find themselves exposed to liability for losses caused not only by them individually but caused also by other cartelists from whom, in the absence of an agreement to share liability, they are unable to recover a contribution. This combination of features of the US system together with the rule on the recovery of lawyers’ fees by a successful plaintiff is cited as one of the explanations of the so-called excesses.

Concerns were expressed in the United States that the threat of class actions for treble damages, with their attendant features as described above, would act as a disincentive to a potential “whistle blower” (i.e. a cartelist providing evidence of an infringement of the antitrust laws in return for amnesty from criminal prosecution). In other words, the concern was that potential applicants might view less favourably the benefits of immunity from prosecution if the cartel were to be exposed when compared with the certain risk of actions for treble damages. To address this potential disincentive, the US Congress enacted legislation in 2004 creating two further benefits to corporate amnesty applicants: they would be liable to only single and not treble damages and would not be jointly and severally liable for all of the damages recoverable from all of the cartelists.¹⁸ This enactment may well have inspired the Commission’s Option 16¹⁹ which

contemplates double damages for horizontal cartels (whether automatic, conditional or at the discretion of the court). The potential award of double damages for serious horizontal infringements would permit the Commission also to propose a limitation of an award to single damages where the defendant has made a successful leniency application.²⁰

A further aspect of the so-called excesses is the extent of discovery in US civil litigation and the cost burden which this may impose on defendants. A concern expressed in relation to the Commission’s options regarding access to evidence is that US style discovery should not be introduced in Europe, least of all in the civil law jurisdictions in which discovery or disclosure of documents by the parties to the litigation and by third parties is typically restricted in comparison even with the position in Ireland and the United Kingdom.

The questions and 36 options contained in the Green Paper are reproduced in full in the Appendix at the end of this article.

The following parts of this article review some of the more important issues arising from a consideration of the options and the Commission’s reliance on existing EU law and jurisprudence to support the general direction of the Green Paper.

Access to evidence

The issue of access to evidence is likely to be more controversial in the civil law jurisdictions in Europe than in the common law jurisdictions. The concept of disclosure of documents between the parties in civil litigation is not an integral part of the civil law system. It is clear, however, that the ability of a claimant to access relevant evidence which is in the possession (or under the control) of the defendant may greatly assist it in the pursuit of a damages claim, both at the moment of proving an infringement and at the stage of establishing a causal link between the infringement and the damage, and then quantifying the loss suffered.

Again, there will be a strong lobby which argues that there is no policy reason to contemplate the introduction of rules of procedure which differentiate between claims for damages in competition cases and other areas of the law—for example, product liability. On the other hand, the Commission’s objective of increasing

¹⁸ Antitrust Criminal Penalty Enforcement and Reform Act of 2004, Pub. L. 108-237, s.213.

¹⁹ Commission Green Paper, SEC (2005) 1732, para.2.3, p.7.

²⁰ Commission Notice on immunity from fines and reduction of fines in cartel cases, [2003] O.J. C45/3.

private enforcement to support public enforcement cannot realistically be achieved if claimants in damages cases rely exclusively on decisions of the European Commission or the NCAs to prove an infringement.

While claims for damages in follow-on actions represent an important aspect in the overall picture, the Commission will be anxious to ensure that its eventual proposals encourage the pursuit of stand-alone actions, where the claimant also has to prove the infringement. In the absence of such actions, there will be little or no support from the private sector for public enforcement. Accordingly, it is to be anticipated that the Commission will make some proposals that facilitate access to evidence in antitrust damages actions.

Double damages

Perhaps the most controversial option contained in the Green Paper is Option 16, which envisages double damages for horizontal cartels, with such awards being either automatic, conditional or at the discretion of the court. There is a strong lobby which supports the compensatory principle for the recovery of damages, and which is opposed to any proposal which would depart from that principle.

In the end, the Commission and the Member States will need to determine policy objectives and priorities in deciding whether the benefits of private litigation (which the Commission sees as an aspect of private enforcement supporting public enforcement) in the field of competition law justify a departure from the principles that normally apply in civil litigation. The concept of double damages would also enable the Commission to address concerns over the impact of proposals encouraging private litigation on the efficacy of leniency programmes in Europe. The Commission could, for example, propose a rule that a successful leniency applicant should be at risk only of single damages. Such an approach would mirror the legislative changes in the United States where successful amnesty applicants are liable, in private litigation, only for single (as opposed to treble) damages and are no longer jointly and severally liable with their co-conspirators.

The standing of claimants

A further issue which gives rise to significant policy considerations relates to the standing of claimants to

bring actions for damages. In the US federal courts, only direct purchasers from the infringers may bring actions for damages.²¹ Indirect purchasers—that is to say, purchasers from the direct purchasers and those further down the chain—are precluded from bringing actions in the federal courts (albeit that such actions are permitted in a large number of the individual states under their own antitrust laws). It is also the position in federal actions in the United States that the defendant may not plead the defence that the direct purchaser has passed on to its own customers all or part of the overcharge.²² As a consequence of these two rules, a direct purchaser that has purchased products at the cartel price but then passed on the cartel price when reselling or incorporating these products in its own manufacturing process will, nevertheless, be able to claim for its part of the total overcharge, notwithstanding that it has in fact suffered no (or only some) loss.

The position in the United States reflects clearly an issue of policy which prioritises the threat to potential infringers of the antitrust laws that they will be made to disgorge their unlawful gains over the mere compensation of victims of unlawful activity. In Europe, it is difficult to see how the Commission could recommend that indirect purchasers should be precluded from seeking legal redress. Indeed the judgment of the ECJ in *Crehan*²³ suggests that all those who suffer loss as a result of an antitrust infringement should be able to seek redress and that the national courts and legal systems are therefore obliged under Community law to protect, and give effect to, such rights. In addressing the defence of “consumer interests”, the Commission explores the possibility of certain types of representative action allowing claims to be brought on behalf of consumers—for example, by consumer associations—without necessarily depriving individual consumers of their right to bring an action.

Passing-on defence

If, for policy and political reasons, it is almost inconceivable that the Commission would propose that only direct purchasers should have standing to bring

²¹ *Illinois Brick Co v Illinois*, 431 U.S. 720 (1977).

²² *Hanover Shoe v United Shoe Machinery Corp*, 392 U.S. 481 (1968).

²³ Case C-453/99, *Courage v Crehan* [2001] E.C.R. I-6297.

actions for damages, what is the likely outcome of the debate on the passing-on defence?

Here the Commission has a dilemma. On one hand, by permitting defendants to raise the passing-on defence, the Commission risks a scenario in which there is considerable uncertainty over the level of recovery by individual claimants and the prospect of extremely complex litigation which could also discourage bona fide claimants. The US federal system of calculating the total overcharge and distributing this between direct purchasers is a much simpler system, and one which is therefore likely to encourage the pursuit of actions for damages. On the other hand, if the Commission recommends the prohibition of the passing-on defence, the spectre of double jeopardy arises. Direct purchasers can claim against the infringers whether or not they have suffered loss. Meanwhile, indirect purchasers further down the chain of supply may also sue for loss suffered by them. Once again, the lobby in favour of the compensatory principle in damages actions would be concerned at the prospect of such double jeopardy.

That said, it is difficult to see how the Commission can ensure that consumers are able to bring actions for damages and also make certain that the claimants most likely to wish to bring actions, namely direct purchasers, are not discouraged from doing so by the prospect of uncertain and complex proceedings. There will certainly be much discussion on this topic.

Jurisdiction

In the run up to the publication of the Green Paper, much was said about the issue of “forum shopping”. Concern was expressed that differences in procedural rules across Europe might lead to forum shopping which is often regarded as undesirable and to be avoided.

This issue is perhaps overstated given the existing rules which apply generally to civil litigation in the EU to determine which court or courts have jurisdiction to hear a claim. In the case of defendants domiciled in the EU (other than Denmark) or European Free Trade Association (“EFTA”) countries, jurisdiction is determined by the Judgment Regulation²⁴ or the Lugano Convention²⁵; the effect of the Regulation and the

²⁴ Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2001] O.J. L12.

²⁵ Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, September 16, 1988.

Convention is essentially similar. The general rule is that a claim may be brought in the country in which the defendant is domiciled. In the case of claims in tort, a defendant domiciled in the EU or an EFTA country may also be sued in the jurisdiction in which the harmful event occurred. This may be either the place where the loss is sustained or the place where the event giving rise to the loss occurs. As such, the existing rules on jurisdiction already envisage the prospect of a claimant having the option to bring an action for damages in one or more of a number of countries: hence the potential for forum shopping exists in any event. It is not anticipated that the Commission will wish to make proposals which would lead to modifications in the present regime. The reference to claims in tort is of particular relevance to actions for damages for infringement of the EC antitrust rules since such actions will be, in many cases, based in tort. In English law, for example, a claim for damages in respect of losses flowing from a breach of Arts 81 and 82 EC is based on the tort of breach of statutory duty. In this case, the duty is created by s.2(1) European Communities Act 1972 which provides that provisions of the EC Treaty shall have direct legal effect and shall be recognised and enforced.

There is, in addition, a rule of jurisdiction under the Regulation and the Convention which provides that when a court has jurisdiction over one defendant (by application of the general rule and/or the rule relevant to claims based in tort), claims may also be brought against other defendants in the same action if all the claims are closely connected and it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

The combination of these rules can confer jurisdiction on a court to hear claims involving a number of claimants and defendants which are not domiciled in that jurisdiction. An example of such an outcome in a case involving a claim for damages for infringement of the EC antitrust rules is *Provimi*²⁶ in which the defendants were members of the Roche and Aventis groups domiciled in England, France, Germany and Switzerland. The Commission had found that companies within those groups had participated in a cartel in breach of Art.81 EC. The claimants, comprised of two English companies and a German company, commenced proceedings in England claiming damages for breach of statutory duty. Amongst other defences,

²⁶ *Provimi Limited v Aventis Animal Nutrition SA* [2003] EWHC 961 (Comm).

the defendants domiciled outside England challenged the jurisdiction of the court.

The parties agreed that for the English domiciled claimant the relevant harmful event occurred in England. Having thus established jurisdiction over one defendant, the court was entitled to exercise jurisdiction over others where the claims were so closely connected that it was expedient to hear them together to avoid the risk of irreconcilable judgments from separate proceedings.

For the sake of completeness, it should be noted that these rules on jurisdiction may be displaced where there is a valid and binding agreement between the parties determining which courts (or arbitral tribunals) will have jurisdiction. Moreover, similar rules apply to claims involving defendants domiciled outside the EU and EFTA states; however, in such cases, the court will also consider whether there is a court in another jurisdiction more appropriately placed to decide the claim.

Accordingly, it is to be expected that claims will continue to be brought in accordance with the application of these existing rules on jurisdiction. The choice which claimants make between jurisdictions in the EU which are available to them will no doubt take into account the benefits flowing to them from the procedural rules in place in these jurisdictions including, for example, the rules on disclosure of documents in Ireland and the United Kingdom. Whatever the outcome of the Commission's initiative to facilitate private actions for damages, it is improbable that such changes would be recommended and implemented as would create an entirely level playing field for the conduct of civil litigation across all EU jurisdictions. In that case, an element of forum shopping will in any event continue to exist.

The Commission's reliance on the Community law and precedent

The Staff Working Paper provides further helpful insight into the Commission's approach to the Green Paper. Throughout the Working Paper, the Commission invokes existing Community law and precedent to support the direction of the options in the Green Paper itself. The Commission does not seek to find direct support for its policy options or to argue that a number of them are already valid under Community law. On the

other hand, the Commission, with some success, invokes existing elements of Community law and precedent to address potential criticisms of the position which it adopts.

At the outset, the Commission explains that the existence of a Community law remedy of damages for breaches of Arts 81 and 82 EC follows from the same principles as those which give rise to such a remedy against Member States for breach of other provisions of Community law. The Commission recalls that such a remedy is founded on the fact that, as is set out in the case law of the ECJ, Arts 81 and 82 EC create directly effective obligations on, and rights for, individuals. The principle of direct effect means that individuals can assert these rights and enforce these obligations directly before a court in a Member State. The Commission refers to the judgment of the ECJ in *Crehan*²⁷ and to the well-known jurisprudence in *van Gend & Loos*²⁸ and *Francovich*²⁹ cases.

In exploring the individual obstacles identified in the Green Paper and the options for addressing them, the Commission looks to other areas of Community law and precedent to support the direction of its proposals.

Disclosure and production of documentary evidence

The Commission refers to what it calls the generally acknowledged fact regarding the difficulty claimants face in obtaining evidence of the alleged antitrust infringement. This difficulty is seen as one of the major obstacles to damages actions. The Commission indicates, correctly, that this obstacle is of particular importance in the context of stand-alone actions. Whilst the Commission points to the fact that judges in all EU Member States have at least some power to order both parties to the dispute and third parties to disclose documents, it recognises that these powers are limited in a number of the Member States and, in practice, infrequently used except in the common law jurisdictions. The Commission might anticipate criticism from the legal community in civil law jurisdictions in

²⁷ Case C-453/99, *Courage v Crehan* [2001] E.C.R. I-6297 at [26] and [27].

²⁸ Case 26/62, *Van Gend en Loos* [1963] E.C.R. 1; [1963] C.M.L.R. D43.

²⁹ Cases 6 & 9/90, *Francovich v Italian Republic* [1991] I E.C.R. 5357; [1993] 2 C.M.L.R.

relation to any proposal to enhance the general ability of claimants in civil litigation to obtain documentary evidence from the other party or, indeed, third parties. Accordingly, the Commission refers to other European and international initiatives in this regard. In particular, the Commission refers to the Directive on the enforcement of intellectual property rights.³⁰ The Commission quotes Art.6(1) which states:

“Member States shall ensure that, on application by a party which has presented reasonably available evidence to support its claims, and has, in substantiating those claims, specified evidence which lies in the control of the opposing party, the competent judicial authorities may order that such evidence be presented by the opposing party, subject to the protection of confidential information.”

Whilst the circumstances in which such disclosure may be ordered under Art.6(1) of the Directive might not represent a sufficiently ambitious target in the context of actions for damages for breach of the antitrust rules, they nevertheless provide the Commission with a useful precedent at the European level. This precedent will serve the Commission in deflecting criticism from those jurisdictions and interest groups which may argue that normal civil litigation rules of procedure should not be changed in order solely to facilitate claims for damages in a particular area of the law.

The Commission also refers to two other projects which have recommended some form of disclosure, namely the European Code of Civil Procedure³¹ and the ALI/UNIDROIT Principles of Trans-national Civil Procedure.³² Again, whilst these projects may not envisage disclosure precisely in the form appropriate for damages actions in antitrust cases, they nevertheless provide the Commission with useful ammunition for its own proposals.

The European Code of Civil Procedure provides support for one of the options³³ outlined by the Commission, namely that the parties to the proceedings should provide a list of documents in their respective

possession, custody or power which relate to any question in issue in the action and which have not previously been communicated to the other parties. The Code also provides that a party who has served such a list of documents shall provide, or allow all other parties to, inspect and to take copies of, any of the documents listed other than those in respect of which the party serving the list has made a claim of privilege against disclosure or communication. Similarly, the ALI/UNIDROIT Principles of Trans-national Civil Procedure provide that a national court should, upon request of a party, “order disclosure of relevant, non-privileged and reasonably identified evidence in the control or possession of another party or non-party”. The Commission points out that it is not a defence to disclosure that the evidence may be used against the party disclosing it. By referring to these two projects, the Commission is clearly indicating that it does not consider the prospect of introducing greater disclosure of documents in civil litigation where damages are claimed for an antitrust infringement to be a particularly radical measure.

The Commission pays particular attention to the importance of disclosure of documents and examination and cross-examination of witnesses in cases where there is an asymmetry of information. The Commission uses the expression “asymmetry of information” to refer to those cases in which one of the parties, typically the defendant, is in possession of significant evidence which would enable the claimant to prove the infringement and to which the claimant would, in the absence of disclosure rules, be unable to gain access. As such, disclosure rules may in general operate to the benefit of either the claimant or the defendant (or both parties), greater disclosure in the context of damages actions for antitrust infringements would be designed to benefit claimants in particular.

Alleviating the claimant's evidentiary burden of proof

The Commission's reference to information asymmetry is also relevant to its consideration of the alleviation of the claimant's burden of proof. The Commission refers to the recently introduced provisions of German competition law which alleviate the claimant's evidentiary burden in abuse actions brought by SMEs.³⁴

³⁴ *Gesetz gegen Wettbewerbsbeschränkungen*, s.20(5).

³⁰ Council Directive 2004/48 on the enforcement of intellectual property rights, [2004] O.J. L157/45.

³¹ See M. Storme (ed.), *Rapprochement UniDroit Judiciaire de Union européenne—Approximation of Judiciary Law in the European Union* (Doradect, Boston/London, 1994).

³² The International Institute for the Unification of Private Law (“UNIDROIT”) and the American Law Institute (“ALI”). The Principles were adopted by UNIDROIT/ALI in 2004. UNIDROIT 2004 Study LXXVI-Doc.11.

³³ Commission Green Paper, SEC (2005) 1732, Option 3, p.5; Commission Staff Working Paper, COM (2005) 672 final, para.92.

The Commission also draws on the jurisprudence of the ECJ in its *Aalborg Portland*³⁵ judgment. In that case, having paraphrased Art.2 of Regulation 1/2003, the court concluded that:

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

The Commission states that, in its opinion, it is arguable that the case presented by the claimant in situations of information asymmetry, e.g. information on price and commercial strategy, would be covered as “factual evidence (. . .) of such a kind” referred to by the court in its judgment. The Commission concludes that, as a result, in situations of information asymmetry, it might be sufficient for the claimant to present facts which *may* constitute evidence of an infringement of the EC competition rules in order for the burden of proof then to be placed on the defendant to adduce the necessary explanations or justifications to prove that those facts do not constitute such an infringement. Again, the Commission’s reference to, and reliance upon, the jurisprudence of the ECJ is significant. It underlies the fact that, whilst the Green Paper and the options which it puts forward would result in a more uniform system of civil procedure for damages actions in competition cases, the train has already left the station in the sense that there are a number of judicial and legislative developments which already point in the direction in which the Commission wishes to see developments continue.

Fault requirement

The Commission’s position on the issue whether, in addition to the necessity to prove the infringement, there should be a requirement to demonstrate fault on the part of the defendant is particularly interesting. In focusing on this issue, the Commission was, in part, reflecting concerns expressed by some Member State governments that liability to damages for an antitrust infringement might be considered excessive and unfair in

35 Joined Cases C 204, 205, 211, 213 & 219/00, *Aalborg Portland v Commission* [2004] E.C.R. I-123 at [79].

certain circumstances where, for example, the defendant genuinely did not know that his actions would constitute an infringement. The example commonly given is in the case of networks of agreements which, because of their cumulative effect, bring the system within the prohibition of Art.81(1) EC.

In the Working Paper, however, the Commission refers to the fact that, in EC competition law, there is no requirement of fault in order to show that there has been a violation of Art.81 or Art.82 EC. The Commission confirms that, in the case of Art.81 EC, this flows as much from the text of the provision itself (which condemns agreements having the “object” or “effect” of restricting competition) as from the case law of the Community courts. It is equally interesting that, in the case of Art.82 EC, the Commission refers to the first *Hoffmann-La-Roche* case,³⁶ which refers to abuse as an “objective concept”. It is to be recalled, however that the case law also makes reference to the concept of intent, for example, in the context of predatory pricing and the *AKZO* case.³⁷

The Commission also refers to damages claims based on violations by Member States of their Treaty obligations. The Commission refers, for example, to the ruling of the ECJ in the *Brasserie du Pêcheur* case³⁸ in which it was held that Community law confers a right to claim compensation if three preconditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the state and the damage sustained by the injured parties.³⁹ The Commission quotes the following passage from the court’s judgment:

“The obligation to make reparation for loss or damage caused to individuals cannot, however, depend upon a condition based on any concept of fault going beyond that of a sufficiently serious breach of Community law. Imposition of such a supplementary condition would be tantamount to calling in question the right to reparation founded on the Community legal order”.⁴⁰

The Commission points out that a sufficiently serious breach of Community law is a prerequisite for liability of

36 Case 85/76, *Hoffmann-La-Roche v Commission* [1979] E.C.R. 461.

37 Case C-62/86, *AKZO v Commission* [1991] E.C.R. I-3359.

38 Joined Cases C 46 & 48/93, *Brasserie du Pêcheur v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport Ex p. Factor tame* [1996] E.C.R. I-1029.

39 *ibid.*, at [51].

40 *ibid.*, at [79].

acts of public authorities. Nevertheless where a public authority has acted with no or considerably reduced discretion, as is the case for all private undertakings, the mere infringement of Community rules may suffice to establish a sufficiently serious breach. The Commission refers in this context to the judgment of the court in the *Camar*⁴¹ case. This approach of the Commission and its reference to the jurisprudence of the court suggests that it is not in favour of the introduction of a fault requirement in damages actions. The Commission provides further support for this proposition by referring to the concept of strict liability in the Product Liability Directive.⁴² The Commission again refers to information asymmetry as one of the reasons why the strict liability rule was introduced in the field of product liability. Accordingly, the Working Paper seems to suggest that the Commission is opposed to the introduction of a legal rule which would diminish the opportunity for claimants successfully to bring actions for damages.

On the other hand, the Commission does float, as one option, the possibility that there might be a defence of excusable error where illegality is shown.⁴³ It is evident, however, that the introduction of such a defence would create significant uncertainty and be difficult to apply in practice. The Commission acknowledges this in the wording of Option 13 where it says that:

“Such a defence would of course implicate a lower degree of certainty for the claimant than an irrefutable presumption and would result in some cases where injured parties do not receive compensation for injuries arising from an infringement of competition law”.⁴⁴

The Commission suggests that these negative aspects could, to a certain extent, be addressed by requiring that the standard of care for undertakings be “set at a high level”.⁴⁵ The concept of increasing the standard of care itself gives rise to complex issues. It is unclear, given the Commission’s reliance on and reference to Community jurisprudence and law (for example in the context of product liability), whether in practice it will seek to pursue the defence of excusable error.

41 Case C-312/00, *Commission v Camar and Tico* [2002] E.C.R. I-11355 at [54].

42 Council Directive 85/374 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, [1985] O.J. L210/29.

43 Commission Staff Working Paper, COM (2005) 672 final, Option 13, p.33.

44 *ibid.*, para.111.

45 *ibid.*

Damages

With regard to damages, the Commission refers to the jurisprudence of the court, again in the *Brasserie du Pecheur* case,⁴⁶ in the context of its discussion of exemplary or punitive damages. The Commission makes it clear that Community law does not prohibit the granting of exemplary or punitive damages where this is permitted under national law, as for example in Ireland and the United Kingdom. The Commission explains one of the circumstances in which exemplary damages may be awarded under English law, namely where:

“wrongful conduct. . .has been calculated by the defendant to make a profit for himself which may well exceed the compensation payable to the claimant”.⁴⁷

In this context, exemplary damages could be relevant were the passing-on defence to be permitted. In cases where the defendant has calculated that any increase in the price of the cartelised product would most probably be passed on to indirect purchasers, thereby leaving the direct purchaser without a claim for damages equal to the overcharge, exemplary damages may be appropriate. The Commission does not specifically draw this point out in its discussion but it is an issue which should perhaps be considered further when reflecting on the passing-on defence.

Further, in relation to the question of interest on damages, the Commission refers to the *Marshall II* case⁴⁸ in which the ECJ acknowledged that:

“Full compensation for the loss and damages sustained (. . .) cannot leave out of account factors, such as the effluxion of time, which may in fact reduce its value. The award of interest, in accordance with the applicable national rules, must therefore be regarded as an essential component of compensation”.

In terms of the quantification of damages, the Commission refers to various methods which are available to the courts. The Commission indicates that, in some cases, it may be disproportionately difficult or even impossible to calculate exactly

46 Joined Cases C 46 & 48/93, *Brasserie du Pêcheur v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport Ex p. Factortame* [1996] E.C.R. I-1029.

47 Commission Staff Working Paper, COM (2005) 672 final, para.118.

48 Case C-271/91, *M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] E.C.R. I-4367 at [31].

the damage suffered. In those circumstances, the Commission suggests that it should be acceptable to show reasonable approximations of the damage suffered. The Commission refers in this respect to the “sampling” method. The Commission indicates that this technique may be particularly effective in litigation involving large groups, such as certain indirect purchaser classes or consumer associations. In support of its proposal that there should, in certain cases, be an approximation of the damage suffered, the Commission refers to the judgment of the ECJ in *Societe Anonyme Des Laminoirs*⁴⁹ in which it held that:

“[w]hen it is necessary to consider a situation as it would have been if there had been no wrongful act or omission, the court must, whilst insisting that all available evidence be produced, accept realistic approximations such as averages which have been established by means of comparisons. (. . .) Although in using this method it is not possible to arrive at an exact assessment of the damage, nevertheless the sampling methods habitually used in economic surveys make it possible to reach acceptable approximations provided that the basic facts are sufficiently reliable”.⁵⁰

This reference to approximation is relevant to the issue of damages actions for breach of the competition laws. One of the obstacles that was identified in the original Comparative Study⁵¹ prepared for the Commission was the difficulty that claimants often face in proving exactly the damage suffered as a result of an antitrust infringement. By referring to the jurisprudence of the court, the Commission is making a conscious effort to smooth the way for a certain relaxation of the rules on quantification of damage, in line with the position in the United States.⁵²

The Commission also refers, in terms of calculating lost profits, to the statements of the ECJ in the *Mulder* case⁵³ to the effect that the ECJ, as is the case for national courts, enjoys a broad discretion when examining statistical data in order to calculate loss of earnings. Again, the Commission’s reference to Community jurisprudence points in the direction of ensuring that claimants with a legitimate claim are not

defeated by the difficulty of proving the exact amount of damage suffered.

The passing-on defence and indirect purchaser standing

The Commission recognises that the achievement of its policy objectives may require a certain degree of compromise. The Commission is aware, for example, that creating the conditions for efficient and effective litigation for the claim of damages where the competition rules have been infringed may require it to make proposals which would prioritise the rights of certain potential claimants over others. In the Working Paper, the Commission explores this issue in the following way:

“In designing any system for claiming antitrust damages the main objective must be the efficient and effective enforcement of the antitrust rules. Such a system would ideally be able to accommodate both the deterrence and the compensation aims to some degree. Therefore, providing [that] an efficient system can be found to compensate indirect purchasers, and in particular final purchasers, then there is no reason why they should not also benefit from actions for damages. Given the above-mentioned complexities, it is, however, likely that a trade-off between justice (in the sense of full recovery for all those who have suffered a loss from an illegal practise) and efficiency is inevitable”.⁵⁴

The trade-off to which the Commission refers relates to the respective rights of different categories of indirect purchasers. The Commission appears to favour a system in which direct purchasers would have an incentive to bring actions, possibly through the prohibition of the passing-on of the defence, whilst indirect purchasers who are consumers would also be able to bring claims possibly through the facilitating mechanism of representative actions. Such a solution would mean that other indirect purchasers, for example at the retail level, may be prevented from bringing actions for damages. The Commission justifies this potential option by stating that:

“It is suggested that the determining factor could be the effective enforcement of Community law. If limiting the rights of certain individuals to claim is necessary to ensure a system which is more effective in safeguarding the enforcement of Articles 81 and 82 EC, then it is

49 Joined Cases 29, 31, 36, 39–47, 50 & 51/63, *Société anonyme des laminoirs v High Authority* [1966] E.C.R. 139.

50 The study is available on the Commission’s website at: www.europa.eu.int

51 *ibid.*

52 *Bigelow v RKO Radio Pictures*, 327 U.S. 251, 264–265 (1946).

53 Joined Cases C 104/89 & 37/90, *Mulder v Council* [2002] E.C.R. I-203 at [79].

54 Commission Staff Working Paper, COM (2005) 672 final, para.179.

submitted that such limitations should be accepted under Community law. Therefore it might be necessary to determine what rights must be facilitated to ensure an effective enforcement system rather than insisting on the absolute protection of all private rights. For the protection of the rights of consumers, a specific small claims procedure or collective action might be an efficient form of process given the very low level of individual damage suffered in many cases. . .”⁵⁵

The Commission’s thinking on this issue is instructive in so far as it identifies the importance of the policy considerations which the Commission has taken into account in formulating its options in the Green Paper. It is clear that the Commission’s overriding objective is to make proposals for an effective and efficient system of enforcement in the field of competition law rather than a perfect solution which ensures that all potential claimants have equal access to the courts. The Commission therefore appears to be leaning towards a prohibition of the passing-on defence whilst allowing at least indirect purchasers who are consumers to bring representative actions.

The Commission relies, in support of the first of these propositions, on a detailed review of relevant jurisprudence starting with the ruling of the ECJ in *Crehan*⁵⁶:

“The court has held that Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail unjust enrichment of those who enjoy them. . .”

The Commission points to the fact that this passage from *Crehan* draws on previous case law of the ECJ. A passing-on defence has been acknowledged by the court in actions for the non-contractual liability of the Community (Art.288(2) EC), e.g. in actions for the recovery of an illegally levied duty brought by undertakings against Member States. The Commission acknowledges that the existence and operation of the passing-on defence in Community law is complex. However, the Commission states that the court itself has placed such conditions on the operation of the defence that it could be argued that, when it exists, such a defence is in practice redundant. Having explained its reasoning in support of this proposition, again by reference to Community jurisprudence, the Commission concludes that there is no passing-on defence in Community law: rather there is an unjust enrichment

⁵⁵ *ibid.*, para.180.

⁵⁶ Case C-453/99, *Courage v Crehan* [2001] E.C.R. I-6297.

defence which requires: (i) proof of passing-on; and (ii) proof of no reduction in sales or other reduction in income.

The Commission refers, for example, to the Opinion of A.G. Slynn in the *Bianco* case⁵⁷:

“The court [in *Just*]⁵⁸ did not, however, hold that the fact that charges have been passed on must as a matter of Community law, e.g. pursuant to a general principle forbidding unjust enrichment, mean that charges wrongly demanded and paid could never be recovered.”

The Commission also notes that, if the passing-on defence were to be recognised, it would be extremely difficult to apportion damage between the different claimants at the different levels of the production and distribution chain. The Commission relies on Community jurisprudence to support the proposition that an apportionment would be consistent with Community law. In this context, the Commission refers to the court’s recognition of partial passing-on in *Comateb*⁵⁹ and *Michailidis*.⁶⁰

The Commission argues that there is not a passing-on defence in Community law and that even if such a defence in national law were not inconsistent with Community law, there are practical difficulties relating to apportionment which should militate in favour of the prohibition of the passing-on defence.

Moreover, the Commission refers to the judgment of the ECJ in *San Giorgio*⁶¹ in which it held that a provision of national law which placed the burden of proof on the party claiming to show that it has not passed on the charges to the final consumer was incompatible with Community law on the grounds that it made it virtually impossible or excessively difficult to secure repayment of the charge wrongly levied and paid. The proposition is that under Community law, the burden of proving passing-on, where the issue arises under national law, is on the defendant.

The Commission’s analysis of the relevant case law is intricate and may not be regarded as wholly persuasive. Nevertheless, it serves the purpose of opening a legal

⁵⁷ Case 378/85, *Les Fils de Jules Bianco and J Girard Fils v Directeur général des douanes et droits indirects* [1988] E.C.R. 1099.

⁵⁸ Case 68/79, *Hans Just v Danish Ministry for Fiscal Affairs* [1980] E.C.R. 501.

⁵⁹ Case C-192/95, *Comateb v Directeur général des douanes et droits indirects* [1997] E.C.R. I-165.

⁶⁰ Case C-441/98, *Kapniki Michailidis v IKA* [2000] E.C.R. I-7145.

⁶¹ Case 199/82, *Amministrazione delle Finanze dello Stato v San Giorgio* [1983] E.C.R. 359.

debate on one of the most important issues and one which the Commission, and indeed the national courts, have to address if the policy objective of facilitating actions for antitrust damages is to be achieved. It also suggests that the issue will likely be referred in any event by a national court or specialist tribunal to the ECJ and that the Commission would then seek to intervene in such proceedings. The question whether the passing-on defence should be permitted in EC antitrust damages actions would have been determined by the Competition Appeal Tribunal and, in turn, might have been referred to the ECJ in the follow-on *Vitamins*⁶² litigation had those proceedings not settled.

Having relied consistently on Community jurisprudence and other existing legislative provisions to support the direction of its arguments, the Commission, when faced with the issue of the standing of indirect purchasers who are not consumers, prioritises policy over jurisprudence. The Commission refers to the passage from *Crehan*⁶³ which is cited frequently in support of the proposition that any individual who has suffered loss as a result of an antitrust infringement under Community law is entitled to recover damages and to the protection of this right by the national courts and legal systems. On the other hand, the Commission then points to the trade-off between the purity of a system which protects all relevant rights and an efficient and effective system of damages claims for competition law infringements. As such, the Commission is opening the door for the possibility of legislation which would define the scope of the judgment of the ECJ in *Crehan*⁶⁴ or, alternatively, some other measure which would seek to clarify the court's judgment in such a way as to permit a prohibition or limitation of standing for indirect purchasers who are not consumers.

Defending consumer interests

In pursuit of its objective of ensuring that consumers are able to bring actions for damages, the Commission refers to the proposal for a Regulation of the European Parliament and of the Council establishing a European

62 Case Nos 1028/5/7/04 & 1029/5/7/04, *Dean Ford Ltd v (1) Roche Products Ltd (2) F Hoffman-La Roche AG (3) Aventis SA (1) BCL Old Co Ltd (2) DFL Old Co Ltd (3) PFF Old Co Ltd v (1) Aventis SA (2) Robana Ltd (3) F Hoffman La Roche AG (4) Roche Products Ltd*.

63 Case C-453/99, *Courage v Crehan* [2001] E.C.R. I-6297.

64 *ibid.*

Small Claims Procedure.⁶⁵ The Commission also refers to the Opinion of A.G. Jacobs in the *Osterreichischer Gewerkschaftsbund* case⁶⁶ where he states:

“Collective rights of action are an equally common feature of modern judicial systems. They are mostly encountered in areas such as consumer protection, labour law, unfair competition law or protection of the environment. The law grants associations or other representative bodies the right to bring cases either in the interest of persons which they represent or in the public interest. This furthers private enforcement of rules adopted in the public interest and supports individual complainants who are often badly equipped to face well-organized and financially stronger opponents”.

The Commission also refers to developments in some Member States where consumers and other representative organisations already have successful experience of litigation in areas other than competition law. The Commission refers, in particular, to the 2002 Swedish Group Proceedings Act which provides for actions to be brought by the representative of the group.

Costs of actions

In the context of examining the extent to which the cost of bringing actions may deter claimants, the Commission turns to Art.6 of the European Convention on Human Rights which stipulates that everyone is entitled to a fair hearing by a tribunal in determining his civil rights and obligations. The Commission goes as far as to suggest that, in certain circumstances, cost rules in national legal systems may be contrary to this provision of the Convention. The Commission also floats the idea that it would be consistent with the Convention for legal aid to be available to individual claimants in appropriate circumstances when bringing actions for damages for infringement of the competition rules.

The Commission evokes the Community law principle of equivalency (i.e. that rules with regard to EC law may not be more stringent than those for violations of national law) and the principle of effectiveness (namely that a certain minimum effectiveness of the remedy under national law and its procedural regulations must be guaranteed). In this respect, the Commission

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

66 Case C-195/98, *Osterreichischer Gewerkschaftsbund v Austria* [2000] E.C.R. I-10497 at [47].

refers to the judgment of the ECJ in the *Clean Car Autoservice* case⁶⁷ in which the court made it clear that the principle of effectiveness was applicable with regard to the recovery of costs. As damages claims are a right conferred by Community law, the Commission argues that the cost rules governing those actions must conform to the principle of effectiveness, e.g. they must not render impossible or excessively difficult the bringing of such a claim. The Commission draws the conclusion that, under applicable Community law, the Member States are under a legal obligation to design their cost rules in such a way that actions for damages can be brought “effectively” before the competent national courts. Thus, if the Commission’s interpretation of Community law is correct in this respect, it would not be necessary for new legislation to be introduced to tackle the issues of cost recovery in relation to actions for damages for infringement of the competition rules but merely some form of clarifying guidelines.

The Commission also refers to the evolution in some Member States of the “loser pays” principle. The Commission notes that, in some Member States, cost rules for some procedures foresee that the unsuccessful claimant will be ordered to pay costs only if his action was unreasonable. The Commission also refers to Art.14 of the Draft Regulation establishing a European Small Claims Procedure⁶⁸ which states that the unsuccessful party shall bear the cost of the proceedings, except where this would be unfair or unreasonable, thus limiting cost recovery to the notion of reasonableness.

Whilst the Commission refers to contingency fee arrangements almost in passing, it does not dwell on this topic. The Commission is clearly aware that there has been considerable opposition in various Member States to the introduction of contingency fees. On the other hand, it is clear that some form of conditional fee arrangements is permissible in a number of Member States, including in the United Kingdom (albeit that the existing rules are uncertain and in any event not conducive to risk sharing by lawyers in complex damages cases). It is perhaps surprising that the Commission does not reflect on these issues in more detail in its Working Paper since the availability of appropriately constructed conditional fee arrangements can clearly make it attractive for the legal profession to

“fund” cases were damages for antitrust infringements are being sought. It remains to be seen whether this issue is explored in more detail in the comments which the Commission will receive as part as the consultation.

Concluding remarks

It is perhaps too early to speculate on the combination of options which the Commission might favour once it has assessed the input which it will receive during the consultation on the Green Paper. The following issues will be critical to the successful achievement of the Commission’s policy objectives:

- the passing-on defence: for the Commission’s objectives to be achieved, serious consideration would need to be given to prohibiting it or restricting its application so as to provide incentives to direct purchasers;
- access to evidence: in order to encourage stand-alone actions in particular, national judges would need to have, and be willing to exercise, reasonable and proportionate powers to order targeted disclosure at an early stage in proceedings where the claimant has satisfied a minimum threshold test demonstrating that the claim is not without merit;
- damages: consideration would need to be given to the calculation of the “overcharge” and to appropriate rules for quantifying (even approximately) damages in complex cases once the fact of injury caused by the infringement has been proved to the appropriate standard;
- representative actions: improved, more user-friendly, procedures for representative actions by consumers, including a review of conditional fee arrangements would be required if the policy objective of protecting the rights of end-purchasers is to be achieved.

The changes required to improve the conditions under which actions for damages can be brought in EC antitrust cases would not lead to the so-called “excesses”. At the end of the day, there is first and foremost a policy decision to be taken: does the Community wish to ensure that public enforcement of the antitrust rules can be effectively supplemented by private enforcement. If the answer to that question is yes, then change is inevitable. Some of these issues will

⁶⁷ Case C-472/99, *Clean Car Autoservice v Stadt Wien and Republik Österreich* [2001] E.C.R. I-9687.

⁶⁸ Commission’s proposal for a Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure, COM(2005) 87, March 15, 2005.

in any event be determined by the courts as cases come before them.

Appendix

Commission Green Paper Questions and Options

Question A: Should there be special rules on disclosure of documentary evidence in civil proceedings for damages under Arts 81 and 82 of the EC Treaty? If so, which form should such disclosure take?

- *Option 1:* Disclosure should be available once a party has set out in detail the relevant facts of the case and has presented reasonably available evidence in support of its allegations (fact pleading). Disclosure should be limited to relevant and reasonably identified individual documents and should be ordered by a court.
- *Option 2:* Subject to fact pleading, mandatory disclosure of classes of documents between the parties, ordered by a court, should be possible.
- *Option 3:* Subject to fact pleading, there should be an obligation on each party to provide the other parties to the litigation with a list of relevant documents in its possession, which are accessible to them.
- *Option 4:* Introduction of sanctions for the destruction of evidence to allow the disclosure described in options 1 to 3.
- *Option 5:* Obligation to preserve relevant evidence. Under this rule, before a civil action actually begins, a court could order that evidence which is relevant for that subsequent action be preserved. The party asking for such an order should, however, present reasonably available evidence to support a prima facie infringement case.

Question B: Are special rules regarding access to documents held by a competition authority helpful for antitrust damages claims? How could such access be organised?

- *Option 6:* Obligation on any party to proceedings before a competition authority to turn over to a litigant in civil proceedings all documents which have been submitted to the authority, with the

exception of leniency applications. Issues relating to disclosure of business secrets and other confidential information as well as rights of the defence would be addressed under the law of the forum (i.e. the law of the court having jurisdiction).

- *Option 7:* Access for national courts to documents held by the Commission. In this context, the Commission would welcome feedback on: (a) how national courts consider they are able to guarantee the confidentiality of business secrets or other confidential information; and (b) on the situations in which national courts would ask the Commission for information that parties could also provide.

Question C: Should the claimant's burden of proving the antitrust infringement in damages actions be alleviated and, if so, how?

- *Option 8:* Infringement decisions by competition authorities of the EU Member States to be made binding on civil courts or, alternatively, reversal of the burden of proof where such an infringement decision exists.
- *Option 9:* Shifting or lowering the burden of proof in cases of information asymmetry between the claimant and defendant with the aim of redressing that asymmetry. Such rules could, to a certain extent, make up for the non-existent or weak disclosure rules available to the claimant.
- *Option 10:* Unjustified refusal by a party to turn over evidence could have an influence on the burden of proof, varying between a rebuttable presumption or an irrebuttable presumption of proof and the mere possibility for the court to take that refusal into account when assessing whether the relevant fact has been proven.

Question D: Should there be a fault requirement for antitrust-related damages actions?

- *Option 11:* Proof of the infringement should be sufficient (analogous to strict liability).
- *Option 12:* Proof of the infringement should be sufficient only in relation to the most serious antitrust law infringements.
- *Option 13:* There should be a possibility for the defendant to show that he excusably erred in law or in fact. In those circumstances, the infringement would not lead to liability for damages (defence of excusable error).

Question E: How should damages be defined?

- *Option 14*: Definition of damages to be awarded with reference to the loss suffered by the claimant as a result of the infringing behaviour of the defendant (compensatory damages).
- *Option 15*: Definition of damages to be awarded with reference to the illegal gain made by the infringer (recovery of illegal gain).
- *Option 16*: Double damages for horizontal cartels. Such awards could be automatic, conditional or at the discretion of the court.
- *Option 17*: Prejudgment interest from the date of the infringement or date of the injury.

Question F: Which method should be used for calculating the quantum of damages?

- *Option 18*: What is the added value for damages actions of use of complex economic models for the quantification of damages over simpler methods? Should the court have the power to assess quantum on the basis of an equitable approach?
- *Option 19*: Should the Commission publish guidelines on the quantification of damages?
- *Option 20*: Introduction of split proceedings—between the liability of the infringer and the quantum of damages to be awarded—to simplify litigation.

Question G: Should there be rules on the admissibility and operation of the passing-on defence? If so, which form should such rules take? Should the indirect purchaser have standing?

- *Option 21*: The passing-on defence is allowed and both direct and indirect purchasers can sue the infringer. This option would entail the risk that the direct purchaser will be unsuccessful in claiming damages as the infringer will be able to use the passing-on defence and that indirect purchasers will not be successful either because they will be unable to show if and to what extent the damages are passed on along the supply chain. Special consideration should be given in this respect to the burden of proof.
- *Option 22*: The passing-on defence is excluded and only direct purchasers can sue the infringer. Under this option direct purchasers will be in a better position as the difficulties associated with the passing-on defence will not burden the proceedings.
- *Option 23*: The passing-on defence is excluded and both direct and indirect purchasers can sue

the infringer. While the exclusion of the passing-on defence renders these actions less burdensome for the claimants, this option entails the possibility of the defendant being ordered to pay multiple damages as both the indirect and direct purchasers can claim.

- *Option 24*: A two-step procedure, in which the passing-on defence is excluded, the infringer can be sued by any victim and, in a second step, the overcharge is distributed between all the parties who have suffered a loss. This option is technically difficult but has the advantage of providing fair compensation for all victims.

Question H: Should special procedures be available for bringing collective actions and protecting consumer interests? If so, how could such procedures be framed?

- *Option 25*: A cause of action for consumer associations without depriving individual consumers of bringing an action. Consideration should be given to issues such as standing (a possible registration or authorisation system), the distribution of damages (whether damages go to the association itself or to its members), and the quantification of damages (damages awarded to the association could be calculated on the basis of the illegal gain of the defendant, whereas damages awarded to the members are calculated on the basis of the individual damage suffered).
- *Option 26*: A special provision for collective action by groups of purchasers other than final consumers.

Question I: Should special rules be introduced to reduce the cost risk for the claimant? If so, what kind of rules?

- *Option 27*: Establish a rule that unsuccessful claimants will have to pay costs only if they acted in a manifestly unreasonable manner by bringing the case. Consideration could also be given to giving the court the discretionary power to order at the beginning of a trial that the claimant not be exposed to any cost recovery even if the action were to be unsuccessful.

Question J: How can optimum coordination of private and public enforcement be achieved?

- *Option 28*: Exclusion of discoverability of the leniency application, thus protecting the confidentiality of submissions made to the competition authority as part of leniency applications.
- *Option 29*: Conditional rebate on any damages claim against the leniency applicant; the claims against other infringers—who are jointly and severally liable for the entire damage—remain unchanged.
- *Option 30*: Removal of joint liability from the leniency applicant, thus limiting the applicant's exposure to damages. One possible solution would be to limit the liability of the leniency applicant to the share of the damages corresponding to the applicant's share in the cartelised market.

Question K: Which substantive law should be applicable to antitrust damages claims?

- *Option 31*: The applicable law should be determined by the general rule in Art.5 of the proposed Rome II Regulation, that is to say with reference to the place where the damage occurs.
- *Option 32*: There should be a specific rule for damages claims based on an infringement of antitrust law. This rule should clarify that for this type of claims, the general rule of Art.5 shall mean that the laws of the states on whose market the victim is affected by the anti-competitive practice could govern the claim.
- *Option 33*: The specific rule could be that the applicable law is always the law of the forum.
- *Option 34*: In cases in which the territory of more than one state is affected by the anti-competitive behaviour on which the claim is based and where the court has jurisdiction to rule on the entirety of the loss suffered by the claimant, it could be considered whether the claimant should be given the choice to determine the law applicable to the dispute. This choice could be limited to choose one single applicable law from those laws designated by the application of the principle of affected market.

The choice could also be widened so as to allow for the choice of one single law, or of the law applicable to each loss separately or of the law of the forum.

Question L: Should an expert, whenever needed, be appointed by the court?

- *Option 35*: Require the parties to agree on an expert to be appointed by the court rather than by themselves. Suspension of or longer limitation periods play an important role in guaranteeing that damages claims can effectively be brought, especially in the case of follow-on actions.

Question M: Should limitation periods be suspended? If so, from when onwards?

- *Option 36*: Suspension of the limitation period for damages claims from the date proceedings are instituted by the Commission or any of the national competition authorities. Alternatively, the limitation period could start running after a court of last instance has decided on the issue of infringement. Causation is a necessary requirement of any damages claim. While proof of a causal link between the infringement and a loss may be particularly difficult to achieve due to the economic complexity of the issues involved, the legal notions of causation in itself, as developed by the case law in the Member States, arguably do not pose a significant obstacle for claimants. However, application of the causation requirement should not lead to exclusion of those who have suffered losses arising from an antitrust infringement from recovering those losses.

Question N: Is clarification of the legal requirement of causation necessary to facilitate damages actions?

Question O: Are there any further issues on which stakeholders might wish to comment?