Volume 4 | Number 2 | Autumn 2008

Competition Policy International

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Published in Competition Policy International (print ISSN 1554-0189, online ISSN 1554-6853),
Autumn 2008, Vol. 4, No. 2. For articles and more information, visit www.globalcompetitionpolicy.org.

The Road to the Commission's White Paper for Damages Actions: Where We Came From

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The European Commission's April 2008 White Paper on Damages Actions for Antitrust Violations is a groundbreaking development. It marks the establishment of a system of private antitrust enforcement system in Europe, which, however, does not imitate the U.S. example but is rather "European" in its conception, origins, and main parameters. To help understand the White Paper proposals, it is imperative to review its origins (i.e., where we came from). This article aims at presenting the jurisprudential developments in Europe that created the right atmosphere for the White Paper to come in existence. The review of these developments explains the main qualities and basic premises of the White Paper. In particular, it explains the fundamental choice to depart from the U.S. solution and instead opt for allowing both offensive and defensive passing-on.

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I. Introduction

The publication in April 2008 by the European Commission of the long-awaited White Paper on Damages actions for breach of the EC antitrust rules ("WP")[1] has again brought EC private antitrust enforcement to the forefront. This article attempts to explain how we got to the WP in the first place and how European Community law, in particular the European Court of Justice's ("ECJ's") rulings, have set the ground for the latest developments. It also proceeds to an appraisal of the WP and of some specific issues on the basis of existing Community law, while referring to some interesting developments in the EU member states.

II. The Road to the White Paper

A. THE "EUROPEAN" CONTEXT OF ANTITRUST RIGHTS AND REMEDIES

The application of EC competition law by civil courts, though not particularly developed in Europe, has not been a recent phenomenon. Indeed, the very first preliminary reference made by a national court to Luxembourg under the old Article 177 EEC, was a competition case where EC competition law arose in the context of private litigation.[2] Of course, the mere application of the competition rules by national courts cannot be said to amount to a system of private antitrust enforcement. The term "enforcement" signifies an instrumental role of private actions in the sense of the private litigants not just seeking redress, but also in effect becoming themselves actors in enhancing the overall efficiency and effectiveness of the competition enforcement system. It is only very recently that private antitrust enforcement appears for the first time as a meaningful complement—though certainly not an alternative—to public enforcement.

1. Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2008) 165 final (Apr. 2, 2008). This comes as a follow up after the publication in December 2005 of a Green Paper, but is also a prelude for Community legislation. In EU jargon, a "White Paper" is a document containing proposals for Community action in a specific area. It sometimes follows a "Green Paper" published to launch a consultation process at European level. While Green Papers set out a range of ideas presented for public discussion and debate, White Papers contain an official set of proposals in specific policy areas and are a prelude to Community legislation. The WP itself is a rather short document that in reality summarizes the far more developed Staff Working Paper ("SWP") (Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules, SEC(2008) 404 (Apr. 2, 2008)). An impressive 600-page Impact Assessment Study (CEPS, EUR & LUISS, Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios, Final Report (Dec. 21, 2007)) is itself usefully summarized in a Commission Impact Assessment Report (Commission Staff Working Document Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules, Impact Assessment, SEC(2008) 405). In most cases in the present article, references made to the "WP" cover the whole of the recent Commission policy initiative and not just the short document which bears that title.

2. Case 13/61, Kledingverkoopbedrijf de Geus en Uitdenbogerd v. Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn, 1962 E.C.R. 45.

The road was opened by the modernization and decentralization European reforms between the years 1999 and 2004. But it has also come as a consequence of groundbreaking rulings by the ECJ, which has extended the scope of remedies available to individuals by Community law to cover also individual civil liability and has always imposed stringent conditions on national substantive and procedural law, in order to ensure the effectiveness of the EC competition rules. The ECJ has indeed been particularly bold in this field due to mainly historical reasons: the Community competition rules have long been recognized as having "horizontal direct effect" (i.e., they apply to legal relationships between individuals), and at the same time they have been treated with a high degree of deference as part of the Community's "economic constitution", thus enjoying an increased normative value.

At the heart of private antitrust enforcement in Europe lies the question of the relationship between Community and national laws.

At the heart of private antitrust enforcement in Europe lies the question of the relationship between Community and national (i.e., EU member states') laws. At the current stage of European integration, rights and obligations emanating from Community law are in principle enforced under national law and before national courts. The Community legal order is not a federal one and the Community acts only within the limits of the powers conferred upon it by the EC Treaty. The Community standard is that Community law is enforced primarily by having recourse to national administrative, civil, and criminal law before national administrative authorities and national courts.

Thus, speaking about private law disputes, on the side of substance, there is no Community law of contract, tort, or unjustified enrichment, or a European Civil Code. Indeed, even if the Community 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 Community courts of full jurisdiction that could apply Community law and deal with Community law-based claims. Thus, national courts act also as "Community courts" of full jurisdiction (juges communautaires de droit commun).

It is true that in the last twenty years much has changed, and one can now speak of a positive integration drive to unify or harmonize rules on remedies and procedures. However, with very few exceptions, these are sectoral rules applying to some very specific Community objectives and the reality remains that there are no cross-sector Community rules of administrative or civil law dealing with the enforcement of Community law-based rights.[3]

3. *See* A.P. Komninos, EC Private Antitrust Enforcement, Decentralised Application of EC Competition Law by National Courts 142-44 (2008).

Consequently, natural and legal persons relying on Articles 81 and 82 EC would have no other means to pursue their civil claims but through access to national courts and laws.[4] However, the substantive and procedural conditions of civil antitrust enforcement can be very different in Europe depending on which national law applies and which national court adjudicates. Inconsistencies and inadequacies in national laws on remedies and procedures are certainly a source of serious concern, not just for EC competition law but for Community law in general. In this context, the problem can be identified in three different, albeit interconnected levels.

First, there is a problem of effective or adequate judicial protection (i.e., the effective protection of Community rights). This is a principle not only of Community law but also of human rights. Indeed, effective judicial protection in the form of access to the courts configuration derives from Articles 6 and 13 of the European Convention of Human Rights. As far as Community law is concerned, and as the ECJ has recognized, Articles 81 and 82 EC "tend by their very nature to produce direct effects in relations between individuals [and] create direct rights in respect of the individuals concerned which the national courts must safeguard." Failure to afford this safeguard "would mean depriving individuals of rights which they hold under the Treaty itself."[5]

Second, there is a problem for the effectiveness of the whole system of Community law as such and, more particularly, for the efficiency of the Community (competition) rules. There are two facets to this. One is Community law-specific and the other is competition law-specific. The first facet of the problem is that when citizens pursue their Community rights before the "juges communautaires de droit commun," in addition to serving their private interests, they are also instrumental for and indirectly act in the Community interest, becoming "the principal 'guardians' of the legal integrity of Community law in Europe."[6] The "direct effect" doctrine was developed partly with this consideration in mind. The second competition law-specific facet refers to the "private attorney general" role of individuals in antitrust cases. In a mature antitrust system, private enforcement is a necessary complement of public enforcement and by no means inferior or weaker. In such a system, private actions are crucial for the efficiency of the system as a whole.[7]

4. However, *see* the new line of case law, in particular, the *Courage* and *Manfredi* rulings (*infra*).

5. Case 127/73, Belgische Radio en Televisie and Societé Belge des Auteurs, Compositeurs et Editeurs de Musique v. SV SABAM and NV Fonior (I) [hereinafter *BRT v. SABAM I*], 1974 E.C.R. 51, at paras. 16 & 17.

6. *See* J.H.H. Weiler, The Constitution of Europe, 'Do the New Clothes have an Emperor?' and Other Essays on European Integration 20 (1999).

7. On this particular point, *see* the analysis of the ECJ's *Courage* ruling (*infra*).

Third, the disparities and inadequacies of national legal systems offend against the principle of consistent and uniform application of Community law. Such discrepancies are particularly regrettable from an EC competition law point of view, because they tend to create variations in the costs of enforcing the EC antitrust rules, and thus lead to unequal conditions of competition among the member states.

In the decentralized system of EC antitrust enforcement, the problem is exacerbated. Competitors and economic actors in general take the likelihood of public or private antitrust action seriously into account in defining their market strategies. In this context, damages have an especially powerful impact on business behavior. An economic operator's exploitation of its "immunity" from civil actions in damages and failure to compensate victims adequately in one jurisdiction, as opposed to other jurisdictions where companies are constantly successfully or unsuccessfully defending civil antitrust actions, is hardly compatible with the creation of "a level playing field for agreements, decisions by associations of undertakings and concerted practices within the internal market," as Regulation 1/2003 propagates.[8]

The ECJ has consistently recognized the "procedural and institutional autonomy" of the member states to identify the remedies, courts, and procedures that are necessary for the exercise of Community law rights at the national level. The term "procedural autonomy" creates the incorrect impression that this principle refers only to national rules of civil, administrative, or criminal procedure. In fact, its scope is much larger and covers all substantive or procedural mechanisms at the national level that can be used for the enforcement of Community law. That is why the term "remedial/procedural autonomy" is preferable. More importantly, however, the Court has also imposed demanding Community limits and safeguards on that autonomy. These are the principles of equality and effectiveness.[9] The first principle means that the enforcement of Community law at the national level should not be subject to more onerous procedures than the enforcement

8. 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, 2003 O.J. (L 1) 1, at Recital 8. *See also* Recital 1, which speaks of the necessity for Arts. 81 and 82 EC to "be applied effectively and uniformly in the Community"; and the Impact Assessment Form of the September 2000 Regulation proposal (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, & (EEC) No. 3975/87 ("Regulation Implementing Articles 81 and 82 of the Treaty"), COM(2000) 582 final, 2000 O.J. (C 365) 56), where reference is made to a "level playing field for companies in the internal market by ensuring more widespread application of the Community competition rules."

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

of comparable national law. The second principle is a much more demanding test. It means that although Community law-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 Community law: full and useful effectiveness (effet utile).

Undoubtedly those two requirements make national divergences less burdensome. The ECJ has, nevertheless, proceeded further than that. Starting with such cases as *Francovich*, *Factortame I*, and *Zuckerfabrik Süderdithmarschen*,[10] it has also recognized the existence of certain autonomous Community law remedies for Community law-based rights, 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 Community law right must be protected through an appropriate corresponding remedy. It has relied on "the full effectiveness of Community rules and the effective protection of the rights which they confer" and on the duties that Article 10 EC imposes on member states and their judicial organs.[11]

> Until 2001, the ECJ never had the opportunity to rule on the issue of civil liabilities arising from the violation of EC competition rules

Professor Van Gerven, a former Advocate General ("AG") of the ECJ and eminent scholar of Community law, has proposed a more global approach to the issue of remedies in Community law, thus stressing the requirement of effective judicial protection which better describes the Court's case law on remedies. Van Gerven speaks of four already existing Community substantive remedies: a general one, to have national measures that conflict with EC law set aside; and three specific ones, compensation, interim relief, and restitution.[12] Individual civil liability is integrated in the first limb of these three specific remedies, beside its admittedly much more developed sibling, state liability. Van Gerven 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 con-

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

11. Joined Cases C-46/93 & C-48/93, Brasserie du Pêcheur SA v. Germany and Regina v. Secretary of State for Transport, ex parte Factortame Ltd. et al. (III), 1996 E.C.R. I-1029, at para. 39.

12. *See* W. Van Gerven, *Of Rights, Remedies and Procedures*, 37 C.M.L.R. 501, 503 (2000).

nected with the Community "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 Community requirements. For these elements, Community 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.[13]

B. WHEN THE ECJ SPOKE

1. *Courage v. Crehan*

Until 2001, the ECJ never had the opportunity to rule on the issue of civil liabilities arising from the violation of EC competition rules, although in some instances it referred to possible damages and other civil claims that private parties could pursue before national courts,[14] but without addressing the question of the Community law or national legal basis.

Earlier, then-AG Van Gerven, in his opinion in *Banks*,[15] had argued extensively in favor of recognizing a Community right to obtain reparation in cases where loss and damage are sustained as a result of an undertaking's infringement of the directly effective Community competition rules.[16] In his carefully structured opinion, the AG had considered that the general basis established by the Court in *Francovich* also applied to the case of "breach of a right which an individual derives from an obligation imposed by Community law on another individual." In competition law, in particular, the AG observed that such a Community right to damages would make the Treaty antitrust rules "more operational", adducing an argument from the U.S. system of antitrust enforcement, where civil suits for damages have played a dominant role.[17] In *Banks*, however, the Court declined to address all these fundamental issues, because it reached the conclusion that the only set of rules applicable to the facts, Articles 65 and 66 ECSC, did not have a direct effect.

The fundamental issue of the Community or national law basis of the right to damages in EC competition law violations was finally addressed by the ECJ in its

13. *See* Van Gerven (2000), *id.*, at 502-04 & 524-26.

14. This was already implicit in *BRT v. SABAM I*, *supra* note 5, at paras. 16 & 22. Reference should also be made to Case C-242/95, GT-Link A/S v. De Danske Statsbaner, 1997 E.C.R. I-4349, at para. 57; and Case C-282/95 P, Guérin Automobiles v. Commission, 1996 E.C.R. I-1503, at para. 39.

15. Case C-128/92, H.J. Banks & Co. Ltd. v. British Coal Corporation [hereinafter *Banks*], 1994 E.C.R. I-1209.

16. AG Opinion, *Banks*, *id.*, at paras. 37 et seq.

17. *Op. cit.* at para. 44.

September 20, 2001 *Courage* ruling.[18] In *Courage*, the Court recognized a right to damages as a matter of Community rather than national law, and stressed the fundamental character of the EC 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 contractual obligations to buy almost all the beer they serve from their landlords. In 1991, Mr. Bernard Crehan signed a 20-year lease with Courage Ltd. whereby he agreed 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, blaming Courage's supply of beer at lower prices to other non-tied pubs ("free houses") for their situation. 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 81(1) EC of the clause requiring him to purchase a fixed minimum quantity of beer from Courage, counterclaimed for damages.

There were two specific obstacles to Mr. Crehan's success. The first one was that according to earlier case law, Article 81 EC 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). 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 ECJ, following the ruling in *Francovich* which had recognized the principle of state liability as a principle of Community law, and also relying on its *Eco Swiss* ruling,[19] stressed the primacy of Article 81 EC in the system of the Treaty, since it "constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market."[20] It also stressed, with particular reference to "the possibility of seeking compensation for loss caused by a contract or by conduct liable to restrict or distort competition," the task of national courts to

18. Case C-453/99, Courage Ltd. v. Bernard Crehan [hereinafter *Courage*], 2001 E.C.R. I-6297.

19. Case C-126/97, Eco Swiss China Time Ltd. v. Benetton International NV, 1999 E.C.R. I-3055.

20. *Courage*, *supra* note 18, at para. 20.

ensure the full effect (plein effet) of Community 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 [81(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 liability for the effectiveness of the law as such is more than evident in this passage, exactly as was the case with state liability in *Francovich*.[21] And finally, the Court dispelled any doubt as to its pronouncement:

> "Indeed, *the existence* of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts *can make a significant contribution to the maintenance of effective competition in the Community*."[22] (emphasis added)

This last quote makes it clear that the meaning of effectiveness in *Courage* has a double facet. It refers not only to Community law in general, but also to the specific field of antitrust. This is clear from the Court's use of the term "significant contribution" to refer to the role of damages claims for the efficiency of antitrust enforcement in Europe, with a view to maintaining effective competition. More authoritative words in favor of private enforcement and the "private attorney general" role[23] of the civil litigant could hardly be pronounced.

2. *Manfredi v. Lloyd Adriatico*

More recently, in *Manfredi*,[24] the ECJ proceeded to deal further with the "constitutive" and "executive" conditions of the Community right to damages. This was

21. *Op. cit.* at para. 26.

22. *Op. cit.* at para. 27.

23. Private antitrust actions, apart from their compensatory function, further the overall deterrent effect of the law. Thus, economic agents themselves become instrumental in implementing the regulatory policy on competition and the general level of compliance with the law is raised. It is for that reason that the private litigant in U.S. antitrust has been called a "private attorney-general" (per J. Jerome Franck *in* Associated Industries of New York State, Inc. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943)).

24. Joined Cases C-295/04 to C-298/04, Vincenzo Manfredi et al. v. Lloyd Adriatico Assicurazioni SpA et al., 2006 E.C.R. I-6619 [hereinafter *Manfredi*].

a preliminary reference case from Italy, where insurance companies had been sued for damages by Italian consumers for prohibited cartel behavior previously condemned by the Italian competition authority. The ECJ 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;
- 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; and
- 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. 81 EC.

The Court, building on *Courage*, and after making it clear that the basis for individual civil liabilities deriving from a violation of Article 81 EC indeed lies in Community law, seems to have followed former AG Van Gerven's scheme of "constitutive", "executive", and simple "procedural" conditions of the Community 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 Community law is obvious from the fact that the Court reiterated the most important pronouncements of *Courage*.[25] In this context, it is also clear that the Court proceeded to define, as a matter of Community law, what former AG 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 81 EC."[26]

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

25. *Op. cit.* at paras. 60, 61, 63 & 89-91 (citing *Courage*, *supra* note 18, at paras. 25-27). In particular, para. 91 of *Manfredi* (quoting para. 27 of *Courage*), stresses that:

> the *existence* of such a right strengthens the working of the Community 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 Community. (emphasis added)

26. *Op. cit.* at para. 61.

ship" between that harm and that violation.[27] In thus defining the Community law constitutive conditions of the right to damages, the Court has produced a broad rule of standing, which includes consumers and indirect purchasers, while at the same time omitting the requirement of fault, which may mean that national rules following more restrictive rules on standing or requiring intention or negligence for an action for damages to be successful are contrary to the constitutive conditions in Community law of the *Courage/Manfredi* right to damages.

To mark the distinction between the existence of the right and its constitutive conditions, governed by Community law, and its exercise and executive conditions, governed by national law, the Court stresses again that "any individual … can claim compensation for [harm causally related with an Article 81 EC violation]," but:

> "[I]n the absence of Community 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."[28] (emphasis added)

We submit that the Court refers here to the "executive" rules of the Community right to damages. In 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

27. *Compare also* the recent ruling in *City Motors* which again refers to the constitutive conditions of the right to damages in the motor vehicle distribution context. Case C-421/05, City Motors Groep NV v. Citroën Belux NV, 2007 E.C.R. I-653, at para. 33:

> 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 81 EC 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 81 EC*. (emphasis added)

28. *Manfredi*, *supra* note 24, at paras. 63-64.

antitrust violation and the availability of punitive damages, both seen as "executive" conditions,[29] 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 AG's conviction that executive conditions affect the very core of the exercise of Community-based rights and should therefore be subject to a more stringent test concerning the Community principle of effectiveness, while detailed procedural rules 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.[30] This means that questions such as causality, nature of harm and damages, and defenses, which can be characterized as "executive" conditions, will be subject to a more demanding test of effectiveness or 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.

C. THE COMMISSION'S 2005 GREEN PAPER

The ECJ's *Courage* ruling provided the impetus for the Commission to adopt a more pro-active stance on private enforcement. Modernization was now a reality and there were, maybe for the first time, serious debates in Europe as to the desirability of introducing measures to enhance private antitrust enforcement. Soon after the ECJ delivered its *Courage* ruling, the Commission commissioned a study ("Ashurst Study") on the conditions for claims for damages in the member states in the case of infringement of EC competition rules.[31] Predictably, the study showed an "astonishing diversity and total underdevelopment" of civil antitrust actions in the member states. Until mid 2004, there were approximately 50 judgments that were the result of damages actions. Of these judgments, only 28 had resulted in a damages award.[32]

After digesting the results of the Ashurst Study and reflecting further on the appropriate way to move forward, on December 19, 2005, the Commission pub-

29. *Op. cit.* at paras. 64 & 92 *et seq.* as to causal relationship and punitive damages, respectively.

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

31. The study is made up of a comparative report on economic models for the calculation of damages and 25 national reports. *See* D. Waelbroeck et al., Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules: Comparative Report (Ashurst report) (2004), *available at* http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/study.html.

32. These statistics are only indicative, since in some member states not all judgments are published and the comparative report necessarily relies on the national reports, for which quality varies. One must also bear in mind that these statistics do not include cases that were settled with significant damages awarded to the plaintiffs.

lished a Green Paper on damages actions for breach of the EC antitrust rules for public consultation.[33] The purpose of the Green Paper, which set out a number of possible options to facilitate private damages actions, was to stimulate debate and facilitate feedback from stakeholders. The Commission was in favor of increased private enforcement, as it believed that this will have a number of advantages for private parties, in particular:

(a) victims of illegal anticompetitive behavior will be compensated for loss suffered;

(b) deterrence of antitrust infringements and compliance with the law will be increased;

(c) a competition culture among market participants, including consumers, will develop further, and awareness of the competition rules will be raised; and

(d) as the Commission and the national competition authorities do not have sufficient resources to deal with all cases of anticompetitive behavior, administrative authorities will have discretion to pursue other priorities.[34]

D. NATIONAL DEVELOPMENTS

It would be inappropriate to end this review of the way to the WP without referring to developments in the member states. Modernization and decentralization of Community competition law enforcement and the related European debate on private enforcement, as well as the 2001 *Courage* ruling by the ECJ, led to important initiatives at the national level. The United Kingdom and Germany completely overhauled their legislation and, among other reforms, introduced provisions aimed at enhancing private antitrust enforcement of national and Community competition law. At the same time, there has been a surge of damages actions and awards in the national courts, most of them being cases of follow-on claims (i.e., actions relying usually on prior decisions by competition authorities). Whether this last development indicates increased awareness by plaintiffs or changing judicial attitudes is still unclear, but it certainly confirms that the European "wake-up calls" are reaching the member states.

To start with the United Kingdom, the Competition Act 1998 did not contain any direct reference to civil actions or actions for damages, though the availabil-

33. Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules [hereinafter "Green Paper"], COM(2005) 672 final (Dec. 19, 2005). The Green Paper was accompanied by a Staff Working Paper which set out the various options more discursively. *See* Commission Staff Working Paper, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules, SEC(2005) 1732 (Dec. 19, 2005).

34. *See* Press Release, European Commission, MEMO/05/489, European Commission Green Paper on Damages for Breach of EC Treaty Antitrust Rules - Frequently Asked Questions (Dec. 20, 2005).

ity of such actions was implicit in some other provisions of the Act.[35] The situation was about to change. In 2001, a consultation paper by the U.K. Department of Trade and Industry powerfully advocated the desirability of private damages actions. Such actions were seen as serving two basic aims: (i) compensating victims of anticompetitive practices; and (ii) drawing private resources into the enforcement process, thus allowing public authorities to pursue the most important cases.

These ideas were set in motion with the Enterprise Act of 2002. Of particular interest for private enforcement is the conferring on the U.K. Competition Appeal Tribunal ("CAT") of jurisdiction to hear claims for damages in competition cases.[36] Damages claims before the CAT presuppose the establishing by either the U.K. Office of Fair Trading ("OFT") or the European Commission that an infringement of competition law has occurred. Such a finding of infringement is binding and cannot be re-litigated. These 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. In addition, U.K. law provides for the possibility for ordinary civil courts to transfer competition issues arising in private civil actions to the CAT.

Section 58A of the U.K. Competition Act also aims at facilitating follow-on civil actions for damages brought before the ordinary civil courts. It provides that findings of infringement of U.K. or Community competition law by the OFT (or by the CAT on appeal) bind the courts deciding on follow-on civil claims for damages.[37] Apart from section 47A on follow-on civil claims for damages, the U.K. system provides for another novelty: section 47B provides for claims for damages brought on behalf of consumers by representative "specified" bodies. These are not meant to be U.S.-style class actions, and the claim must specify the consumers on whose behalf the claim is being brought.

The latest amendment of the German Competition Act offers another paradigm. German law has long-provided for antitrust damages actions, but the new section 33 of the GWB marked important progress, in that it provided a legal basis for damages claims for violation not only of German, but also of Community, competition law. The new provision also abandoned the previous rather restrictive condition for standing, which was conferred only on persons

35. *See, e.g.*, U.K. Competition Act 1998, at §§ 55(3)(b) & 58(2).

36. *Id.* at § 47A.

37. It is noteworthy that this provision is different from section 47A of the Act. The former refers only to the U.K. competition authorities' decisions, while the latter extends the binding effect of infringement findings to decisions of the European Commission. In addition, the provision of section 58A refers to follow-on civil proceedings for damages before the ordinary civil courts (the Chancery Division of the High Court), while section 47A refers to follow-on claims brought before or transferred to the CAT.

within the "protective scope" of the statute, and stressed that any "person affected", including competitors and "other market participants" can sue for damages. The law also gave standing to associations for the promotion of commercial or independent professional interests, including consumer associations. One novel feature was that it is now possible for the courts to calculate the damages taking into account the proportion of the profit which the defendant derived from the infringement. In addition, the passing-on defense is restrained, though not completely banned. Finally, German law goes even further than U.K. law by conferring a binding effect, not only on European Commission and Bundeskartellamt, but also on all other EU member states' 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.

As far as national case law is concerned, there has also been a boom in recent years. It is interesting to note that many of the recent cases, some of which are still pending, are follow-on cases. The *Vitamins* case is the most prominent source of such actions and there are already damages awards and settlements in Germany, England, Sweden, and other jurisdictions. A famous example is the *Provimi* judgment decided at the admissibility stage by the English High Court, where, in addition to English parties, a German party was also claiming antitrust damages.[38] Judgment was given only as to the jurisdictional issues and subsequently the parties settled. There, it was established that where there is an English connecting factor in the private international law sense (i.e., an English element to a cartel), other non-English claimants may also bring claims in London for their non-English based losses, instead of having to pursue separate claims in other jurisdictions.

The *Vitamins* litigation provided also for the first claims that were brought before the CAT as follow-on civil claims for damages under the special procedure of section 47A of the U.K. Competition Act. These cases did not lead to final judgments as they were settled, although there has recently been a resurgence.[39] However, another recent follow-on action brought before the CAT, and which was also settled, gave rise to an interim award of damages, which was the first ever award of damages in the United Kingdom for a competition law infringement. This was based on previous infringement decisions by the OFT and CAT in an abuse of dominance case concerning margin squeeze and rebates in the pharmaceutical sector. On November 16, 2006, while the case was still pending,

38. Provimi Ltd. v. Aventis Animal Nutrition SA et al. QB, 2003 E.C.C. 353 (Com. Ct.).

39. *See* Case No. 1029/5/7/04, Deans Foods Limited v. Roche Products Limited, F. Hoffman-La Roche AG and Aventis SA (2004) (case settled); and Case No. 1028/5/7/04, BCL Old Co. Ltd. DFL Old Co. Ltd. and PFF Old Co. Ltd. v. Aventis SA, Rhodia Ltd., F. Hoffman-La Roche AG and Roche Products Ltd. (2004) (case settled). But *see also*, very recently, Case No. 1098/5/7/08, BCL Old Co Ltd. et al. v. BASF AG, BASF plc and Frank Wright Ltd. (2008) (case pending); and Case No. 1101/5/7/08, Grampian Country Food Group Ltd et al. v. Sanofi-Aventis SA et al. (2008) (case pending).

the CAT awarded "interim damages" for an amount of GBP 2 million.[40] That represented, in the court's view, roughly 70 percent of the likely final damages award. Meanwhile, more actions for damages have been brought before the CAT, but again for the most part these were settled.[41]

In Germany, the courts' initial rejectionist approach has now changed and the first successful follow-on damages claims in the *Vitamins* litigation have become a reality. It is noteworthy that certain German courts adjudicating claims for damages in the post-*Courage* era refused to grant damages to direct purchasers of vitamins on passing-on grounds, because the cartel was not specifically directed at them but at all market participants.[42] This built on a very restrictive reading of standing under German law that was certainly incompatible with Community law, in particular the *Courage* ruling, which accepted no such limitations but granted a right to damages to all individuals harmed by the anticompetitive conduct. Recent German judgments, however, have reversed this restrictive approach and have rendered the first damages awards.[43]

Important successful damages claims have also been reported in Austria, France, Denmark,[44] Spain,[45] Sweden, and Italy, where the Corte di Cassazione after lengthy tribulations established that consumers could claim damages from

40. Case No. 1060/5/7/06, Healthcare at Home Ltd. v. Genzyme Ltd., 2006 C.A.T. 29 (case settled). Under English law, interim damages can be an adequate provisional measure, if there is a very good prima facie case and if damages appear to be an appropriate final remedy.

41. *See*, *e.g.*, Case No. 1078/7/9/07, The Consumers Association v. JJB Sports plc (2007) (case settled); Case No. 1088/5/7/07, ME Burgess et al. v. W. Austin & Sons (Stevenage) Ltd. and Harwood Park Crematorium Ltd. (2007) (case pending); and Case No. 1077/5/7/07, Emerson Electric Co et al. v. Morgan Crucible Company plc et al. (2007). In the latter case, the CAT decided, on a preliminary point, that the time for making a claim for damages pursuant to section 47A of the Competition Act 1998 had not yet begun to run, since appeals were pending before the Community Courts against the Commission's decision which the plaintiffs sought to rely on in their follow-on claims (*see* Judgment of 17 October 2007, Emerson Electric Co et al. v. Morgan Crucible Company plc et al., 2007 C.A.T. 28). Eventually, the CAT granted permission to the plaintiffs to proceed with their damages claims against the immunity recipient, which had naturally not challenged to the CFI the European Commission's—in that case—cartel infringement decision (Judgment of 16 November 2007, Emerson Electric Co et al. v. Morgan Crucible Company plc et al., 2007 C.A.T. 30), but not against the other addressees of the infringement decisions, whose appeals to the CFI were still pending (Judgment of 28 April 2008, Emerson Electric Co et al. v. Morgan Crucible Company plc et al., 2008 C.A.T. 8).

42. Judgment of 11 July 2003, 7 O 326/02 – Vitaminkartell (LG Mannheim, 2004); and Judgment of 15 January 2004, 12 HK O 56/02 Kart - Vitaminpreise, 54 WuW 1179 (LG Mainz, 2004).

43. Judgment of 4 January 2004, 13 O 55/02 Kart – Vitaminpreise, 54 WuW 1182 (LG Dortmund, 2004). The damages awarded in this case amounted to the difference between the price paid as a result of the cartel and a hypothetical market price. In addition, the court ruled that the defendant had failed to prove that the plaintiff had passed on his damage to his customers.

44. Judgment of 20 April 2005, GT Linien A/S v. DSB and Scandlines A/S, UfR 2005.2171 H (2005). The award of damages amounted to DKK 10 million plus interest and was mostly upheld by the Danish Supreme Court. *See also* Judgment of 3 October 2002, EKKO v. Brandt Group Norden et al. (EKKO I),

a cartel of insurance companies previously convicted by the Italian competition authority.[46]

III. The White Paper

A. INTELLECTUAL DEBT ACKNOWLEDGED

It is only in the aftermath of the ECJ's important pronouncements that the European Commission decided to go forward with the publication of its Green and White Papers. In so doing, the Commission availed itself of an increased degree of legitimacy in an area, which is always sensitive due to the inevitable intrusion on what is perceived as the member states' institutional and procedural autonomy. It would have been very difficult for the Commission to go ahead and propose Community legislative action, if it had not been for the ECJ's seminal rulings. This intellectual debt is fully acknowledged in the WP, which gives much space to the acquis communautaire, as established by the Court.

Indeed, the WP starts from the premises that the right to be compensated for harm caused by an antitrust violation is a right guaranteed by the Treaty itself, as the ECJ has stressed in *Courage* and *Manfredi*. This statement is an important reminder because the idea that the right to damages is based in Community law is still resisted by some commentators, particularly in the German-speaking theory, which sees this purely as a matter of national law, subject only to the Community principles of equality and effectiveness.[47] The Commission is now

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footnote 44 cont'd
UfR 2004.2600 S (Copenhagen Maritime and Commercial Court, 2004); and Judgment of 15 October 2004, EKKO v. Electrolux Home Products Denmark et al. (EKKO II), UfR 2005.388 S (2005).

45. Case No. 125/2005, Antena 3 TV v. LNFP (Juzgado de Primera Instancia No. 4 de Madrid, Jun. 2005). In this case, in a "follow-on" civil action, the court awarded a record EUR 25 million in damages because LNFP, the Spanish football league, had abused its dominant position by selling broadcasting rights on an exclusive basis to regional public broadcasters, thus foreclosing certain new entrants. The damages claim was based on an earlier national infringement decision, confirmed by the Spanish competent courts. *See also* Case No. 36/2005, Conduit Europe SA v. Telefónica de España SAU (Juzgado de lo Mercantil No. 5 de Madrid, Nov. 11, 2005), confirmed in Audiencia Provincial de Madrid (Secc. No. 28) (May 25, 2006); and Case No. 73/2006, Conduit Europe SA v. Telefónica de España SAU (May 25, 2006). In that case, the court awarded the plaintiff, an Irish communication services provider, EUR 639,000 for losses incurred as a result of the defendant's abuse of a dominant position, consisting of giving defective and incomplete information in order to block the plaintiff's entry into the market for subscriber directory inquiries.

46. Case No. 2207, Compagnia Assicuratrice Unipol SpA v. Ricciarelli, 11 Danno e Responsabilità 495 (Corte di Cassazione, Feb. 4, 2005).

47. In favor of the Community law basis of the right to damages, *see also* K. Lenaerts & K. Gutman, *'Federal Common Law' in the European Union: A Comparative Perspective from the United States*, 54 Am. J. Comp. L. 1, 91-94 (2006); and Opinion of AG Poiares Maduro, Case C-438/05, The International Transport Workers' Federation and the Finnish Seamen's Union v. Viking Line ABP and OU Viking Line Eesti, 2007 E.C.R. I-10779, at para. 53 (which, referring to *Courage*, clearly speaks of a claim "based directly" on Community law).

unequivocal: there are many references to "the establishment under Community law of a right to compensation", derived "directly from Community law", and to the fact that "this European law remedy can as such not be refuted or conditioned by national legislation of any kind."[48] There is also a clear distinction between the existence of the right, which is a matter of primary Community law, and its exercise, which is determined by national legislation and which the WP intends on harmonizing to a certain extent through secondary Community law.[49]

A fundamental quality of the WP is that it codifies and restates the existing acquis communautaire involving most aspects of the right to damages for EC competition law violations. Naturally, references to the ECJ *Courage* and *Manfredi* rulings are prominent, but there are also references to other case law that deals with many other questions of remedies and procedures available at the national level for the enforcement of Community law. The Commission's choice to dedicate whole sections of the WP to the presentation of the impressive acquis communautaire is a wise one. First, it shows that even if the whole initiative to introduce Community measures for private actions were abandoned, the existing acquis itself is a Community minimum from which there can be no departure. Second, it acts as a powerful support and starting point for Community legislation.[50]

Notwithstanding this acquis communautaire and the Community law basis of the right to damages, the WP recognizes 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. Community measures (e.g., a regulation or directive), and most likely 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.

B. THE MAIN POLICY OPTIONS OF THE WHITE PAPER

The Commission speaks in the WP of a "combination of measures at Community and national level." It is fair to say that the Commission had never pretended to have an exclusive role in this area, but its more deferential attitude to national competencies may be the result of some resistance at the national level with respect to Community unification and harmonization initiatives especially those touching upon matters of national procedural laws. Indeed, the WP is now proposing to leave to the national level rules on costs, court fees, and funding.[51] In

48. SWP, *supra* note 1, at paras. 308-09 (emphasis added). *See also* WP, at § 1.1.

49. SWP, *supra* note 1, at para. 309.

50. Indeed, an argument that is often heard in favor of Community legislation in this area is that if Community legislation does not step in to deal with the conditions for the exercise of the right to damages (positive integration), then the ECJ would have to do this through the preliminary reference procedure (negative integration).

51. *See* SWP, *supra* note 1, at ch. 9.

addition, and to the extent Community legislation is necessary, "procedural" matters, such as collective relief and access to evidence, are seen as candidates for harmonization (through a directive), rather than for unification (through a Regulation). It is the view of this author, however, that a Regulation would be more appropriate for core conditions of the exercise of the right to damages, like standing, passing-on, and questions pertaining to fault.

The two basic objectives of damages actions, as perceived by the WP, 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 must be the secondary objective.[52] The Commission also mentions as a third objective the development of a competition culture among market participants and the increased awareness of the competition rules.[53]

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

- standing to sue for damages should be recognized for all persons harmed by an EC 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");
- at the same time, it should 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 WP 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 ("NCAs") or final judgments on judicial

52. This hierarchy may also explain the absence of proposals for more "offensive" or "aggressive" mechanisms, such as punitive damages. On the two objectives, *see recently* P. Nebbia, *Damages Actions for the Infringement of EC Competition Law: Compensation or Deterrence?*, 33 Eur. L. Rev. 23 (2008).

53. SWP, *supra* note 1, at paras. 14-15.

review should be binding on national courts throughout the European Union in follow-on civil actions;

- objective (strict) liability should be the rule (no fault requirement) for damages, once the infringement has been established, unless the infringer demonstrates that there is a genuinely excusable error (i.e., he bears the burden of such proof);
- full compensation should be available, covering not just actual losses, but also lost profits and interest;
- there should be no Community 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; and
- the immunity recipient's civil liability should be limited to claims by his direct and indirect contractual partners.

C. THE IMPACT OF THE PRE-EXISTING ACQUIS COMMUNAUTAIRE ON THE WHITE PAPER'S TREATMENT OF THE CONDITION OF STANDING

The fact that Community 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, in particular for indirect purchasers and consumers.

Perhaps the most important feature of the WP is the broad rule of standing it advocates, notably for indirect purchasers and of course consumers. At the same time, the WP proposes the retention of the "passing-on defense". The question of the standing of indirect purchasers is closely connected with the prohibition or permission of the passing-on defense. Indeed, standing of indirect purchasers is referred to at times as "offensive passing-on".

Under U.S. antitrust law, indirect purchasers (e.g., traders that have purchased from retailers rather than from the manufacturer), cannot recover damages,[54] notwithstanding the fact that the harm may have been passed on to them. U.S. law clearly favors compensation only of direct purchasers, and indeed, it disal-

54. State antitrust laws in the United States, however, may allow for indirect purchaser suits.

lows the passing-on defense in this case.[55] There is a powerful policy rationale behind this rule, that the direct purchaser is a more "efficient" plaintiff, ultimately preferable to indirect purchasers as a "private attorney general". In general terms, the U.S. rule also seems to take into account certain prudential considerations, such as the burden on the judicial system that would result if the private right of action were available in an unlimited way to remotely injured plaintiffs. Then, denying indirect purchasers standing is a direct consequence of the exclusion of the passing-on defense, since the defendant and perpetrator of the antitrust violation should not be vulnerable to multiple actions referring to the same acts, while at the same time it is not open to him to rely on the fact that the damage may have been passed-on. In other words, the U.S. system bans the defensive use of the passing-on principle by defendants, while at the same time banning its offensive use by indirect purchasers who base their claims precisely on the fact that the overcharge was passed on to them.

THE FACT THAT COMMUNITY 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, IN PARTICULAR FOR INDIRECT PURCHASERS AND CONSUMERS.

Irrespective of the critique that can be made against this rather inflexible U.S. judge-made rule,[56] in the European context of damages claims, the constitutional status of the Treaty competition provisions and the fact that they form the basis of rights for individuals, mean that the U.S. theories could not have been adopted uncritically. Thus, the a priori exclusion of indirect purchasers from the ambit of the persons who can claim damages would not have been compatible with Community law.

In *Courage*, the Court had no difficulty in finding that Article 81 EC not only protected third-party competitors (in that case third-party beer suppliers foreclosed by a specific network of exclusive beer supply agreements), but also pro-

55. *See* Hanover Shoe v. United Shoe Machines Corp., 392 U.S. 481 (1968) and Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

56. The problem with the total exclusion of indirect purchasers is that there may be times when the direct purchasers benefited from the infringement and are not at all inclined to sue. An upstream cartel may also shield itself from private damages claims by forwarding a share of cartel profits to its direct purchasers. These benefits dissuade the direct purchasers from exercising their exclusive right to sue for private damages. *See further* M.P. SCHINKEL, J. TUINSTRA & J. RÜGGEBERG, ILLINOIS WALLS: HOW BARRING INDIRECT PURCHASER SUITS FACILITATES COLLUSION (Amsterdam Center for Law & Economics, Working Paper No. 2005-02, April 2008), *in* RAND J. ECON. (forthcoming). It is noteworthy that the recent report of the U.S. Antitrust Modernization Commission proposes overruling *Illinois Brick* and *Hanover Shoe* to the extent necessary to allow both direct and indirect purchasers to sue to recover for actual damages from violations of federal antitrust law (*see* Antitrust Modernization Commission, Report and Recommendations (April 2007)).

tected "any individual",[57] including co-contracting parties, or in that case, tenants. *Manfredi* built on *Courage* and defined in detail the Community law constitutive condition of standing, explicitly recognizing that consumers enjoy standing to sue for harm caused to them by anticompetitive conduct.[58] Indeed, the WP follows that approach and adopts a broad rule of standing, covering also indirect purchasers. It is actually interesting that the WP refers to indirect purchasers' standing, not as a proposal, but rather as part of the already-existing acquis communautaire.[59]

Thus, in Europe, the solution will be the opposite from the U.S. solution: both direct and indirect purchasers will have standing to sue, but at the same time the passing-on defense will be available. Allowing the passing-on defense is a logical consequence of the broad rule of standing, otherwise, as the WP 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.[60]

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 WP proposes the introduction of a rebuttable presumption that the overcharge has indeed been fully passed on to the plaintiff-indirect purchaser. This is intended as an alleviation of the victim's burden of proof, without, however, affecting the main conditions of civil liability: in other words, the plaintiff would still have to prove the infringement, the existence of the initial overcharge, and the extent the overcharge caused him harm (including causation).[61]

Where the WP may give rise to a discussion as to its compatibility with the *Courage/Manfredi* case law is in its proposal to limit the civil liability of successful immunity recipients[62] to claims by their "direct and indirect contractual partners". The aim is basically to safeguard the effectiveness of the Leniency Program, which

57. *Courage*, *supra* note 18, at para. 26.

58. *Manfredi*, *supra* note 24, at paras. 60, 61 & 63. Compare AG Mischo's Opinion in *Courage*, *supra* note 18, at 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)

59. SWP, *supra* note 1, at paras. 33-37. Of course, the broad rule of standing does not affect the necessity of a causal link between the harm and the infringement of Articles 81 and 82 EC (*op. cit.* at paras. 37 & 205).

60. *Op. cit.* at note 3, para. 210. At the same time, the WP stresses that the standard of proof for the passing-on defense 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.

61. *Op. cit.* at para. 220.

62. This proposal does not cover the other leniency applicants that did not receive full immunity.

might have been put at risk as a result of the Commission's drive for an enhanced system of private actions in Europe. According to that proposal, the immunity recipient would be liable only to persons that bought the products or services in question directly from the recipient (direct contractual partners) or those down the supply chain who bought these products or services from the direct contractual partners themselves.[63] Thus, a victim that did not buy cartelized products or services directly or indirectly from him,[64] a harmed competitor, a shareholder,[65] or a victim of so-called "umbrella pricing"[66] would not be able to claim damages. At the same time, this rule would in effect remove the immunity recipient's joint liability,[67] since, as the Commission explains in an example, "where 30% of a victim's total purchases of cartelized products originate from the immunity recipient, the latter would only be liable for 30% of the total harm suffered by this victim due to the overcharge of the cartelized products."[68]

THE QUESTION HERE IS WHETHER THE LIMITATION OF THE RIGHT OF COMPETITORS AND OTHERS NOT FALLING UNDER THE COMMISSION'S DEFINITION OF "DIRECT AND INDIRECT CONTRACTUAL PARTNERS" IS AT ODDS WITH PRIMARY COMMUNITY LAW.

The question here is whether the limitation of the right of competitors and others not falling under the Commission's definition of "direct and indirect contractual partners" is at odds with primary Community law (i.e., with the Treaty itself and the ECJ rulings in *Courage* and *Manfredi*), which stress that the right to damages should be open to "any individual". However, the fact that primary Community law itself provides for a broad rule of standing does not mean that the Community legislator cannot make a policy decision and restrict—though not eliminate—the right of some

63. *Op. cit.* at para. 305.

64. An issue is what happens with cartels that do not involve the sale of goods or services to contractual partners (e.g., a cartel not to sell in a particular market or to a particular client).

65. Whether shareholders or other persons related to a company that has breached the antitrust rules, such as employees, can sue for damages, is debated. In the author's view, the broad language in *Courage* should cover these persons too, assuming they can identify and prove harm and, more importantly, causation.

66. These are customers who purchased not from cartel members but from fringe firms outside the cartel, but within the same relevant market and that charge a higher price as a non-cooperative response to the cartel price. *See further* Impact Assessment Study, *supra* note 1, at 413.

67. The WP considers that removal of joint liability by itself is not sufficient to effectively limit the immunity recipient's liability (SWP, *supra* note 1, at para. 304). *Compare*, however, SWP, at para. 322, where removal of joint liability is surprisingly mentioned as a separate proposed measure. Perhaps the reference in para. 322 was left in from a previous draft by mistake.

68. SWP, *supra* note 1, at note 160.

plaintiffs, if that would be beneficial to the effectiveness of the whole system of enforcement.

A closer look at the proposed solution reveals that in reality the WP does not propose to affect the exercise of those persons' right to damages against the other cartel members that did not receive full immunity from fines. Indeed, joint and several liability of these cartel members continues to be the rule, so they would still be jointly and severally liable to pay damages to a potential harmed competitor for the whole of his harm. Thus, in reality, what the WP proposes is not to totally bar some persons from suing for damages, but rather to make those persons only slightly worse off by slightly increasing their risk in case of the insolvency of all or some of the other cartel members with the exception of the immunity recipient. This is a rather low risk.[69] In fact, irrespective of this WP proposal and of what primary Community law dictates, all plaintiffs always bear the risk of all the cartel members' insolvency. So, it seems that the proposed solution would most likely not seriously affect the existence of the Community right to damages, while at the same time it would undoubtedly strengthen the effectiveness of one aspect of the Leniency Program, the race to the authority to be the first undertaking that self-reports, thus ensuring full immunity status.[70] Being second or third would not only mean the loss of full immunity, but also exposure to damages liability for the whole of the harm.[71]

An even better solution would be to completely exclude the immunity recipient's liability also for claims by his direct and indirect contractual partners. Again, this would not dramatically affect the exercise of the right to damages by these persons, since they could still claim compensation for the whole of their damage against the other cartel members, who would remain jointly and severally liable. As a safety valve, the law could provide that this total exclusion of liability would not apply to the exceptional case of insolvency by one or more of the jointly and severally liable (other) cartel members.[72] While not affecting the right of compensation, such a solution would enhance the effectiveness of the Leniency Program

69. The cartels that are prosecuted by the Commission under Article 81 EC are likely to concern activity and companies of a certain size and therefore the risk of insolvency of any of these companies is extremely low.

70. *See also* Impact Assessment Study, *supra* note 1, at 521.

71. Note, however, that the Commission does not propose to disallow contribution among the (non-immunity recipient) cartel members.

72. In such a case, the plaintiffs would have to sue first the other cartel members and, in case of insolvency of the latter, they could then bring a new action against the immunity recipient for the part of harm that is attributable to him (in other words, removal of joint liability for him should here be the rule).

even more.[73] Indeed, this has now been adopted in the amended text of the Hungarian Competition Act, which, with the intention to increase the attractiveness of the leniency policy, provides that a leniency applicant receiving full immunity from fines would not be liable to pay damages to third parties, until and if such damages can be collected from other cartel members (i.e., from those which did not receive full immunity under the leniency policy).[74]

Besides, ensuring that the Leniency Program remains attractive and thus effective is very beneficial for private enforcement and potential plaintiffs. First, the plaintiffs become aware of the cartel infringement, which is more effectively exposed to the public authority by the leniency applicants. Second, the facts are established during the administrative proceedings. Third, courts or plaintiffs could under certain circumstances ask for documentary evidence in the hands of the public enforcer, in order to establish the liability or damage. Fourth, a final public decision, depending on the applicable rules, may have a binding effect on the follow-on civil proceeding or may constitute prima facie evidence of the cartel violation.[75]

73. Of course, a debate is still possible, if one views *Courage* and *Manfredi* not only as authority for a Community right to damages available to victims, but also as authority for a Community law obligation imposed on infringers (to compensate the victims). In that case, indeed, any exclusion of an infringer's liability to certain classes of victims would be contrary to primary Community law. In the author's view, however, the language in *Courage* and *Manfredi* (*supra* notes 18 and 24, at paras. 26-27 and paras. 89-91, respectively), which is rights- and not obligations-centered, and the underlined powerful rationale of effectiveness would allow for a compromise in order to safeguard the effectiveness of public enforcement and thus by implication the effet utile of Article 81 EC.

74. The amended text has not yet come into force due to a pending review by the Constitutional Court, because of certain concern on new rules imposing liability on management. Although the amendments were due to take effect in September, the entire amending act is now suspended until the Constitutional Court concludes its review. In any case, the new provisions on damages actions are not subject to the ongoing constitutional review, so they are likely to enter into force as they stand now.

75. *See also* A.P. Komninos, *The EU White Paper for Damages Actions: A First Appraisal*, 84 Concurrences 2, 89-90 (2008).