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Experience to Date and the Path Ahead

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A much cited 2004 study described private competition law litigation in Europe as being in a state of “total underdevelopment.” Ever since, the European Commission, along with several member state governments and competition authorities, has made facilitating private enforcement of competition laws a cornerstone competition law policy. The situation is evolving—across Europe courts are becoming more open to antitrust plaintiffs and litigation is active. But with the main procedural and policy issues that govern civil litigation under the responsibility of 27 countries with rich and diverse legal traditions, progress has been uneven. The consequence is a patchwork under which European litigants on both sides of the table face difficult questions of standing, jurisdiction, access to evidence, and entitlement to and calculation of damages—the answers to which vary widely by country.

This article provides an overview of the current state of private enforcement of EU competition law. In doing so, it summarizes and assesses the central recommendations of the European Commission’s 2008 White Paper on damages actions for breaches of EU competition law, considering the context under which the White Paper was issued as represented by the policy options laid out initially in the Commission’s 2005 Green Paper, existing member state legal systems, and experience in national antitrust damages litigation.

*Cleary Gottlieb Steen & Hamilton LLP, Brussels. It would be impossible for one person to stay current regarding developments in national litigation across the European Union, and this article accordingly reflects input from many experts who reflect the great international breadth of Cleary Gottlieb’s lawyers in Brussels and elsewhere. I am particularly grateful for substantive input from Shaun Goodman, Neil Rigby, and Andrew Ward, for coordinating assistance provided by Tanya Dunne and Colin Raftery, and for valuable comments from John Temple Lang.

I. Overview of EU Competition Law Application by National Courts

A. INTRODUCTION

The EC Treaty places individuals at the heart of EU competition policy, since it includes competition law among the tools to be used to achieve purposes such as economic development and an improved standard of living. In practice, however, private lawsuits have not played a prominent role in the enforcement of EU competition law. In contrast with the situation in the United States—where the commonly held view is that private actions make up 90 percent of antitrust enforcement—EU competition law enforcement has been driven almost exclusively by public authorities. Notwithstanding the formal recognition in Regulation 1/2003 of member state courts' power and obligation to apply EU competition law directly, member state law and practice concerning private actions for breach of competition laws remain relatively undeveloped.¹

The European Commission is doing what it can to encourage member states to change this situation. Successive Commissioners for Competition have advocated private enforcement in national courts as an important prong of EU competition policy.² Commission press releases accompanying Article 81 cartel decisions now openly invite follow-on private actions for damages.³ In late 2005, the Commission released a Green Paper for public comment, raising for discussion

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1. A 2004 report for the European Commission characterized the situation as a state of "total underdevelopment." 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)* [hereinafter "Comparative Report"], available at http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/study.html.
 2. See, e.g., M. Monti, European Commission, Speech No. 04/403, Private litigation as a key complement to public enforcement of competition rules and the first conclusions on the implementation of the new Merger Regulation, Speech at the IBA - 8th Annual Competition Conference, Fiesole (Sep. 17, 2004); N. Kroes, European Commission, Speech No. 05/533, Enhancing Actions for Damages for Breach of Competition Rules in Europe, Dinner Speech at the Harvard Club, New York (Sep. 22, 2005); and N. Kroes, European Commission, Speech No. 05/613, Damages Actions for Breaches of EU Competition Rules: Realities and Potentials, speech at the conference 'La reparation du prejudice cause par une pratique anti-concurrentielle en France et à l'étranger: bilan et perspectives', Paris (Oct. 17, 2005).
 3. Commission press releases accompanying cartel decisions routinely conclude with the following statement:

Any person or firm affected by anti-competitive behaviour as described in this case may bring the matter before the courts of the Member States and seek damages, submitting elements of the published decision as evidence that the behaviour took place and was illegal. Even though the Commission has fined the companies concerned, damages may be awarded without these being reduced on account of the Commission fine.

policy options that would facilitate private damages actions for breach of EU competition rules.⁴ The Commission followed in April 2008 with a White Paper setting forth concrete proposals for action.⁵

The White Paper is a modest 10-page document that summarizes the Commission's proposals to address perceived obstacles to the development of private antitrust damages litigation in Europe. It is accompanied by detailed supporting documents, including a Staff Working Paper⁶ which summarizes much of

THE DEVELOPMENT OF PRIVATE ENFORCEMENT IN THE EUROPEAN UNION OVER THE COMING YEARS WILL BE DRIVEN IN LARGE PART BY THE RESPONSES IN LEGISLATION AND IN PRACTICE TO THE WHITE PAPER'S RECOMMENDATIONS.

the reasoning underlying the White Paper's recommendations and an Impact Assessment⁷ which analyzes the benefits and costs of various policy options that were considered in developing the White Paper. The White Paper introduces proposals for member state action on a range of issues central to the development of private antitrust enforcement in the European Union, including standing to bring claims, collective actions, disclosure/discovery rules, and

the quantification of damages. The development of private enforcement in the European Union over the coming years will be driven in large part by the responses in legislation and in practice to the White Paper's recommendations.

This article provides an overview of the current state of private enforcement of EU competition law. In doing so, it summarizes and assesses the White Paper's central recommendations in light of the context in which they were issued, as represented by the policy options laid out initially in the Green Paper, the existing member state legal systems, and the experience to date in national antitrust damages litigation.

4. Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final (Dec. 19, 2005) [hereinafter "Green Paper"].

5. Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2008) 165 final (Apr. 2, 2008) [hereinafter "White Paper"].

6. Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules, SEC(2008) 404 (Apr. 2, 2008) [hereinafter "Working Paper"].

7. Commission Staff Working Document, Accompanying document to the White Paper on Damages actions for breach of the EC antitrust rules, Impact Assessment, COM(2008) 165 final, SEC(2008) 406 (Apr. 2, 2008) [hereinafter "Impact Assessment"]. The Impact Assessment is based in significant part on findings set forth in a 671-page Impact Study prepared by a team of external consultants. See CEPS, EUR & LUISS, Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios, Final Report (Dec. 21, 2007) [hereinafter "Impact Study"].

B. GOALS OF PRIVATE ENFORCEMENT AND RELATION TO PUBLIC ENFORCEMENT

Civil litigation in member state courts is the primary means by which private parties may enforce the rights afforded them by competition law directly, through actions for injunctive relief or damages against another private party or the state. From the Commission's perspective, private litigation is not aimed at protecting the public interest but at protecting individuals' "subjective rights under Community law."⁸ Such subjective rights include victims' rights to compensation for losses sustained as a result of competition law violations. The Commission regards improving citizens' awareness of and ability to directly enforce their rights under EU competition law as important in part because the possibility to be awarded damages "makes the competition rules instantly relevant for citizens."⁹ Putting competition law to work for individual consumers has emerged as a central plank of Commissioner Neelie Kroes' tenure.

From the Commission's perspective, an important indirect benefit of private litigation is that it adds to the amount of competition law enforcement, thereby contributing to deterrence and consequently to compliance with competition rules. Private litigants may supplement public enforcement by taking action against infringements that the competition authorities are unwilling or unable to pursue due to lack of resources.¹⁰ Increased private action may also improve the detection rate of competition infringements, as private parties who are victims of anticompetitive conduct may be better placed than public enforcers to identify violations.¹¹ The Commission thus regards private enforcement, particularly at the consumer level, as a complement to public enforcement and has made facilitation of private enforcement a clear policy goal. In the words of Commissioner Kroes:

8. Council Regulation (EC) No. 1/2003 of December 16, 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 7.

9. Kroes (Sep. 22, 2005) *supra* note 2.

10. M. Monti, European Commission, Speech No. 04/403, Private litigation as a key complement to public enforcement of competition rules and the first conclusions on the implementation of the new Merger Regulation, Speech at the IBA - 8th Annual Competition Conference, Fiesole (Sep. 17, 2004), at 2. The European Court of Justice relied on a similar argument over forty years ago in support of establishing the direct effect of EU law in Case 26/62, Van Gend & Loos, 1963 E.C.R. 1 ("The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by articles 169 and 170 to the diligence of the commission and of the member states.").

11. See D. Woods et al., *Private enforcement of Community competition law: modernization and the road ahead*, 2 COMPETITION POL'Y NEWSLETTER 31, 33 (2004).

“No matter how closely public intervention mirrors the concerns of consumers, no matter how effectively the fines that we impose punish and deter unlawful behaviour, the victims of illegal behaviour will still not be compensated for their losses. [Public enforcement] cannot make amends for the damage and suffering caused to consumers. Therefore, consumers should be empowered to enforce their rights themselves.”¹²

As the discussion above indicates, the effort to promote private antitrust actions has been gathering momentum for several years, but it has not been without its critics, even from within the Commission. For example, it has been argued that public enforcement is inherently superior to private enforcement, partly since public enforcement benefits from more effective investigative and sanctioning powers than private actions, which are driven purely by profit motives and are globally more costly for society. These commentators also argue that deterrence should be achieved through tougher public sanctions (including jail sentences) and increased resources for competition authorities, rather than the threat of private damages actions.¹³ In response, the Commission has repeated the need to “strike the right balance” between effective private enforcement and excessive litigation¹⁴ and clarified that its intent is to “foster a competition culture, not a litigation culture.”¹⁵ In accordance with these statements, the White Paper is careful to emphasize the need to preserve a “genuinely European approach” to the issue of damages actions that is “rooted in European legal culture and traditions.”¹⁶

C. THE LEGAL BASIS FOR PRIVATE ENFORCEMENT

Because there is no European court competent to hear damages actions brought by private plaintiffs for breach of EU competition law, private enforcement requires individuals to invoke European competition law before national courts, which must apply EC law directly. The direct applicability of Articles 81 and 82

12. N. Kroes, European Commission, Speech 07/698, Making consumers’ right to damages a reality: the case for collective redress mechanisms in antitrust claims, Speech at the Conference on collective redress for European consumers, Lisbon (Nov. 9, 2007).

13. See, e.g., W.P.J. Wils, *Should Private Enforcement Be Encouraged in Europe?*, 26 *WORLD COMPETITION* 473 (2003).

14. Kroes (2007), *supra* note 12; Kroes (Sep. 22, 2005), *supra* note 2.

15. Kroes (Sep. 22, 2005), *supra* note 2.

16. White Paper, *supra* note 5, at § 1.2.

EC has long been recognized in the case law,¹⁷ and the power and obligation of national courts to apply EU competition law is now formalized in Article 6 of Regulation 1/2003.¹⁸

Although litigation in national courts is based on national procedural rules, the principle of EC law primacy and the duty of loyal cooperation under Article 10 EC impose constraints on national courts on how they handle private damage actions based on alleged EU competition law violations. The first consequence of these principles is that national courts are obliged to construe national law in light of European law¹⁹ and even to disapply any provision of national law that would be contrary to European law.²⁰ National courts will not be able to apply national laws that frustrate damage actions under EU competition law.

Some additional constraints on national courts posed by the EC law primacy principle are now embodied in Regulation 1/2003. Article 3 of Regulation 1/2003 compels national courts to apply European competition law if the conduct in question may affect trade among member states. The courts may apply national competition law alongside the EC provisions, but only if the outcome under the national law does not differ from that under EC law (the only exception being that national laws on unilateral conduct may be stricter than Article 82 EC²¹). In addition, Article 16 of Regulation 1/2003 promotes the uniform application of Community law by prohibiting national courts from issuing judgments running counter to a previous Commission decision relating to the same agreement or practice.²²

The procedural autonomy enjoyed by member states in the absence of harmonization²³ is also limited by the two cornerstone EC law principles of equivalence and effectiveness, derived from Article 10 EC. The equivalence principle

17. See, e.g., Case 127/73, BRT v. SABAM, 1974 E.C.R. 51, at para. 16 (“[A]s the prohibitions of Articles [81] (1) and [82] tend by their very nature to produce direct effects in relations between individuals, these articles create direct rights in respect of the individuals concerned which the national courts must safeguard.”).

18. Article 6 of Regulation No. 1/2003 provides that: “National courts shall have the power to apply Articles 81 and 82 of the Treaty.” See Reg. No. 1/2003, *supra* note 8, at art. 6.

19. Case C-106/89, Marleasing, 1990 E.C.R. I-4135.

20. Case 106/77, Simmenthal, 1978 E.C.R. 629.

21. Reg. No. 1/2003, *supra* note 8, at art. 3(2). Pursuant to Article 3(3), the application of national legislation, the primary objective of which is different from Articles 81 and 82, may lead to a different outcome.

22. This provision formalizes the *Masterfoods* doctrine from Case C-344/98, *Masterfoods*, 2000 E.C.R. I-11369 [hereinafter *Masterfoods*], at paras. 49-52.

23. Case 33/76, *Rewe*, 1976 E.C.R. 1989, at para. 5; and Case 45/76, *Comet*, 1976 E.C.R. 2043, at para. 12.

requires national courts not to treat claims founded on EC law less favorably than claims under national law. Consequently, all the mechanisms available to individuals to enforce their rights under national competition law are extended to European competition law. The effectiveness principle goes further, providing that member states may not render enforcement of European law impossible or extremely difficult. National courts may even be forced to invent remedies that do not exist in national law if their absence puts at risk the effectiveness (“effet utile”) of European competition law.²⁴

This principle has been central in the development of private enforcement of EU competition law. In the European Court of Justice’s *Banks* case from the early 1990s, Advocate General Van Gerven argued that the effectiveness principle supports allowing damages actions for losses sustained by EU competition law violations, and invited the Court to develop a case law to this effect.²⁵ The Court declined to set such a precedent in that case, but moved in this direction several years later in the landmark *Crehan* judgment, holding that:

“The full effectiveness of Article [81 EC] . . . would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. [...] 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.”²⁶

Crehan opened the way to private enforcement of EU competition law. Although the judgment concerned Article 81 EC, the Court’s holdings clearly go beyond the facts of the case to apply also to non-contractual relationships, including breaches of Article 82 EC. Nevertheless, *Crehan* does not create a new European remedy. Rather, “the consequences in civil law attaching to an infringement of [Articles 81 and 82 EC] . . . are to be determined under nation-

24. Case C-213/89, *Factortame I*, 1990 E.C.R. I-2433.

25. Opinion of Advocate General Van Gerven, Case C-128/92, *Banks v. British Coal Corporation*, 1994 E.C.R. I-1209.

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

al law . . . , subject, however, to not undermining the effectiveness of the Treaty.”²⁷ Thus, the principle of a private right to damages for competition law violations has been recognized in European law, but it must be implemented by national law.

Today, in the absence of Europe-wide rules, each member state has its own rules governing civil litigation and the systems differ widely. While some member states maintain rules that act as obstacles to effective private competition law enforcement, others are more receptive to private actions, either due to features of their civil procedural law or because they have adopted specific legislation relating to competition law claims. Section II below outlines several key procedural and substantive issues relating to the development of private competition law enforcement and summarizes how they have been approached in various member states and in the White Paper.

WHILE SOME MEMBER STATES MAINTAIN RULES THAT ACT AS OBSTACLES TO EFFECTIVE PRIVATE COMPETITION LAW ENFORCEMENT, OTHERS ARE MORE RECEPTIVE TO PRIVATE ACTIONS, EITHER DUE TO FEATURES OF THEIR CIVIL PROCEDURAL LAW OR BECAUSE THEY HAVE ADOPTED SPECIFIC LEGISLATION RELATING TO COMPETITION LAW CLAIMS.

II. Key Issues in the Development of Private Enforcement

A. STANDING: WHO CAN BRING A CLAIM?

The Court of Justice in *Crehan* articulated a broad standard of who has the right to bring a private action for EU competition law violations, holding that the full effectiveness of EU competition law “would be put at risk if it were not open to *any individual* to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.”²⁸

Not all member states have always clearly supported such a broad right of standing. Member states require a potential claimant to demonstrate an “interest” in bringing an action, but some had imposed additional limitations that set

27. Case T-395/94, *Atlantic Container Line*, 2002 E.C.R. II-875, at para. 414.

28. *Crehan*, *supra* note 26, at para. 26 (emphasis added). See also *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*], at para. 61 (“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”).

the bar higher for plaintiffs to get into court.²⁹ In recent years, however, several countries with apparently diverging rules (e.g., Germany) have amended laws to make their courts more open to claimants, and today there are few if any practical limitations on the right of any natural or legal person who has suffered harm as a result of violations of Article 81 or 82 EC to bring a claim in an appropriate member state court (jurisdictional issues are addressed below). The most pressing issues concerning potential antitrust plaintiffs' access to the courts now relate to the availability of representative or class action proceedings and the funding of claims.

1. Representative and Collective Actions

Damages suffered individually by final consumers and low-volume purchasers will often be too small to make litigation worthwhile even if the aggregate harm caused by anticompetitive behavior is large. The Commission has for several years advocated the view that effective private enforcement requires some form of collective action to consolidate small claims and spread the costs and risks of litigation. While perhaps implicitly recognizing the rarity of collective actions in Europe to date, in the period leading up to issuance of the White Paper Commissioner Kroes stated that “representative action—empowering groups that truly represent the interests of consumers—is [close] to the heart of European traditions.”³⁰

In the United States, collective antitrust claims are brought primarily through “opt-out” class actions, in which a single plaintiff is able to commence an action on behalf of an entire class of unnamed plaintiffs (thus requiring those who do not wish to participate in the action to opt out). Opt-out class actions are generally regarded as efficient vehicles for aggregating small claims that would be unlikely to be individually litigated as they lower the cost to individual litigants, bring superior legal resources to bear, and strengthen the plaintiffs' negotiating position. On the other hand, opt-out class actions are procedurally complex and often slow to proceed (particularly since the initial class certification stage of the litigation is often lengthy and highly contentious), are expensive to pursue and defend, and significantly diminish individual control by plaintiffs.

29. A much-discussed example from Germany is perhaps most notable. In 2003, the Landgericht Berlin (district court) placed a tight restriction on standing by requiring that the claimant (who was seeking damages from members of a cement cartel) show that the law on which the claim was based had the purpose of protecting the claimant, and thus that “purchasers of cement at cartel prices could not claim damages unless they had been individually targeted by a market-sharing cartel.” *Max Boegl Bauunternehmung et al. v. Hanson Germany* (Ger. Dst. Ct. Jun. 27, 2003).

30. N. Kroes, European Commission, Speech 07/128, Reinforcing the fight against cartels and developing private antitrust damage actions: two tools for a more competitive Europe, Speech at the Commission/IBA Joint Conference on EC Competition Policy, Brussels (Mar. 8, 2007).

Along with contingent legal fees, burdensome discovery processes, and treble damages, the opt-out class action process has been widely regarded in Europe as one of the principal “excesses” of the U.S. system. Today, no EU member state has a procedural device directly parallel to the opt-out class action, although several countries do allow certain types of collective actions to be brought and the laws in this area are evolving quickly. In 2007 Commissioner Kroes stated expressly that she “would not support the introduction” of opt-out class actions in Europe.³¹ Unsurprisingly, then, the White Paper does not advocate the introduction of opt-out class actions, but instead proposes the adoption of two alternative measures to facilitate collective redress:

- representative actions brought by qualified entities, such as consumer associations or trade associations, on behalf of identified or, in some limited cases, identifiable victims. These entities would be either (i) officially designated in advance or (ii) certified on an *ad hoc* basis by a member state to bring an action on behalf of some or all of their members for a particular antitrust infringement. Damages would be awarded to the representative entity and used preferably to compensate the harm suffered by all those represented in the action; and
- opt-in collective actions, in which victims decide to combine their individual claims for damages suffered into one single action.

As explained below, each of these types of actions has been applied at the member state level, and neither Commission proposal is likely to be controversial. Below are summaries of some of the approaches currently being taken.

a. Representative Actions and Consumer Claims

Several member states permit collective damages actions to be brought by consumer associations. Consumer actions are a useful mechanism to bring some claims that would otherwise not be brought due to their small individual value and the large number of claimants.

A few such actions have already been initiated in the antitrust context. In England, under the Competition Act 1998, certain specified bodies are entitled to bring collective consumer claims for damages on behalf of, and with the consent of, named individual consumers. These are follow-on actions before the Competition Appeals Tribunal (“CAT”) all relating to the same infringement, with damages paid to the individual consumers. The first consumer action was commenced in February 2007 by the consumer association Which? on behalf of consumers who purchased replica football shirts from retailers during 2000 and 2001, following on from the previous decision of the U.K. Office of Fair Trading

31. *Id.*

(“OFT”) that retailers had fixed the prices of replica football jerseys.³² On January 9, 2008, Which? announced that it had reached a settlement with the defendant, retailer JJB Sports, according to which JJB would pay cash refunds of £20 to consumers who had joined the Which? action and £10 to consumers who had purchased shirts during the infringement period but had not opted into the collective action.³³

A similar case is ongoing in France. In 2006, UFC-Que Choisir, a major French consumer association, launched an unprecedented follow-on damages action based on a decision by the French Competition Council finding that the three main mobile phone operators (Orange, SFR, and Bouygues) had entered into a market sharing cartel and fined the operators a total of €534 million.³⁴ UFC-Que Choisir created a website³⁵ where customers of the mobile phone operators could (i) use a “damage calculator” to determine how much damages they could claim and (ii) give the association the power to bring a claim on their behalf. In October 2006, UFC-Que Choisir filed a complaint before the Commercial Court of Paris seeking damages on behalf of over 12,500 consumers.³⁶ In December 2007, the Court ruled that the action against Bouygues was inadmissible.³⁷ UFC-Que Choisir has since suspended its parallel actions against Orange and SFR and appealed the Bouygues judgment to the Paris Court of Appeal, which is expected to rule on the case in early 2009.

In Spain, in late 2007 the Association of Banking Services Users (*Ausbanc Consumo*) launched a claim against Telefónica seeking €458 million in damages,

32. Case No. CA98/06/2003, Price Fixing of Replica Football Kit (OFT, Aug. 1, 2003).

33. See Press Release, Which?, JJB to pay fans over football shirt rip-off (Jan. 9, 2008), available at http://www.which.co.uk/reports_and_campaigns/consumer_rights/reports/Ripoffs,%20scams%20and%20fraud/JJB_agree_shirts_deal_news_article_557_128985.jsp.

34. See Press Release, Conseil de la concurrence, The Conseil de la concurrence imposes fines totalling 534 million Euros on Orange France, SFR and Bouygues Télécom (Dec. 1, 2005), available at http://www.conseil-concurrence.fr/user/standard.php?id_rub=160&id_article=502.

35. Cartelmobile.org, Home, at <http://www.cartelmobile.org> (last visited Sep. 5, 2008).

36. See Cartelmobile.org, Soutenez-nous!, at <http://www.cartelmobile.org/soutien.php> (last visited Sep. 5, 2008).

37. French law provides two forms of collective action that may be used by consumer associations: a proceeding in the “collective interest” of consumers (“procédure dans l’intérêt collectif des consommateurs”) (French Consumer Code, at art. L421-1 to L422-8) and a “joint representation” action (“action en représentation conjointe”) (French Consumer Code, at art. L422-1 to L422-3). UFC-Que Choisir had brought a collective interest action, which the Court held was inadmissible since such actions cannot be initiated (but only joined) by a consumer association. The association should have used the joint representation procedure, but by soliciting plaintiffs on its website and via e-mail, UFC-Que Choisir violated the rules governing joint representation actions, which state that a mandate to bring action “may not be solicited by means of a public appeal on radio or television, nor by means of posting of information, by tract or personalised letter. Authorisation must be given in writing by each consumer.”

following on from the European Commission's decision finding Telefónica guilty of abusing its dominant position in the Spanish broadband internet market and imposing a fine of €151 million.³⁸ Damages are sought on behalf of all holders of an ADSL line in Spain during the relevant period. Using data from the Spanish telecom regulator and the European Commission, Ausbanc arrived at its damages figure by subtracting the Commission's fine from the €600 million it says Telefónica earned during the five years it abused its dominant position. In December 2007, the Madrid Commercial Court granted leave for the action to proceed and stayed the action for two months to give aggrieved parties time to appear, having published notice of the action in the leading Spanish newspapers.³⁹ This claim is the first of its type in Spain by a consumer group. It benefits from the new Spanish competition law, which allows individuals to claim damages before the courts without a prior declaration from the Spanish competition authority that a practice is prohibited.

Similar procedural devices are available in some other member states, such as Austria,⁴⁰ Portugal,⁴¹ and Sweden,⁴² although they have apparently not yet been used to seek damages for competition law infringements.

Despite the precedents that exist, the consumer claim procedure is limited in scope, as it is an opt-in procedure, is generally only available to consumers, and proceedings must usually be brought as a follow-on action. In May 2008 Which?, the U.K. consumer group that led the litigation against JJB Sports, stated that

38. Commission Decision of 4 July 2007, Case COMP/38.784 - Wanadoo España v. Telefónica, 2008 O.J. (C 83) 5.

39. See Press Release, Ausbanc Consumo, Action Against Telefonica Is Granted Leave to Proceed (Dec. 12, 2007), available at http://www.ausbanc.es/medios/notasprensa/detalle/2007/np20071212telefonica_ing.pdf.

40. The Austrian Consumer Protection Act also provides for the possibility of collective actions brought by certain enumerated associations, including the Verein für Konsumenteninformation (a consumer rights association), on behalf of the general public to obtain cease and desist orders. See Consumer Protection Act (Konsumentenschutzgesetz - "KSchG"), at § 29 and Act against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb - "UWG"), at § 14.

41. Portugal allows for a limited opt-out procedural device in representative or collective action cases brought by an association or public prosecutor (so-called popular actions), although these actions seem to serve more as actions in the collective interest than as means of securing individual compensation and have not yet been applied in the antitrust context. See Impact Study, *supra* note 7, at 310 & 316.

42. In Sweden, private damages actions may be initiated by class actions under the Class Action Act. Lag (2002:599) om grupprättegång. See also Swedish Competition Act, Konkurrenslag (1993:20), at art. 33, available at http://www.kkv.se/t/Page_905.aspx (English translation). Class actions may be initiated by: (i) private individuals or legal entities; (ii) consumer or labor organizations; or (iii) any public authority designated by the government. The Swedish class action system is based on the "opt-in" model, which means that only class members who have given written notice to the court may ultimately participate as passive members in the proceedings.

further representative damage claims based on the opt-in model used in the JJB action are “highly unlikely” because they are not financially viable. (JJB Sports reportedly set aside £100,000 to cover payments under the settlement—far less than the £6.7 million fine that it paid to the OFT.) Which? claims that only an opt-out model would allow the group to assemble a sufficient number of claimants to make actions worthwhile.⁴³ This position is at odds with the White Paper’s focus on promoting representative claims based on an opt-in regime (i.e., precisely the model that Which? has applied but now considers unviable).

The OFT had already signaled its desire for the law to move in the direction proposed by Which?. In late 2007 the OFT issued recommendations regarding the promotion of private actions, at the heart of which is a series of ways to expand the use of the representative action device. Among the most important OFT recommendations are: (i) to allow stand-alone claims to be brought through representative actions (as opposed to the current U.K. system under which representative actions are limited to follow-on actions before the CAT); (ii) to make available a representative action procedure for small and medium-sized businesses (as opposed to consumers only)—in line with the White Paper’s proposal; and (iii) to introduce the possibility of opt-out representative actions for damages on behalf of consumers/businesses at large (as opposed to the current opt-in procedure on behalf of named consumers).⁴⁴ The OFT’s proposals gained further momentum in July 2008, when the U.K. Civil Justice Council (“CJC”), an advisory public body established under the Civil Procedure Act 1997 with responsibility for overseeing and coordinating the modernization of the civil justice system, recommended a series of measures to encourage better enforcement of consumer rights. Among the CJC’s recommendations to the Lord Chancellor is establishing a court-supervised opt-out procedure for collective redress.⁴⁵

The issue of collective redress is also under active consideration in other jurisdictions. For example, the French Parliament is scheduled to discuss the law on the “class action à la française” by the end of 2008, after three years of postponements. The European Commission is also currently studying collective redress more generally (in relation to areas besides just competition law) and intends to issue another communication on the issue in December 2008.

43. Deborah Prince, Which? Head of Legal Affairs, Presentation at the British Institute of International and Comparative Law, 8th Annual Trans-Atlantic Antitrust Dialogue, London (May 15, 2008).

44. U.K. OFFICE OF FAIR TRADING, PRIVATE ACTIONS IN COMPETITION LAW: EFFECTIVE REDRESS FOR CONSUMERS AND BUSINESS (OFT Discussion paper, No. 916, Apr. 2007) [hereinafter “OFT Discussion Paper”], at §§ 5-7.

45. See http://www.civiljusticecouncil.gov.uk/files/Improving_Access_to_Justice_through_Collective_Actions.pdf.

b) *Acquisition of Claims*

In Germany, representative damages claims are not permitted, as damages may only be awarded to parties who have suffered loss. (Actions by professional associations to recover profits illegally obtained through breach of competition rules are unlikely to be pursued, as recovered profits must be paid to the state.) However, multiple claims may be assigned to a single entity to enable a single collective case to proceed. This procedure is currently being used in a case before the Düsseldorf Regional Court, in which claims have been brought on behalf of 29 companies by the Belgium-based company Cartel Damages Claims (“CDC”)⁴⁶ against six cement producers, following on from a 2003 finding of infringement and imposition of €660 million in fines against the cement cartel.⁴⁷ In this action, CDC reportedly acquired the damages claims of 29 companies (direct purchasers) affected by the activities of the cartel for EUR 1,000, and agreed to return approximately 75 to 85 percent of the EUR 151 million claim sought to these customers in the event of success.⁴⁸ Costs of the proceedings (reportedly well over EUR 2 million) were covered by initial lump sum contributions from the assignors.

The Regional Court admitted the claims in an interim judgment on February 21, 2007. In addition to confirming its jurisdiction over the case, the court confirmed CDC’s right to bring the claim, characterizing the assignment of the claims to it as “a full transfer of rights,” which granted CDC standing under German law.⁴⁹ On May 14, 2008, the Higher Regional Court of Düsseldorf affirmed the lower court’s interim judgment on appeal, confirming that CDC’s claims are admissible. The Higher Court’s judgment can also be appealed, so it may be some time before the case is finally resolved. However, if this type of action is ultimately upheld in Germany or elsewhere,⁵⁰ it may pave the way for opportunistic companies to acquire claims in order to investigate and pursue them.

c) *Mass settlement*

In the Netherlands, collective actions brought by representative associations may seek declaratory relief, on the basis of which individual actions for damages may be brought. Since July 2005, it is also possible for a representative associa-

46. See CDC, Cartel Damage Claims, at http://www.carteldamageclaims.com/english/introduction_engl.htm (last visited Sep. 5, 2008).

47. Case O (Kart) 147/05 – CDC (Regional Court of Düsseldorf, 2005) [hereinafter CDC].

48. *Germany: A Private Affair*, FOCUS EUROPE (The American Lawyer, Summer 2007).

49. However, the Court confirmed that the defendant’s arguments to the effect that the transfer was invalid were to be considered separately in assessing the merits of the claims.

50. CDC is also reportedly pursuing potential cases in the Netherlands and the United Kingdom.

tion to settle a mass damages claim. The new Act on Collective Settlement of Mass Damages⁵¹ includes a process by which a legal entity may be created to represent the interests of a group of injured individuals and given the authority to reach a settlement agreement with the party that caused the damage. The parties must jointly submit the settlement agreement to the Amsterdam Court of Appeal for approval. The settlement agreement must contain: (i) the criteria to allow injured individuals to be eligible for payment; (ii) an accurate estimate of the total number of injured individuals; (iii) the total amount of damages to be awarded; and (iv) the formula used to calculate the damages for each injured individual. Injured individuals satisfying the criteria under the settlement agreement will have the option to “opt out” before a specified date set by the court (usually within 3 months), after which the settlement becomes binding upon all class members who have not opted out. Thus far, this procedure has been used only in the product liability and financial sectors, and it remains to be seen whether it will be expanded to the competition law sector.

2. Costs and Funding Claims

Litigation is expensive. Civil litigation in most EU member states operates on a “loser pays” principle designed to discourage unmeritorious claims (and defenses) by requiring the losing party to pay its own costs as well as a proportion of the costs of its adversary (in the United Kingdom, normally around 60 percent). This works to deflate legal costs for successful private plaintiffs. However, it also creates risk. Given the inherent uncertainty in bringing a lawsuit, a plaintiff will always face the risk of losing the case and having to pay not only its own legal costs but also the defendant’s. In addition, the “loser pays” rule can work against bringing claims involving small amounts of damages, since even successful claimants often do not recover 100 percent of their costs, and must make up the shortfall from the damages award. In complex cases, the amount of the cost award shortfall may even exceed the damages awarded, thereby deterring meritorious damage claims from being brought.

The Commission’s 2005 Green Paper cited Article 6 of the European Convention on Human Rights (which guarantees everyone fair access to courts) as providing support for the notion that member states are under a legal obligation to design their cost rules (including the level of court fees) so that damages actions can “effectively” be brought before the competent national courts. The Green Paper had posed a number of options that would potentially have alleviated cost burdens on plaintiffs. However, the White Paper takes a conservative approach and does not suggest any specific changes to national cost regimes in favor of claimants. It merely encourages member states “to reflect on their cost

51. Wet collectieve afwikkeling massaschade, Dutch Code of Civil Procedure, at §§ 7:907-10 & 1013-18.

rules so as to facilitate meritorious litigation, taking into consideration existing practices.”⁵² Appropriate measures could include:

- encouraging settlements as a way to reduce costs;
- setting court fees at a level where they do not become a disproportionate disincentive to bringing antitrust damages claims; and
- giving national courts discretionary “cost-capping” authority (i.e., the possibility of issuing cost orders derogating, in justified cases, from the normal “loser pays” cost rules).⁵³

The measures to reduce fee risk and burden on potential antitrust complainants that have been enacted or are being considered at the member state level include the following.

a) Cost capping

The Green Paper asked whether it would be appropriate to exempt unsuccessful plaintiffs from paying the defendant’s legal costs, save where actions have been introduced in a “manifestly unreasonable manner.” Such a rule would put claimants in a strong position, given the low likelihood of a finding of “manifest unreasonableness.” The White Paper does not take up this proposal from the Green Paper, but the possibility of such “cost-capping” orders already exists in some member states. In the United Kingdom, for example, while cost-capping orders have been used infrequently in the commercial context, they might—if granted in the context of consumer claims—prove a useful tool in facilitating claims by consumers or businesses of modest means.⁵⁴ The OFT has also recently suggested that in representative actions it may be appropriate to cap the claimant’s liability for the defendant’s costs at zero.⁵⁵ In Germany,⁵⁶ claimants of limited means may be granted a reduction in the costs payable (i.e., the fees of the defendants and of their own lawyers) if they lose their case.

b) Contingency fees

In the United States, a common solution to the costs difficulty for plaintiffs is to allow for contingency fees (i.e., arrangements in which no fee is charged by the plaintiff’s lawyers unless the claim is successful), in which case the legal fee is

52. Working Paper, *supra* note 6, at para. 245.

53. White Paper, *supra* note 5, at § 2.8.

54. In damages actions before the Competition Appeals Tribunal (“CAT”), CAT Rule 55 provides that costs are not based on the “loser pays” principle but are within the discretion of the CAT.

55. OFT Discussion Paper, *supra* note 44, at paras. 8.11-8.18.

56. GWB, at § 89a.

often expressed as a percentage of the damages awarded. Contingency fees are another aspect of the U.S. system that has drawn criticism from some in Europe, generally on grounds that they promote excessive litigation—either because bringing a claim carries little or no risk for the plaintiff (encouraging meritless litigation) or because they can result in exorbitant fees for plaintiffs' lawyers.

Contingency fee arrangements are not permitted in most EU member states, although some partial exceptions have recently developed. In Italy, outcome-based fee structures that would likely permit “no win, no fee” arrangements have been allowed since 2006. In Germany, third-party funders may acquire claims with the condition that the third party will pay a “success fee” to the assignor of the claim if the third-party funder wins the case. This structure represents something much like a contingency fee: the third party buys a claim for a reduced amount and, in the event of winning the case, pays a share of the proceeds to the assignor (i.e., the injured party). As explained above, this approach was recently endorsed by the Regional Court of Düsseldorf (Landgericht) in the *CDC* judgment.⁵⁷ However, because this structure effectively permits circumventing the prohibition in German law on contingency fees, the judgment has been controversial and is currently under appeal.

c) Conditional fees

In England, conditional fees—lawyers' fees that may be increased if the claim is successful—are permitted. The maximum increase is currently set at 100 percent. However, the OFT has recently questioned whether, in view of the risk and complexity, this cap provides sufficient incentive for law firms to offer conditional fees in antitrust cases. The OFT recommends this cap be reconsidered for certain competition law damages cases, subject to judicial supervision of the funding arrangement. The OFT also suggests that fee increases in excess of 100 percent might more appropriately be deducted from the damages award rather than paid by the defendant.⁵⁸

d) Legal aid

While legal aid is not likely to be available or sufficient to fund most claims (particularly since in most member states damages claims are ineligible for legal aid), on occasion it can represent an additional or even a primary source of funding. In a notable example in England, pub owner Bernie Crehan was granted “exceptional funding” to pursue his case against Inntrepreneur (including, in particular, defending Inntrepreneur's appeal at the House of Lords of the Court of Appeal's 2004 damage award). The English Lord Chancellor can grant exceptional fund-

57. *CDC*, *supra* note 47.

58. OFT Discussion Paper, *supra* note 44, at paras. 8.1-8.10.

ing where a case has “significant wider public interest” or the lack of public funding would lead to obvious unfairness in the proceedings.

e) *Third-party funding*

Another approach is to permit third parties to fund litigation. There are several firms specializing in litigation funding in Germany and England. In England, third-party commercial funders offer loans to claimants that are repayable only if the claimant is successful. If the claimant loses, the commercial funder’s liability for the defendant’s costs will normally be capped at an amount equivalent to the amount of funding provided to the claimant, so long as the claimant (rather than the funder) remains in control of the litigation as the primarily interested party.⁵⁹ Recently, UK plaintiffs’ lawyers and insurance providers have come together to offer a “risk-free” funding model to antitrust damages claimants under which the law firm undertakes cases on a conditional fee basis while the insurer provides after-the-event insurance to protect the claimant against adverse costs orders.⁶⁰ The OFT has recently expressed the view that third-party funding is an important potential source of funding for competition law damages claims, and has encouraged the creation of a merits-based litigation fund for competition claims where commercial basis funding is not available.⁶¹

As explained above, in Germany third parties have even been permitted to acquire claims, rather than just provide funding. In the CDC judgment, the Regional Court of Düsseldorf held that a claim may be assigned to a third party (in this case the firm Cartel Damages Claims (“CDC")), which will fund and pursue the claim and may agree to share any proceeds of the case with the injured parties. As noted above, this approach largely circumvents the German legal prohibition on contingency fees, but the judgment was upheld on appeal in May 2008. Additional avenues for appeal remain open to the defendants, however, so final case resolution may be some time away. Whatever the outcome, whether such an approach would be accepted outside Germany is not clear, particularly since many other member states also prohibit or restrict contingency fees or third parties acquiring and directing litigation.

HOWEVER, THE QUESTION OF JURISDICTION—WHICH COUNTRY TO LITIGATE IN—IS A COMPLEX ISSUE FOR POTENTIAL CLAIMANTS, DEFENDANTS, AND COURTS HEARING DAMAGES ACTIONS UNDER EU COMPETITION LAW. WHEN ONE OR MORE OF THE PARTIES TO THE DISPUTE OPERATES ON A CROSS-BORDER BASIS AND/OR IS LOCATED IN DIFFERENT MEMBER STATES, WHERE SHOULD THE CLAIM BE HEARD?

59. *Arkin v. Borchard Lines*, 2005 E.W.C.A. Civ. 655.

60. *Cartel Case Approaches*, LAW SOCIETY GAZETTE, August 21, 2008, at 3.

61. OFT Discussion Paper, *supra* note 44, at 8.19-8.26.

B. JURISDICTION: WHERE CAN THE CLAIM BE BROUGHT?

1. Choice of Forum

Article 6 of Regulation 1/2003 gives national courts the express power to apply Articles 81 and 82 EC. However, the question of jurisdiction—which country to litigate in—is a complex issue for potential claimants, defendants, and courts hearing damages actions under EU competition law. When one or more of the parties to the dispute operates on a cross-border basis and/or is located in different member states, where should the claim be heard?

a) *EU defendants*

For defendants domiciled within the European Union, this question is answered by Regulation 44/2001 EC, the so-called “Brussels Regulation.”⁶² The basic rule is that defendants are to be sued in the member state in which they are “domiciled,” which may be the location of its statutory seat, central administration, or principal place of business. That member state court will have jurisdiction to rule on all the harm suffered by the claimant, including harm suffered outside the jurisdiction.

There are several alternatives to this straightforward rule that are likely to apply in competition law damages actions, potentially creating additional jurisdictional possibilities.

- First, in matters relating to contract, a claim may be brought in the member state where the contractual obligation was or should have been performed (Article 5(1)).
- Second, in matters of tort (e.g., breach of statutory duty, which is the heading under which many member states place competition law damage claims), a defendant may be sued in the member state where the harmful event occurred (Article 5(3)). According to the European Court of Justice’s judgment in *Bier*,⁶³ this provision gives claimants two alternatives: (i) the place where the harmful event that is the origin of the damage occurred; or (ii) the place where the damage was suffered (although jurisdiction under this second alternative will be limited to damage suffered in that member state⁶⁴).
- Third, where there are multiple defendants, a claim may be brought in the member state in which any one of them is domiciled, provided that the claims are so closely connected that it is expedient to hear

62. Council Regulation (EC) 44/2001 of 22 December 2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2001 O.J. (L 12) 1.

63. Case 21/76, *Handelskwekerij G. J. Bier BV v. Mines de potasse d’Alsace SA*, 1976 E.C.R. 1735, at paras. 24-25.

64. Case C-68/93, *Shevill v. Presse Alliance SA*, 1995 E.C.R. 1, 415, at para. 33.

and determine them together to avoid the risk of irreconcilable judgments (Article 6).⁶⁵

The European Courts have held that these exceptions to the general “defendant’s domicile” rule should be interpreted narrowly.⁶⁶ The Article 5 exceptions are only to be applied based on the existence of a “particularly close connecting factor” between the dispute and a member state other than the defendant’s domicile.⁶⁷ In light of the *Bier* judgment, Article 5(3) is susceptible of broad interpretation, since, in a sense, any claimant will suffer loss at its place of business, regardless of where the harmful act was committed. To prevent the court of the claimant’s place of business assuming jurisdiction in every such case and so weakening or entirely subverting the basic jurisdictional principle of Article 2, it is settled that the “place of damage” means the place where the physical damage is done or the recoverable economic loss is actually suffered.⁶⁸

In addition to the rules under the Brussels Regulation, if the parties have contractually agreed that any disputes that might arise should be determined in the court of a particular member state, the contractual jurisdiction clause, rather

65. See also *Provimi v. Roche and Ors.*, 2003 E.W.H.C. 961 (Comm. Ct.) [hereinafter *Provimi*], discussed further *infra*.

66. See Case 189/87, *Kalfelis v. Schröder*, 1988 E.C.R. 5565, at para. 19 (“the ‘special jurisdictions’ enumerated in Articles 5 and 6 of the Convention constitute derogations from the principle that jurisdiction is vested in the courts of the State where the defendant is domiciled and as such must be interpreted restrictively”).

67. Case 220/88, *Dumez France v. Hessische Landesbank*, 1990 E.C.R. I-49, at para. 17:

[T]hose cases of special jurisdiction, the choice of which is a matter for the plaintiff, are based on the existence of a particularly close connecting factor between the dispute and courts other than those of the defendant’s domicile, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings.

68. *Id.* at para. 20:

It follows from the foregoing considerations that although, by virtue of a previous judgment of the court (in [*Bier*] . . .), the expression “place where the harmful event occurred” contained in Article 5(3) of the [Brussels Regulation] may refer to the place where the damage occurred, the latter concept can be understood only as indicating the place where the event giving rise to the damage, and entailing tortious, delictual or quasi-delictual liability, directly produced its harmful effects upon the person who is the immediate victim of that event.

See also Case C-364/93, *Marinari*, 1995 E.C.R. I-2738, at para. 14:

Whilst it has . . . been recognised that the term “place where the harmful event occurred” within the meaning of Article 5(3) of the [Brussels Regulation] may cover both the place where the damage occurred and the place of the event giving rise to it, that term cannot be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere.

than the Brussels Regulation, will determine jurisdiction so long as it is sufficiently clear that the clause was intended to apply to claims for breach of competition rules (Article 23). However, the English High Court interpreted this Article narrowly in the 2003 *Provimi* judgment, discussed further *infra*, and its practical value is at present unclear.

Finally, even where a court does not have substantive jurisdiction to try a claim, it may still have jurisdiction to grant interim relief pending trial in another member state where there is a “real connecting link” between the member state and the requested relief (Article 31). This could be, for example, where the persons or assets subject to the requested relief are located within the jurisdiction. In such cases, however, jurisdiction must be established under national law, as Article 31 merely permits jurisdiction, but is not in itself a basis for jurisdiction.

b) Non-EU defendants

For claims brought against defendants not domiciled in the European Union, jurisdiction is determined according to national law. Most member states have jurisdictional rules similar to those in the Brussels Regulation. The most common grounds for establishing jurisdiction over non-EU defendants in EU member states include: (1) the defendant has property in the jurisdiction; (2) the defendant has a business or branch in the jurisdiction; (3) the conduct in question affected the market in the jurisdiction; (4) the defendant has been duly served in the jurisdiction; and (5) there are several defendants in connected claims, one of which is domiciled in the jurisdiction.⁶⁹

2. Which Court?

Article 35 of Regulation 1/2003 leaves to member states the decision as to which national tribunals should be given competence to apply EU competition law. Member states’ court systems and their allocation of competence over competition law claims among their various courts differ substantially. Some member states have created or assigned jurisdiction over competition law damages claims to specialized tribunals, while others have no special institutions or procedures and simply treat competition law cases like other tort damage actions. In some member states, jurisdiction differs depending on whether the claims are based on national law or EC law. Below is a summary of the systems in several member states.

a) England

Antitrust disputes in England and Wales are usually heard in the Chancery Division of the High Court. Follow-on actions for damages based on a prior finding of infringement by the European Commission or the Office of Fair Trading

69. See Comparative Report, *supra* note 1, at 41-42.

may also be heard in the Competition Appeals Tribunal (“CAT”), a specialized panel that hears competition disputes and conducts proceedings with a more flexible and case-managed approach.⁷⁰

b) France

In France, as of January 1, 2006, exclusive jurisdiction over claims (including damages actions) based on competition law has been granted to specialized courts.⁷¹ It remains unclear, however, whether follow-on damages actions must also be heard in these specialized courts. Only the Paris Court of Appeal may hear appeals in cases related to anticompetitive practices.⁷² The French Supreme Court (Cour de Cassation) has set up economic training for judges to deal with competition matters.

c) Germany

The regional courts (“Landgericht”) have competence over competition damage claims, irrespective of the amount of damages claimed.⁷³ In most Federal States (“Bundesländer”), this competence is granted to specialized regional courts for antitrust disputes, which have exclusive jurisdiction.⁷⁴

d) Italy

In Italy, damages claims based on Italian competition law are heard at first instance in the courts of appeal, with decisions subject to review by the Court of Cassation on questions of law only. Claims based on EU law are heard in the lower civil courts (giudici di pace and tribunali).⁷⁵

70. Competition Act 1998, at §§ 47A & 47B.

71. See Décret No. 2005-1756 du 30 décembre 2005 fixant la liste et le ressort des juridictions spécialisées en matière de concurrence, de propriété industrielle et de difficultés des entreprises, en application de l’Article L. 420-7 du Code de commerce. This decree lists eight courts of first instance and eight commercial courts that have exclusive jurisdiction over claims relating to anticompetitive practices as of January 1, 2006. The specialized courts are located in Paris, Marseille, Bordeaux, Lille, Fort-de-France, Lyon, Nancy, and Rennes.

72. Criminal courts have been empowered to award damages for breach of specific competition law provisions, applying in such cases the same statutory provisions as civil judges, but it is unclear whether such powers continue since the establishment of the specialized civil courts.

73. GWB, at § 87.

74. *Id.* at § 89.

75. Italian Competition Act, at § 33.

e) Spain

The new Competition Act, which entered into force on September 1, 2007, equates the treatment of EC and national competition law claims before Spanish courts by extending the competence of the specialized commercial courts (“Juzgados de lo Mercantil”) to hear claims for damages based on national competition law. Previously, these courts could only hear claims for damages based on EU competition law; claims based on national law had to be “follow-on” actions rather than stand-alone claims, and had to be filed before the ordinary civil courts. The new Act allows claimants to file damage actions on a stand-alone basis or as a follow-on action, even prior to the conclusion of appeals to decisions by the Spanish competition authorities.

f) Sweden

All Swedish courts have jurisdiction to hear damages claims for competition law violations, but as confirmed recently,⁷⁶ only the Swedish Competition Authority, the Stockholm District Court, and the Market Court (on appeal) have authority to issue decisions prohibiting competition law violations.

3. Scope for Forum Shopping?

The jurisdictional rules outlined above leave open the possibility that any of several member states may be an appropriate forum for private EU competition law litigation, which inevitably invites a degree of forum shopping. Different procedural factors such as the duration and cost of litigation, the availability of disclosure, the possibility of collective actions, and the likelihood of obtaining interim relief may militate in favor of one jurisdiction over another. This can leave defendants uncertain as to where claimants might try to establish jurisdiction, and can also require defendants to litigate in an effort to resist jurisdiction where claimants bring cases with a weak jurisdictional basis. Yet it also provides scope for pre-emptive forum selection by potential defendants.

Two recent judgments by courts in England are particularly instructive on these issues.

a) Consolidating EU-wide claims in one member State: The Provimi case

A 2003 judgment by the English High Court represents a milestone for plaintiffs (particularly in follow-on cartel litigation) as the court allowed the consolidation of Europe-wide damages claims in a single proceeding even though some of the plaintiffs and some of the defendants were foreign, some of the transactions in question took place outside England, and some of the claims related to injury suffered outside England.

76. Göta Hovrätt Ö 638-07, Skyways Express / Norrköpings kommun genom Marknadsföringsbolaget Nya Norrköping (Apr. 18, 2007).

The *Provimi* case involved claims brought by vitamin purchasers against Hoffmann-La Roche and Aventis in the wake of the European Commission's infringement decision in the vitamins cartel.⁷⁷ The claimants were two English companies and a German company, each of which was a direct purchaser from the defendants. The court first established the jurisdiction of the English courts in relation to claims involving the defendants domiciled in England on the basis of Articles 2(1) and 5(3) of the Brussels Regulation (as well as corresponding provisions of the Lugano Convention⁷⁸). Article 2(1) established jurisdiction over the English defendants in the proceedings. Regarding Article 5(3), which provides that the defendant can be sued "where the harmful event occurred," the court was prepared to assume that where the claimant is domiciled in England, the harmful event occurred in England.⁷⁹

The court's treatment of non-U.K. claims potentially has the most far-reaching effect. The German claimants had purchased from German subsidiaries of the defendants (Swiss and French companies), but had not made any purchases from U.K. subsidiaries. These claimants brought action in the United Kingdom against the U.K. subsidiaries, seeking damages for loss suffered outside the United Kingdom. The defendants argued that the U.K. courts lacked jurisdiction under the Brussels Regulation since neither the direct sellers nor their parent companies were U.K. domiciled (failing the Article 2(1) test) and the harmful event and loss had occurred in Germany where the purchases had been made (failing the Article 5(3) test).

On an application for strike out (where the legal threshold is whether the claimant has an arguable case), the court found against the defendants based on the following reasoning. The concept of an "undertaking" under EU competition rules refers to an economic unit that is wider than a corporate entity. Thus, where a parent undertaking commits an infringement of Article 81 EC and a subsidiary implements that infringement by charging a cartelized price—even if unknowingly (as here, where the parent companies set the prices charged by their U.K. subsidiaries)—the subsidiary arguably also commits an infringement and may be sued for all losses flowing from it. Furthermore, the court found it a triable issue whether the infringement by the U.K. subsidiary caused loss to the non-U.K. claimant—even though there had been no direct commercial relationship between the two—because, but for its participation in the cartel through charging cartelized prices, the U.K. subsidiary arguably would have offered products at

77. Commission decision of 21 November 2001, Case COMP/E-1/37.512 - Vitamins, 2003 O.J. (L 6) 1 [hereinafter *Vitamins*].

78. European Union, The Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Sep. 16, 1988).

79. *Provimi*, *supra* note 64, at para. 10.

lower prices that would have been available to the claimant.⁸⁰ Jurisdiction of the non-U.K. claimant to sue the U.K. subsidiary defendants was thus established.

Additionally, the court held it had jurisdiction over claims by the non-U.K. claimant against the non-U.K. co-defendants under Article 6(1) of the Brussels Regulation, finding that the claims at issue (all of which involved the same essential facts) were closely connected to the claims against the U.K. defendants and that, in view of the undeveloped state of the law in the area of private damages actions for competition law infringements, there was a risk of irreconcilable judgments if the non-U.K. claims were heard in separate proceedings in Germany or France.⁸¹ This judgment potentially opens the doors to the English courts for foreign claimants against any defendant undertaking with a U.K. subsidiary that charged “cartelized” prices, even if unknowingly.

Also importantly, the court held that jurisdiction clauses in certain of the defendants’ standard terms and conditions that would have given exclusive jurisdiction to courts in Switzerland, France, and Germany under Article 23 of the Brussels Regulation were not sufficiently broad to cover the claimants’ tort claims for damages under Article 81 EC—notwithstanding the broad language of certain of the clauses, which applied to “all disputes arising out of the legal relationship.” This effectively means that jurisdiction clauses that do not specifically mention potential competition law damages actions are unlikely to be controlling as regards jurisdiction, notwithstanding the apparent clarity of Article 23. Given the obvious commercial reality, such clauses are unlikely to be included in contracts. Accordingly, contractual jurisdiction clauses are unlikely to have much effect on cartel damages claims, at least in the United Kingdom.

b) Challenging jurisdiction: The SanDisk case

At the other end of the spectrum from *Provimi*, another recent judgment from England illustrates that the Brussels Regulation does not confer unlimited choice of jurisdiction on claimants. In *SanDisk v. Sisvel*,⁸² a U.S. claimant brought an action in the English High Court against non-U.K. defendants for alleged anti-competitive conduct relating to the licensing and enforcement of certain patents. As the defendants were domiciled in Italy, France, Germany, and the Netherlands, the English courts lacked jurisdiction under Brussels Regulation Article 2(1). SanDisk argued that the court had jurisdiction under Article 5(3), maintaining that the defendants’ conduct (a series of alleged abuses including tying essential and non-essential patents, misuse of the patent system, and employing sham legal actions including obtaining seizures in the Netherlands,

80. *Id.* at paras. 37-42.

81. *Id.* at paras. 43-49.

82. *SanDisk Corporation v. Koninklijke Philips Electronics NV & Ors*, 2007 E.W.H.C. 332 (Ch).

Germany, and Italy of SanDisk products that were allegedly in violation of the defendants' patents) amounted to a campaign of anticompetitive behavior pursued throughout Europe, including in the United Kingdom. SanDisk also requested interim relief (an order preventing the defendants from initiating patent enforcement actions against SanDisk that would prevent SanDisk from carrying on its business without giving prior warning to SanDisk) under Article 31 of the Brussels Regulation.

The court ruled against SanDisk on all counts, finding that it lacked both substantive and interim jurisdiction over the claims. The court emphasized that alternative forums (the defendants' domiciles) were clearly available to the claimant and cited repeatedly the obligation to narrowly interpret the exceptions to Article 2 narrowly.⁸³ Regarding Article 5(3), the judge concluded that because none of the decisive "first steps" of the alleged abuses took place in the United Kingdom and SanDisk did not suffer immediate damage in the United Kingdom by reason of any of these abuses, the Article 5(3) test was not satisfied. Regarding interim jurisdiction, because the substance of the complaint and the interim relief sought lay in the enforcement measures taken by the defendants against SanDisk in other countries, the United Kingdom lacked the necessary "real connecting link" to the alleged abuse. Courts in the member states where seizure orders against SanDisk products had been obtained were "beyond doubt in the best position to decide what, if any, measures of warning [of future infringement actions] it is appropriate for Sisvel to give SanDisk."⁸⁴

This case offers several lessons. First, the appearance created by judgments like *Provimi* notwithstanding, choice of jurisdiction under the Brussels Regulation is not without limit and, particularly, the potentially broad Article 5(3) "place of harm" provision will not always be given an expansive reading. Second, potential claimants need to weigh the risk that by bringing actions only tenuously related to the United Kingdom in an effort to gain benefit of the advantageous U.K. civil procedure rules, entire claims may be struck out before even getting to the substance of the case. In assessing the jurisdictional arguments, the judge in *SanDisk* also gave preliminary consideration to the substantive merit of the alleged abuses, since in order to assume jurisdiction under Article 5(3), the court must first find that the claimant has demonstrated that it has a "good arguable case." The judgment concludes expressly that SanDisk's claims "cannot so be described,"⁸⁵ which will no doubt handicap any efforts by SanDisk to pursue the claims in another jurisdiction. Third, the case highlights the burden that even successful defendants will face in resisting jurisdiction by forum-shopping claimants. The defendants here will have incurred large legal bills, perhaps only

83. See also *supra* note 65.

84. *Id.* at para. 53.

85. *Id.* at para. 41.

60 percent of which may have been recoverable from the unsuccessful claimant under the U.K. costs rules.

c) Pre-empting choice of jurisdiction

The various jurisdictional possibilities afforded by the Brussels Regulation not only provide claimants with forum shopping opportunities, but also open the way for potential defendants to steer anticipated litigation away from claimant-friendly jurisdictions. For both claimants and defendants, there can be significant advantage in moving quickly to establish jurisdiction.

THE VARIOUS JURISDICTIONAL
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TO ESTABLISH JURISDICTION.

Claimants will want to establish jurisdiction where the rules are favorable and it is convenient for them to litigate. Article 27 of the Brussels Regulation provides that once jurisdiction is established in one member state, courts in other member states must decline jurisdiction in any subsequent proceedings brought in the same action. Courts may also choose to stay subsequent proceedings in related cases (Article 28). Thus, in cases involving multiple claimants, the first claimant to litigate may have a choice of jurisdiction, while subsequent claimants may have none.

Similar considerations apply from the defendant's perspective. A company that anticipates being sued for damages (e.g., because it anticipates receiving a decision finding it guilty of cartel behavior) can seek a preemptive negative declaratory judgment against potential claimants in the jurisdiction of its choice. The company would bring an action against a potential claimant seeking a declaration that there has been no infringement or, more likely, no damages. Potential claimants from other member states could be brought into the action under Brussels Regulation Article 6(1), which, as noted above, provides that where there are multiple defendants, a claim may be brought in the member state in which any one of them is domiciled, provided that the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments. Such an action could allow a potential defendant to have claims against it heard in a jurisdiction with restrictive discovery rules or where the passing-on defense is recognized. Faced with such an action, a claimant may find that it is unable to bring a subsequent damages claim in another member state, as under Articles 27 and 28 the courts decline jurisdiction or stay proceedings pending the outcome of the declaratory action. The main obstacle to defendants' use of this tactic may be more practical

than legal, as it effectively requires a company to sue its customers—inevitably straining those relationships.⁸⁶

4. What Law Applies?

Until recently, there had been some ambiguity with respect to which country or countries' laws should apply in damages actions involving harm in more than one member state. Regulation 864/2007, which comes into force on January 11, 2009, clarifies the issue by harmonising EU-wide conflict-of-law rules for non-contractual claims (including tort claims based on competition law violations).⁸⁷ Under the Regulation, the general rule is that the court should apply the law of the country where the damage occurred.⁸⁸ The Regulation also offers a specific rule with respect to multi-jurisdictional competition law claims: when the defendants' conduct allegedly affected more than one country, a claimant who sues in the court of the defendant's domicile (pursuant to the general rule of the Brussels Regulation) may choose to base the entire claim on the law of the court seized, provided that the market in that member state is among those directly and substantially affected by the competition law violation.⁸⁹ This clarifies that under the specified conditions, the court may apply its own law to the entirety of the claim, regardless of where the damage occurred—as opposed to applying its own law in respect of damage in its territory and the law of another member state in respect of damage incurred there.

5. Limitation Periods

Limitation periods can have a decisive effect on the availability of damages in many typical circumstances. For instance, a short limitation period could time-

86. Another possible adverse consequence is the effect on discovery in other pending litigation. Following the European Commission's 2006 decision in the Synthetic Rubber cartel (Commission decision of 29 November 2006, Case COMP/38.638 - Synthetic Rubber (not yet reported)), in which (among others) the Italian firm Eni was fined EUR 272 million, Eni launched an action for negative declaratory judgment in the Court of Milan, seeking to have the judge ascertain that the unlawful behavior, if any, had not had an impact on the market so that no damage claims could be brought against it. As part of that proceeding, Eni disclosed a non-confidential version of the Commission's statement of objections ("SO"). During the same time period, in litigation before the European Court of First Instance, Eni had: (1) sought to prevent Michelin (a customer) from using the SO, which it had received as a third party to the Commission's cartel investigation, against Eni in follow-on damages litigation; and (2) challenged the Commission's decision to send the SO to Michelin in the first place. In July 2008, the CFI ruled that, because Eni had since disclosed the SO in the Milan proceeding, Michelin was free to access and use the SO without restriction. The Court then declined to rule on the fundamental question whether the Commission had been right to send the SO to Michelin as there was no longer reason to adjudicate the issue. Order of the Court of First Instance of 2 July 2008, Case T-12/07, *Polimeri Europa v. Commission*, 2008 O.J. (C 223) 73.

87. Regulation (EC) No. 864/2007 of the European Parliament and of the Council of July 11, 2007 on the law applicable to non-contractual obligations (Rome II), 2007 O.J. L 199/40.

88. *Id.*, Article 4.

89. *Id.*, Article 6(3)(b).

bar follow-on actions in the wake of an infringement decision by a regulator or a successful test case. Member state rules on limitation periods vary widely as regards both the length of the relevant time period (ranging from one to 30 years) and, equally important, the triggering event. Limitation periods in some member states start to run from the date on which the infringement occurred, irrespective of the claimant's knowledge, while in other member states the clock starts ticking only once the damage was, or should have been, detected by the potential claimant. Some member states have rules combining both subjectively and objectively fixed limitation periods. This diversity of approaches means that liability will extinguish at different times across the European Union, even in respect of the same infringement. Liability must therefore be assessed on a state-by-state basis to determine potential exposure.

Below are some examples of different member states' rules concerning limitation periods, which illustrate the diversity of approaches among the member states.

a) Austria

Damages claims in Austria are time-barred three years from the date on which the claimant becomes aware of the damage and of the identity of the person responsible for such damage. If the claimant is not aware of the damage or of the person responsible for such damage, the applicable time period is 30 years from the date on which the damage was incurred.⁹⁰

b) Belgium

The limitation period for actions based on tort law is 5 years from the day on which the injured party became aware of the damage, or, in any event, 20 years from the date on which the infringement occurred.⁹¹

c) England

In England, cases must be brought before the courts within six years from the date on which the cause of action accrued (the date on which it is reasonable to conclude that damage has been or will be suffered, having regard to any deliberate concealment by the defendant). In follow-on actions before the CAT, cases must be brought within two years following the later of the completion of any appeal (or the lapsing of any appeal period) and the date on which the cause of action accrued.⁹²

90. Austrian General Civil Code (Allgemeines Bürgerliches Gesetzbuch), at § 1489.

91. BCC, at art. 2262bis.

92. The CAT recently ruled that this two-year period cannot be extended by mutual agreement of the parties, although the CAT has discretion to extend the time limit. Judgment of 17 October 2007, *Emerson Electric Co. & Ors. v. Morgan Crucible Company plc*, 2007 C.A.T. 28.

d) France

In France, the limitation period expires 10 years after the claimant became aware of, or should have become aware of, the damage.

e) Germany

The limitation period for private competition damages claims under German law is 3 years, beginning at the end of the calendar year when the plaintiff was injured and the injured party knew or should have known of the circumstances giving rise to the claim. The limitation period is tolled as of the date on which any European competition authority commences an investigation or proceedings for an infringement, and does not resume until six months after the competition authority's case has been decided or proceedings have otherwise been concluded.⁹³ In any event, the limitation period cannot be later than 10 years after the damage was incurred or 30 years after the date of the infringement.

f) Italy

In Italy, private damage claims based on competition law infringements are governed by both tort and contract law. The limitation period expires 5 years (in respect of tort claims) or 10 years (in respect of contract claims) after the plaintiff first knows or reasonably should have known of the injury, as well as of its unjust nature (i.e., that the harm was caused by a breach of the competition rules). Thus, the limitation period might start running from the publication date of a decision by the Italian Competition Authority to open an investigation or a court judgment concerning an infringement.⁹⁴

g) Spain

In Spain, proceedings must begin within 1 year from the date on which the injured party discovers the damage or an infringement decision is adopted.

The European Commission is concerned that limitation rules in some member states can act as a barrier to the recovery of damages, and the White Paper accordingly makes two suggestions towards harmonizing limitation periods:⁹⁵

- first, in the case of a continuous or repeated infringement, the limitation period should not start to run before the day on which the infringement ceases or before the victim of the infringement can reasonably be expected to have become aware of the infringement and of the harm it caused him; and

93. GWB, at § 33(5).

94. Case No. 2305/2007, SAI v. Nigriello (Court of Cassation, 2007).

95. White Paper, *supra* note 5, at § 2.7.

- second, member states should remain free to set their own limitation periods with reference to stand-alone actions, but in case of follow-on actions, a *new limitation period* of at least two years should start once the infringement decision on which a follow-on claimant relies has become final.

The latter rule would give injured parties the advantage of preserving the right to claim damages until the initial public enforcement proceedings have run their course, thus eliminating the burden and risk of having to prove the existence of the infringement in a stand-alone action.

C. PROOF OF INFRINGEMENT

In all member states, as is normally the case in all civil damages actions, successful claimants in competition law cases must prove the existence of an infringement to the requisite legal standard. As a practical matter, the requirement to establish the infringement divides the universe of potential competition law damages claims into two categories: stand-alone actions and actions following on from a prior finding of infringement.

1. Proof of infringement in a stand-alone action

In a standalone action alleging a competition law infringement, the claimant is in the customary position of a tort plaintiff: having to prove the existence of the infringement itself before the question of damages will be addressed. In most member states, as under Article 2 of Regulation 1/2003, the burden lies with the claimant to prove that the conduct in question had an appreciable effect on competition and therefore infringes the competition rules. Such proof often requires detailed evidence of both the defendant's specific conduct and of competitive conditions in the relevant market, making access to evidence critical. Without benefit of the resources and investigatory powers of a competition authority, claimants in stand-alone actions must fall back on the possibilities offered by national discovery rules, many of which are highly restrictive and effectively require the claimant to have sufficient evidence to discharge the burden of proof even before launching an action. For this reason, the burden of proving an infringement can represent a significant obstacle for potential claimants in stand-alone actions.

a) Discovery/disclosure

The majority of member states follow the civil law tradition, which does not embrace the concept of disclosure of documents between the parties in civil litigation. While the courts retain powers to order production of documents, the parties' ability to compel production of documents is limited. Lack of access to evidence in these jurisdictions substantially impairs the claimant's ability to prove an infringement in a stand-alone action.

The European Commission has cited lack of disclosure as one of the major obstacles to private enforcement. The White Paper follows proposals first tabled in the Green Paper, suggesting that member states adopt special rules expanding the possibilities for claimants to obtain documentary evidence from third parties in EU competition law actions for damages. In particular, the Commission proposes granting national courts the power to order parties to proceedings (or third parties) to disclose precise categories of relevant evidence, provided that the plaintiff:

- has presented all the facts and provided evidence reasonably available to him and that these show plausible grounds to suspect that he has suffered harm from an antitrust infringement committed by the defendant;
- has shown that despite all efforts, without the discovery order he would not be able to produce or obtain the requested evidence;
- has specified sufficiently precise categories of evidence to be disclosed; and
- has satisfied the Court that the evidence requested is both relevant to the case and necessary and proportionate.

The White Paper states that such a “fact-pleading” disclosure regime, under strict judicial control, would assist in overcoming the inherent information asymmetry that disadvantages plaintiffs, while still preventing so-called “fishing expeditions”⁹⁶ and “discovery blackmail.”⁹⁷

The White Paper recommends further that national courts should be granted powers to impose sufficient sanctions to deter the destruction of relevant evidence or refusal to comply with a discovery order. It also highlights the importance of granting adequate protection from discovery to corporate statements by leniency applicants⁹⁸ and to the investigations of competition authorities.

96. See, e.g., Working Paper, *supra* note 6, at note 39 (“[A] strategy to elicit in an unfocused manner, through very broad discovery requests, information from another party in the hope that some relevant evidence for a damages claim might be found.”).

97. See, e.g., *id.* at note 40 (“[A] strategy to request very broad discovery measures entailing high costs with the intention to compel the other party to settle rather than to continue the litigation, although the claim or the defense may be rather weak or even unmeritorious.”).

98. The White Paper recommends that all corporate statements submitted by a leniency applicant under Article 81, regardless of whether the application for leniency is accepted, is rejected, or leads to no decision by the competition authority, should be protected from disclosure. In a related point, the White Paper proposes for further consideration a rule whereby the immunity recipient’s civil liability would be limited to claims by his direct and indirect contractual partners. White Paper, *supra* note 6, at § 2.9.

These ideas have been met with resistance from several member states. However, the Commission views this as a critical issue. Absent broader discovery rules, stand-alone actions will remain difficult and risky to bring (particularly in the civil law member states)—yet without stand-alone actions, it is difficult to see how the overarching goal of making private actions an important complement to public competition law enforcement will be achieved.

In common law jurisdictions such as England and Wales (as well as Ireland and Cyprus), the discovery issue is seen as less pressing since pre-trial disclosure obligations are an established part of civil litigation.

FOLLOW-ON ACTIONS ARE LIKELY TO BE LESS RISKY FOR CLAIMANTS TO BRING AND WILL DOUBTLESS REPRESENT A SUBSTANTIAL PROPORTION OF ALL PRIVATE COMPETITION LAW DAMAGES CLAIMS IN EUROPE OVER THE COMING YEARS.

These rules ensure that parties have access to any documents on which the other party intends to rely, as well as documents that adversely affect that party's case or support another party's case. In some circumstances, disclosure may even be obtained at the pre-action stage (in order to avoid proceedings) or against third parties. These rules remain less expansive than U.S.-style discovery, as there are no depositions, the scope for discovery

against third parties is more restricted and the range of documents required to be disclosed is more limited. Nevertheless, in the absence of serious reform in the civil law jurisdictions, the possibility of obtaining important documentary evidence from (in particular) defendants will inevitably draw potential competition law claimants, particularly those with stand-alone claims, toward the common law jurisdictions.

2. Proof of infringement in a follow-on action

In a follow-on action, the burden of proving an infringement is substantially alleviated since the claimant can take advantage of the already-existing competition authority decision finding an infringement. When a claimant can gain benefit of a presumption of infringement based on a prior decision, the damages action will effectively be limited to the issues of causation and quantification of damages, significantly easing the claimant's burden. For this reason, follow-on actions are likely to be less risky for claimants to bring and will doubtless represent a substantial proportion of all private competition law damages claims in Europe over the coming years.

a) EU decisions

In actions following on from prior European Commission infringement decisions, the situation is clear: Commission decisions are binding on national courts as to the existence of an infringement. According to Article 16 of Regulation 1/2003, in order to avoid the risk of conflicting decisions, national courts "cannot take decisions running counter to the decision adopted by the Commission." In cases

where the Commission has initiated proceedings and a decision is therefore contemplated, national courts must also avoid giving conflicting decisions, which may create an obligation to stay any national proceedings on the same matter.

The extent to which Commission decisions that are subject to appeal are binding on national courts as regards the existence of an infringement is slightly less clear. The general rule is that Commission decisions under appeal are not binding, but that in most cases it will be appropriate for the national courts to stay proceedings pending the final resolution of appeals against the Commission decision.⁹⁹ The rationale for this rule lies in the need to avoid conflicting decisions. It is at least arguable, however, that there is no such risk if the pending appeal of the Commission decision does not relate to the existence of an infringement—as may well be the case when, for example, a cartel leniency applicant does not contest the issue of liability but appeals the Commission’s calculation of the fine. A claimant who sought to use the Commission decision merely as evidence of the existence of an infringement may have strong arguments that there is no risk of conflicting decisions and thus no need for the court to stay proceedings pending the potentially lengthy appeals process through the European courts.¹⁰⁰

The U.K. Competition Appeals Tribunal recently addressed a number of related jurisdictional and evidentiary issues in the *Morgan Crucible* litigation. The case involved a follow-on action under s47A of the Competition Act brought by Emerson Electric and others against Morgan Crucible (“Morgan”), which had applied for and received immunity from fines under the European Commission’s leniency program in connection with the carbon and graphite products cartel.¹⁰¹ The Commission decision had been appealed to the European Courts by several defendants, but not Morgan (which had received immunity from fines). The CAT first ruled that the damages claim could only be brought upon the express permission of the CAT, regardless of the fact that Morgan was not party to the

99. See *Masterfoods*, *supra* note 22, at para. 57:

When the outcome of the dispute before the national court depends on the validity of the Commission decision, it follows from the obligation of sincere cooperation that the national court should, in order to avoid reaching a decision that runs counter to that of the Commission, stay its proceedings pending final judgment in the action for annulment by the Community Courts, unless it considers that, in the circumstances of the case, a reference to the Court of Justice for a preliminary ruling on the validity of the Commission decision is warranted.

100. See *Iberian UK Ltd. v. BPB Industries plc*, 1996 C.M.L.R. 601 (English High Court, 1996), at para. 69 (“Except in the *clearest cases of breach or non-breach*, it will be a proper exercise of discretion to stay proceedings here to await the outcome of the European proceedings.” (emphasis added)). The claimant would argue that when an appeal of a Commission decision does not contest the existence of an infringement, the decision represents a sufficiently clear precedent on that issue even pending the appeal.

101. Commission decision of 28 April 2004, Case COMP/38.359 - Electrical and mechanical carbon and graphite products, 2004 O.J. (C 102) 6.

appeal—confirming that the existence of any related appeal was sufficient to prevent a claimant from bringing a damages claim without the CAT's permission.¹⁰² The claimants then sought the CAT's permission to proceed against Morgan and, in a subsequent judgment, obtained permission to proceed.¹⁰³ In granting permission, the CAT rejected Morgan's attempt to reject the claim as unfounded and focused on the claimants' concerns that, were their claim not to be allowed to proceed pending the outcome of appeals in the European Courts, there was a reasonable prospect that critical documents relating to Morgan's conduct would not be preserved, and would therefore be unavailable for discovery.¹⁰⁴

Thus, although the claimants prevailed, the CAT's reasoning suggests that permission to proceed against a cartel immunity recipient pending appeals by other defendants will be granted only in exceptional circumstances. Defendants will probably be able to postpone such actions by giving suitable assurances to the claimants that evidence will not be destroyed pending the outcome of the appeals. The decisions thus provide a measure of reassurance that immunity applicants will not open themselves immediately to joint and several liability for damages caused by a cartel; a more lenient approach toward the claimants would have represented a serious blow to immunity programs throughout the European Union.

b) National decisions

Due in part to a lack of precedent, the situation in respect of actions following on from infringement decisions by national regulators is slightly less clear. In the United Kingdom, prior decisions of the Office of Fair Trading (OFT) and Competition Appeals Tribunal (CAT) are binding on national courts as proof of infringement once appeals have been exhausted.¹⁰⁵ In Germany, prior decisions of any EU antitrust authority, as well as judgments by national courts as to the validity of such decisions, are binding as proof of infringement.¹⁰⁶ Similar rules apply in Belgium.¹⁰⁷ Other member states do not make prior decisions of a com-

102. Judgment of 17 October 2007, *Emerson Electric Co. & Ors. v. Morgan Crucible Company plc*, 2007 C.A.T. 28.

103. Judgment of 16 November 2007, *Emerson Electric Co. & Ors. v. Morgan Crucible Company plc*, 2007 C.A.T. 30.

104. In support of this conclusion, the CAT referred specifically to "a previous history of destruction of documents by Morgan Crucible."

105. United Kingdom, Competition Act 1998, at §§ 47A & 58A.

106. GWB, at § 33(4).

107. Belgian courts are precluded from taking decisions contrary to Belgian Competition Council decisions. LPEC (at art, 11, § 1) expressly states that the Belgian Competition Council is an administrative court. Accordingly, under Belgian law, the Council's decisions have *autorité de chose jugée* (i.e., are binding) unless and until such decisions are annulled by the Brussels Court of Appeals—the only

footnote 107 cont'd on next page

petition authority binding, but national courts are likely to regard such decisions as persuasive evidence of the existence of an infringement.

The White Paper proposes to clarify this situation by extending the same precedential value that is accorded to Commission decisions to infringement decisions by national competition authorities (“NCAs”) that are members of the European Competition Network. The Commission thus proposes that final infringement decisions taken by an NCA under Article 81 or 82, and final judgments by review courts upholding those decisions, should be accepted in every member state as irrebuttable proof of the infringement in subsequent actions for damages.¹⁰⁸ Such a rule is logical but will test the faith of member states in the competence and diligence of their fellow countries’ competition authorities and courts.

The proposed rule would apply only to NCA decisions that are final (where the defendant has exhausted all appeal avenues) and that relate to the same practices and same undertaking(s) concerned in the follow-on litigation. The Working Paper clarifies that binding effects should only be granted to decisions relating to:

“(i) the same agreements, decisions or practices that the NCA found to infringe Article 81 or Article 82 EC, and (ii) to the same individuals, companies or groups of companies which the NCA found to have committed this infringement (normally, the addressee(s) of the decision).”¹⁰⁹

c) *Precedential value of decisions in similar cases*

The Regulation 1/2003 rule on the binding effect of Commission decisions applies only to decisions that address the same issues and the same parties as those before the national court. This raises the question whether decisions dealing with facts that are merely similar to those at issue before a court will also be binding. The U.K. House of Lords considered this issue in the *Crehan* case,¹¹⁰

footnote 107 cont’d

court that has jurisdiction to hear appeals on Council decisions (LPEC, at art. 75). This implies that the parties to the proceedings before the Belgian Competition Council are bound by the Council’s infringement decision, including in subsequent proceedings involving the same parties and the same practice before the courts. This is the case even if the decision is appealed, since the appeal, in principle, is not suspensive (LPEC, at art. 76, § 4). Decisions by other national competition authorities do not have specific evidentiary value, but may carry some weight with the courts.

108. White Paper, *supra* note 6, at § 2.3.

109. Working Paper, *supra* note 6, at para. 154.

110. *Inntrepreneur Pub Company and others v. Crehan*, 2006 U.K.H.L. 38.

holding that claimants will not be entitled to “piggy back” a private damages action on a prior competition authority infringement decision where the prior decision deals with a different—even if very similar—situation.¹¹¹ The House of Lords explained that while it is clear that conflicting decisions must be avoided (citing *Delimitis*¹¹² and other precedents), there is no risk of such conflict where the legal and factual context of the case that was examined by the Commission is not completely identical to that before the national court (citing the Opinion of Advocate General Cosmas in the *Masterfoods* case¹¹³). This is consistent with the approach proposed in the White Paper.

Based on this judgment, while a prior Commission infringement decision in a similar case may be admitted as evidence, and may even be highly persuasive, it will not constitute binding proof of the infringement and the court will need to reach its own determination on that issue. In such instances, defendants will be entitled to argue that the similar case at issue should be decided differently—in effect challenging the findings of the Commission to the extent the cases are not distinguishable. Factors affecting the amount of weight to be accorded to the Commission decision would include: whether the decision was addressed to a party against whom the decision is relied on in the national court proceeding; if not, whether that party had an opportunity to participate in the Commission proceedings; in the case of findings of fact, whether these were essential or non-essential to the Commission’s conclusions; and whether the findings of fact related to the same time period at issue in the national case or were otherwise on the same subject.

The effect of this judgment cuts both ways. On one hand, while courts may regard prior similar decisions as highly persuasive, the fact that the court will need to reach its own determination on the issue of infringement may nonetheless raise the evidentiary burden for claimants. In the knowledge that defendants are likely to argue that the prior decision should not apply to the new case, claimants will need to consider whether they will be able to adduce evidence in addition to the prior decision that will persuade the court that an infringement occurred. On the other hand, this approach also means that claimants are not necessarily barred from commencing proceedings where there is a prior similar decision finding non-infringement, as the claimant may seek to persuade the court that the regulator’s decision is inapplicable, either because the facts are different or because the conclusion was wrong.

111. Specifically, the House of Lords held that the national judge was not bound to apply against the defendant Inntrepreneur prior to European Commission findings against other U.K. brewers that their similar pub lease agreements had the effect of hindering access to the market, in contravention of Article 81(1) EC.

112. Case C-234/89, *Delimitis v. Henninger Bräu AG*, 1991 E.C.R. I-935.

113. Opinion of Advocate General Cosmas in *Masterfoods*, *supra* note 22.

3. Potential Sources of Evidence

In addition to the regular discovery/disclosure avenue discussed above, claimants in follow-on actions may have access to other sources of evidence deriving from the regulator's investigation. Most straightforwardly, the findings of fact in Commission or national authority decisions will be of use to claimants. It is also possible for claimants to obtain access to the actual case files held by competition authorities.

a) Access to European Commission case files

European Commission case files will contain a wealth of evidence potentially of value to claimants in related damages actions, including documents provided voluntarily to the Commission (e.g., leniency applications and supporting materials), documents obtained by the Commission under compulsory process (e.g., documents seized in "dawn raids," responses to information requests), statements of objections, and internal Commission reports and analyses. By law, access to Commission case files, excluding business secrets and confidential information, is granted only to addressees of statements of objections¹¹⁴ and to complainants whose arguments are rejected by the Commission (and, in the latter case, only in respect of the documents on the basis of which the complaint was rejected).¹¹⁵ These rules do not as a general matter grant file access to any interested party (e.g., customers of firms found to have participated in a price-fixing cartel), even if they have participated in the Commission's proceedings as a complainant. Complainants do, however, have a right to receive a non-confidential version of the Commission's statement of objections, with a view to facilitating the complainant's participation in the ongoing proceeding.¹¹⁶

Special rules apply to access to the Commission's case file in respect of leniency applications. The Commission's 2006 Leniency Notice expressly recognizes that

“normally public disclosure of documents and written or recorded statements received in the context of this notice would undermine certain public or private interests, for example the protection of the purpose of inspections and investigations . . . even after the decision has been taken.”¹¹⁷

114. Commission Regulation (EC) No. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, 2004 O.J. (L 123) [hereinafter "Implementing Regulation"], at art. 15.

115. *Id.* at art. 8.

116. *Id.* at art. 6(1).

117. Commission Notice on Immunity from fines and reduction of fines in cartel cases, 2006 O.J. (C 298) 17, [hereinafter "Leniency Notice"], at para. 40.

Accordingly, third-party access to leniency applications is subject to additional restrictions intended to prevent public disclosure. First, only addressees of the statement of objections are granted access to other parties' leniency statements; complainants are not given access. Second, in practice leniency statements are often made orally, and third parties that get access to the file are not allowed to take copies of such statements (although they can make their own transcripts of oral statements). Third, companies that get access to leniency statements are only entitled to use the information contained therein "for the purpose of judicial or administrative proceedings for the application of the Community competition rules at issue in the related administrative proceedings," with sanctions provided for the misuse of such information.¹¹⁸ The latter restriction appears stricter than the general restriction on use of information (other than leniency statements) obtained from the Commission file, which may be used only "for the purposes of judicial or administrative proceedings for the applications of Articles 81 and 82 of the Treaty."¹¹⁹ It is not clear whether this restriction contemplates use of the materials only in the proceeding itself or an appeal thereof, or whether using the materials as evidence in related private enforcement actions is permitted. Moreover, the sanctions for misuse of information that apply with respect to disclosed leniency applications do not extend expressly to other information obtained from the Commission's file.

Several cases pending before the European Courts will test the Commission's power to withhold documents in its case file from prospective damages claimants. An interesting example involves the Dutch government, which is contemplating bringing a damages action against members of the bitumen cartel that was fined €267 million by the Commission in 2006. The Dutch government was an indirect purchaser from the cartel, as it ultimately pays for road construction. The Dutch government asked the Commission for a copy of the full confidential version of the infringement decision to use in its damages case. The Commission takes the view that the Dutch government should be treated like any other damages claimant as regards access to its case file, and has declined to turn the decision over. The Dutch government has responded by applying to the Court of First Instance for an order against the Commission compelling disclosure.¹²⁰

118. *Id.* at para. 34.

119. Implementing Regulation, *supra* note 110, at arts. 15(4) & 8(2).

120. Case T-380/08, *Netherlands v. Commission*. See also Case T-437-08, *CDC Hydrogene Peroxide v. Commission* (prospective damages claimant seeking access to an index of information gathered during the Commission's investigation of the hydrogen peroxide cartel); Case T-344-08, *EnBW Energie Baden-Württemberg v. Commission* (prospective damages claimant seeking information from Commission case file in the insulated gas switchgear cartel); Case T-399-07, *Basell Polyolefine v. Commission* (prospective damages claimant challenging Commission decision refusing to turn over information from its case file in the organic peroxides cartel).

b) Access to national competition authority case files

It is sometimes possible for claimants to obtain access to files held by NCAs. The approach varies among member states and is not always clear. Some illustrative examples are below.

(i) Belgium

In Belgium, documents gathered by the Belgian competition authority during the course of its investigations may be produced in court, by order of the court, but only for purposes of applying the Belgian Competition Act or Articles 81 or 82 EC.¹²¹ According to commentators, the Belgian competition authority (or even the European Commission) could also be summoned to produce specific documentary evidence within the framework of a pending case, subject to safeguards to guarantee the protection of legitimate business secrets. This interpretation has, however, not been tested in the context of damages litigation.

(ii) England

In England and Wales, claimants may petition courts to order third-party disclosure against the OFT,¹²² which could result in OFT case files being turned over to private claimants. However, the OFT has stated that it will view such requests as exceptional, that it will take all measures to avoid disclosing leniency documents, and that it will oppose third party disclosure applications in the form of a “fishing expedition” (e.g., if an application asked for disclosure of all documents submitted to the OFT by a person or all documents submitted in support of a leniency application, without further particularization).¹²³ The OFT is particularly concerned about protecting against the disclosure of documents provided in the context of a leniency application, since “if undertakings are discouraged from applying for leniency due to the risk of private actions, it is likely that a smaller proportion of cartels will be uncovered.”¹²⁴ The OFT has recommended that a power be conferred on the Secretary of State to provide that “leniency documents, appropriately defined, are excluded from use in litigation without the consent of the leniency applicant.”¹²⁵ The OFT defines “leniency documents” as “documents that are created for the purpose of the leniency application,” which

121. Belgian Competition Act, at art. 84.

122. CPR, at rule 31.17. The court may make a third-party disclosure order only where the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties and disclosure is necessary in order to dispose fairly of the claim or to save costs.

123. OFT Discussion Paper, *supra* note 44, at paras. 6.8-6.10.

124. *Id.* at para. 9.4.

125. *Id.* at para. 9.5.

would seem to exclude from protection preexisting internal company documents that are provided to the OFT as part of a leniency application.

(iii) Germany

In Germany, claimants as interested third parties may have a right of pre-trial access to files of the Federal Cartel Office (“FCO”) provided that: (i) the plaintiff’s reasonable interests outweigh the legitimate interests of the wrongdoer (or any third party) in non-disclosure; and (ii) granting access does not imperil the FCO’s investigation.¹²⁶ In an atmosphere of increasing support for private damages litigation in Germany, the claimant’s interest in evaluating the scope of possible competition damages claims may well prevail over the interests of the defendant (or third party). The balance of interests, therefore, may often allow access to the FCO’s file, subject to the protection of legitimate business secrets. Like the OFT, the FCO has taken the view that leniency applications should be protected, and, as such, does not grant access to them.¹²⁷ If leniency applications were disclosed to potential claimants, the full effectiveness of the German leniency program would be at risk, as cartel members would likely be deterred from coming forward and cooperating with the authority. The FCO’s position on not granting access to leniency applications has not yet been tested in the German courts.

(iv) Ireland

Discovery is available to parties to litigation and third parties, provided they are subject to the jurisdiction of the Court. The parties must request discovery (and specify the precise category of documents sought and the reasons why such documents are required) and discovery must be “necessary for disposing fairly of the matter or for saving costs.”¹²⁸ Discovery is available with respect to the Irish Competition Authority’s files, subject to privilege. Discovery is not available, however, with respect to foreign competition authorities or the European Commission unless these authorities are parties to the action.

(v) Italy

In Italy, individuals have a general right of access to documents held by the public administration, but it remains unclear whether this right may be exercised by claimants in civil actions with respect to confidential documents in the competition authority’s file.

126. Administrative Offence Law (Gesetz über Ordnungswidrigkeiten, OWiG), at § 46 (in connection with § 406e of the German Code of Criminal Procedure (Strafprozessordnung, StPO)).

127. See Notice No. 9/2006, Guidelines Leniency Program (Federal Cartel Office, 2006), at para. 22.

128. *R. v. Secretary of State for Home Affairs Ex-parte Harrison*, 1997 J.R. 113, 119.

On this issue, the White Paper merely states that “adequate protection [from disclosure] should be given to corporate statements by leniency applicants and to the investigations of competition authorities.”¹²⁹ The Staff Working Paper explains further the Commission’s view that leniency statements should be protected from disclosure in civil litigation both before and after the competition authority’s decision has been taken.¹³⁰ With respect to evidence other than leniency statements in the possession of a competition authority, the Commission notes that in some circumstances disclosure to private parties may interfere with the authority’s ongoing investigations. The Staff Working Paper accordingly suggests that member states consider a rule whereby courts should temporarily refrain from ordering disclosure against the Commission or an NCA if it is shown that a disclosure order would jeopardize an ongoing investigation (as might be the case, for example, in respect of internal company documents submitted along with a corporate statement in the leniency context).¹³¹ While the Commission’s recognition of the need to protect leniency applications from disclosure is welcome, it would have been useful if the Commission had also made clear (as the OFT has done) that the competition authority’s file should not become the de facto principal source of evidence for claimants on “fishing expeditions” and that disclosure requests against a competition authority should be the exception rather than the rule.

c) Use of economic evidence to prove infringement

Given the increasing emphasis on economic analysis in competition law, the need to prove or disprove the existence of an infringement (in cases where the court is not bound by a prior decision) will often require the parties to adduce detailed economic evidence, typically in the form of expert reports, on several key issues: (i) the definition of the relevant market; (ii) an explanation of the dynamics of competition in that market and an assessment of market power or dominance; and (iii) a determination of the extent to which the impugned conduct has had an effect on competition (as well as (iv) an estimate of the level of damages suffered, which is discussed in the next section).

Conducting a detailed economic analysis is challenging in itself, particularly when the requisite data may not be readily available; an additional hurdle arises in deciding how best to use the resulting evidence in the litigation context. The difficulty lies in conducting a sufficiently robust empirical analysis while also presenting the methods, assumptions, and results in a manner that supports the legal argument and is intelligible to the court. This may involve a trade-off between

129. White Paper, *supra* note 5, at § 2.2.

130. Working Paper, *supra* note 6, at para. 118.

131. *Id.* at para. 119.

(i) relatively simple techniques, where the results may be more intuitive and thus more appealing to the court, but which may have more limited probative value, and (ii) more complex methods which, while potentially more robust, will inevitably require more data and be more difficult for the court to understand.

There are significant procedural differences between the member states regarding the use of expert evidence. While most member states permit parties to appoint experts, evidence from court-appointed experts (common in competition law cases in countries such as France and Italy) may be given greater weight. In England, experts are chosen by the parties, affording a greater degree of control. At the same time, however, the procedural rules impose a number of limits on this control: (i) the court must first give permission (by finding that the issues on which the expert intends to give evidence are matters that require expert evidence); (ii) experts owe an over-riding duty to the court (rather than to the parties that have appointed them and paid for the evidence), and their independence will be tested closely; and (iii) the data and modeling used by an expert must normally be provided to the opponent in advance of trial to enable them to replicate and test the evidence in preparation for cross-examination.

D. PROOF AND QUANTIFICATION OF DAMAGES

Once the existence of an infringement has been established, the two additional elements generally needed to support a claim are proof of damages suffered and a causal link between the infringement and those damages.

1. Causation

In any damages claim, it is incumbent on the plaintiff to prove that the infringement in question caused the damages suffered. The defendant is only liable for those damages that were caused by the unlawful action. A typical approach to the causation issue, applied in England and Wales, is to apply the so-called “but for” test: but for the infringement, would the claimant have suffered the loss?

Notwithstanding the straightforward appearance of this test, proof of causation in antitrust cases can be highly complex. The financial loss suffered by the victims of anticompetitive behavior will often consist of paying a supra-competitive price. The claimant in such circumstances has to show that a price rise was the consequence of the defendant’s unlawful action. The defendant might respond that any price rise was caused by something different, such as normal market functioning or third party actions. As discussed below, additional complications can arise in jurisdictions that recognize the passing-on defense (which includes most member states). Proving a causal link might require reconstruction of a hypothetical marketplace free of the anticompetitive conduct at issue, which can call for a highly complex economic analysis.

Two recent French judgments illustrate how claimants may have difficulty proving the existence of a causal link between the infringement and the alleged

damages suffered. First, the *Arkopharma*¹³² case was a follow-on damages claim by a vitamins purchaser against Roche (a member of the vitamins cartel that had previously been sanctioned by the European Commission).¹³³ Arkopharma claimed that, since it had bought vitamins from Roche at prices affected by the cartel, it had suffered damage resulting from Roche's wrongfully increased prices. The Court dismissed the claim on two grounds, one of which was the claimant's failure to prove a causal link between the infringement (as to the existence of which the Commission's decision was dispositive) and the alleged damages. In particular, the Court found that Arkopharma had failed to demonstrate that it was unable to pass the overcharge on to its customers. According to the Commission's findings, the vitamins cartel covered more than 80 percent of the worldwide market. Consequently, market conditions were the same for all vitamin purchasers, each of whom could only buy products from cartel members. Each could therefore pass any overcharge on to its own customers without incurring any loss of customer base. The fact that Arkopharma had chosen not to pass through the overcharge reflected a deliberate commercial decision, and the loss of margin suffered (as Arkopharma in most cases effectively absorbed the overcharge attributable to the cartel) was not causally linked to the infringement.

The second interesting French judgment on the issue of causation is *Doux*.¹³⁴ This was another follow-on action from a Commission infringement decision, this time against the company Ajinomoto in the wake of the lysine cartel.¹³⁵ Doux argued that it had suffered damage since the cartel in which Ajinomoto participated had raised the price of lysine, an essential component of animal feeds produced by Doux. The court dismissed Doux's claim, finding that Doux had failed to establish a causal link between the infringement and the alleged damage suffered, since Doux had not demonstrated that market conditions prevented it from passing on the overcharge to its customers. Similar to the reasoning in the *Arkopharma* case, the court noted that all lysine producers had participated in the cartel and therefore all producers of animal foodstuffs were in the same position (i.e., they all suffered the same overcharges). Doux could therefore have passed the overcharge on to its customers without any risk of losing clients to the competition. If Doux had suffered damage in the form of reduced margins, therefore, such loss was not attributable to the infringement but to Doux's own commercial strategy.

These judgments illustrate the close relationship between the issues of causation and the passing-on defense, which is considered further below. When the passing-on defense is allowed, direct purchaser claimants may have more difficul-

132. *Arkopharma v. Roche* (Nanterre Commercial Court, May 11, 2006).

133. *Vitamins*, *supra* note 77.

134. *Doux Aliments v. Ajinomoto* (Paris Commercial Court, May 29, 2007).

135. Commission decision of 7 June 2000, Case COMP/36.545 - Amino Acids, 2001 O.J. (L 152) 24.

ty proving that the infringement caused any damage to them. At the same time, courts that disallow or are more restrictive with respect to the passing-on defense may be more hesitant to reject claims on the ground that the causation element has not been established.

2. Quantification of Damages

As explained in Section I.C above, in *Crehan* the European Court of Justice established the right of individuals to obtain damages for breaches of EU competition law, but the types of damages available to claimants and the methods by which those damages are calculated remain largely matters of national law. According to the ECJ's more recent judgment in *Manfredi*,¹³⁶ each member state may choose how best to provide for compensation of damages, provided that (i) domestic rules do not discriminate against damage claims for breach of EU competition rules, as compared with claims under national rules (the principle of equivalence) and (ii) domestic rules do not render the exercise of the right to damages excessively difficult (the principle of effectiveness). The principle of effectiveness requires member states to allow claimants the potential to claim compensation for actual loss, lost profit, and interest caused by the infringement of EU competition law, but issues such as punitive damages and restitution are left to the member states (subject to the principle of equivalence). This has created a legal patchwork across the European Union in which defendants face the prospect of significantly different degrees of liability in various countries depending on permitted types of damages and methods of quantification. The incentives for forum shopping are clear.

a) Which damages are available?

(i) Compensatory damages

The primary basis on which damages are assessed in all member states is to award compensatory damages for loss actually suffered by the claimant as a result of the infringement. For example, in England and Wales, where the approach is broadly similar to that taken in the civil law jurisdictions, claimants must establish, on a balance of probabilities, that the infringement caused the loss and that the loss was not too remote, speculative, or inconsequential to be recovered.

In assessing compensatory damage claims, courts often apply a counterfactual analysis, comparing the claimant's actual position to the situation the claimant would have been in "but for" the illegal conduct. Such an approach most straightforwardly includes overcharges (e.g., higher prices resulting from cartel behavior) among recoverable compensatory damages (although the French *Arkopharma* and *Doux* judgments summarized above highlight that overcharges may not be recoverable if the claimant was able to pass them on to customers).

136. *Manfredi*, *supra* note 28.

Compensatory damages also typically encompass lost net profits, which can be in the form of opportunity cost (measured by reference to earnings, as in a case where a product reseller had to reduce its purchases because of cartelized pricing), and can also cover lost going concern value (normally measured by reference to market valuation).

To be recoverable, compensatory damage claims must not be too speculative or too remote from the conduct at issue. In applying the usual “but for” framework, some speculation in establishing what would have happened absent the illegal conduct is unavoidable, but courts set boundaries on the extent of permissible speculation. For example, a claimant might allege that the defendant’s abusive rebate scheme caused damage in the form of both (i) loss due to customers terminating agreements with the claimant as a result of the defendant’s unlawful pricing terms and (ii) lost enterprise value due to market share erosion following from an inability to compete against the defendant’s scheme. The second claim would likely be regarded as more speculative than the first, and could well be disallowed. The issue of remoteness deals with how directly relevant an alleged harm is to the conduct at issue (i.e., how many causal links are needed to connect the damage to the infringement). For example, a claim in the example above for loss due to the cost of borrowing additional operating capital, which the claimant allegedly would not have needed but for the defendant’s unlawful rebate scheme, might be seen by a court as too remote from the infringement.

Whether a given claim will pass or fail the speculation and remoteness requirements is highly fact specific, so it is difficult to identify clear trends as to how cases are likely to be decided. In England, the courts have in most cases held that future profits are too speculative to be recovered. By contrast, in Italy certain cases have awarded claimants damages on account of loss of future profits, calculated based on the average duration of contracts that were terminated as a result of the competition law infringement.

(ii) *Exemplary/punitive damages*

Exemplary damages are intended to punish the defendant and have a deterrent effect. In contrast to the U.S. system, which grants successful plaintiffs treble damages under the Sherman Act of 1890, most EU member states regard exemplary damage awards as contrary to public policy and do not permit them. The only present exceptions to this rule are in Ireland,¹³⁷ where exemplary damages are permitted for conscious and deliberate competition law violations (although such awards have been rare), Cyprus, and England, where exemplary damages can be

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137. Irish Competition Act, at § 14(5).

awarded if a defendant's unlawful conduct had been calculated to result in profit that would exceed any compensation that might have to be paid to claimants (which could apply in the antitrust context).¹³⁸

An important judgment on the issue of punitive damages, in the *Devenish* litigation,¹³⁹ was issued by the English High Court in late 2007. In a follow-on claim for damages against the companies involved in the vitamins cartel, the court held that the claimants were not entitled to recover exemplary damages. The defendants had already been assessed record fines by the European Commission, which in the Court's view precluded an award of exemplary damages under Community law. First, the court reasoned that because exemplary damages and regulatory fines are both intended to punish and deter anticompetitive behavior, the non bis in idem (double jeopardy) principle precludes an award of exemplary damages in a case in which the defendants have already been fined (or had fines imposed and then reduced or commuted) by the European Commission. Second, the court found that an exemplary damage award would "run counter" to the Commission's decision, in violation of Article 16 of Regulation 1/2003 EC, since it would essentially amount to a conclusion that the Commission's fines were inadequate to punish and deter. Finally, the Court acknowledged that under domestic English law, exemplary damages are within the Court's discretion, but noted that the fact that a defendant had already been fined by the European Commission would be a strong argument against the award of exemplary damages. The claimant was therefore not entitled to recover exemplary damages under either EU or national law. The UK Court of Appeal upheld the trial court's judgment in October, 2008.¹⁴⁰ The persuasive effect of this precedent in other member states remains to be seen, but the ruling—that under EU law punitive damages cannot be awarded in follow-on damages claims—is clear.

Despite a general lack of support for exemplary damage awards at the member state level, the European Commission has at various times considered trying to press for change. The Green Paper raised the possibility of introducing mandatory double damages for cartel behavior across the European Union as a means of creating additional incentive for injured parties to bring damages claims.¹⁴¹ In March 2007, Commissioner Neelie Kroes stated that although she would not support the introduction of U.S.-style automatic treble damages, "double damages for hard core cartels are worth considering, but only if it is proven that sin-

138. *Rookes v. Barnard*, 1964 A.C. 1129(1), at 37 (per Lord Devlin).

139. *Devenish Nutrition Ltd. & Ors. v. Sanofi-Aventis (France) & Ors.*, 2007 E.W.H.C. 2394 (Ch.).

140. *Devenish Nutrition Ltd. v. Sanofi-Aventis (France) & Ors.*, 2008 E.W.C.A. Civ 1086.

141. Green Paper, *supra* note 4, at § 2.3; and Working Paper, *supra* note 6, at § III.B.3.

gle damages are not enough to get the victims to court.¹⁴² The tension between this idea and the *Devenish Nutrition* court's ruling that exemplary damages in follow-on litigation are prohibited by Community law and would likely not be awarded in England and Wales—the largest jurisdiction where exemplary damages are potentially available—is evident.

Perhaps in implicit recognition of this, the White Paper does not advocate the introduction of multiple or punitive damage awards. The Commission points out that Community law does not prevent member states from providing for punitive damage awards,¹⁴³ and does not exclude introducing them in future if private damages actions in Europe do not become more common over the coming years.¹⁴⁴ But the White Paper's recommendations are firmly rooted in the compensatory principle of damages as articulated by the Court of Justice in *Manfredi*, which is the same as or very similar to the basis already used in most member states. To increase transparency and awareness, the White Paper suggests that the rules set forth in *Manfredi* should be codified in a Community legislative instrument.¹⁴⁵

(iii) *Restitution*

An alternative remedy available in many member states is restitution, which aims to prevent unjust enrichment of the defendant by permitting the claimant to recover the amount of illegal gain obtained by the defendant. Restitution may be of particular relevance in two circumstances likely to arise in the antitrust context: (i) where the claimant seeks to recover profits made by an infringing party, on the basis of a theory of unjust enrichment; and (ii) where the claimant seeks to recover sums paid that cannot otherwise be recovered because the parties are co-contractors to an agreement that is void for being in breach of Article 81 EC. In the view of some authorities, restitution may also be an appropriate basis for calculating damages in representative actions, where the calculation of compensatory damages on an individual basis may be too complex or inefficient.

Approaches to the issue of restitution differ among member states. For example, in Germany the Federal Cartel Office may order the defendant to pay an amount corresponding to the gain made from the antitrust infringement, even if this exceeds the amount of the claimant's loss.¹⁴⁶ In Italy, restitution is also avail-

142. Kroes (2007), *supra* note 30.

143. Working Paper, *supra* note 6, at paras. 188-92.

144. *Id.* at para. 195.

145. White Paper, *supra* note 5, at § 2.5.

146. GWB, at § 34.

able, although under Italian law restitution may not exceed the claimant's loss. Further, while the profit realized by the defendant as a result of the unlawful conduct is, in principle, irrelevant to the calculation of compensatory damages, it may in certain circumstances be taken into consideration to estimate the claimant's loss of income. For example, in refusal to deal cases where the incumbent keeps competitors out of a new market, the incumbent's actual profit may be a proxy for the profit lost by competitors.¹⁴⁷ In England and Wales, restitution is an equitable remedy within the discretion of the court. While not yet awarded in the antitrust context, there has been some suggestion by the Competition Appeals Tribunal that restitution may be an appropriate basis on which to quantify a monetary award for antitrust harm, and the OFT has recommended that courts be given discretion to award damages on a restitutionary basis in representative actions where calculation of compensatory damages on an individual basis may be evidentially too complex or inefficient.¹⁴⁸ However, in the recent *Devenish* judgment,¹⁴⁹ the English High Court ruled that an antitrust claimant (in this case, a purchaser in follow-on litigation based on the vitamins cartel) was not entitled to an account of the profits of the parties to the cartel or restitution of unjust enrichment, but could seek compensatory damages only. The court rejected the claimant's argument that compensatory damages would be insufficient due to difficulties in proving the exact amount of loss, and declined the claimant's invitation to recognize that restitutionary awards are available in all tort cases, including the breach of statutory duty claim at issue. The UK Court of Appeal upheld the trial court's judgment in October, 2008.¹⁵⁰

(iv) *Interest*

The European Court of Justice has held that compensating a claimant for loss suffered must take into account the time value of money, which means that interest on the loss is an essential element of compensation.¹⁵¹ Specific rules for the calculation of interest are left to the member states. The availability of pre-judgment interest can have a significant impact on the total value of a damages award. It is notable that, while the U.S. system provides for treble damages, pre-judgment interest accrues only from the date of bringing the claim, rather than the date of injury; in addition, such interest is awarded only on a showing that the defendants engaged in dilatory or bad faith conduct during the litigation.

147. See *Wind v. Telecom* (Rome Court of Appeals, Jan. 20, 2003).

148. See OFT Discussion Paper, *supra* note 44, at paras. 7.31 & 7.35.

149. *Devenish Nutrition and Ors v. Sanofi-Aventis*, 2007 E.W.H.C. 2394.

150. *Devenish Nutrition Ltd. v. Sanofi-Aventis (France) & Ors.*, 2008 E.W.C.A. Civ 1086.

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

In Europe, by contrast, pre-judgment interest dated from the time of injury is available in several member states. For example, in England, damages are typically assessed as at the date of the infringement, with pre-judgment interest generally awarded (simple interest at the claimant's normal borrowing rate, or the Bank of England base rate plus one percent); post-judgment simple interest on the judgment debt, and on any costs award made, is also payable at a rate of 8 percent. In Germany, interest is due from the moment the damage occurred, with the interest rate fixed at the base rate of the central bank plus five percent. In Spain, courts may award interest from the date on which the damage occurred, but this rule is flexible and not always applied.¹⁵² On the other hand, pre-judgment interest is generally not available in France, although judges retain discretion in awarding it. Relatively severe rules on interest such as those in Germany and England may result in damage awards that are as high as would be involved in a case of exemplary damages, although the principle behind awarding interest is compensatory rather than punitive.

The White Paper cites the *Marshall* and *Manfredi* judgments in support of its position that victims' rights to full compensation for the harm caused includes not only actual loss and loss of profit, but also interest from the time the damage occurred until the sum awarded is actually paid.¹⁵³

b) How are damages calculated?

As noted above, compensatory damages in all member states aim to put the claimant in the same position it would have been in "but for" the infringement. There are no limits on the amount of damages that may be awarded and no obligation for the court to take into account any fines that may already have been imposed on the defendant by a competition authority.

Compensatory damages are usually calculated as the difference between the claimant's actual position and the hypothetical position that the claimant would have been in but for the unlawful conduct. This measure therefore includes both actual losses sustained by the claimant and profits missed as a result of the infringement. Quantifying this can be difficult, since reconstructing the counterfactual "but for" scenario typically requires making key economic assumptions, small changes to which can have significant effects on the outcome.

Claimants will most commonly seek compensation for two types of antitrust damages: overcharges (e.g., artificially high prices due to price-fixing or market allocation agreements) and losses due to other anticompetitive behavior such as refusal to supply or exclusionary conduct by a dominant rival (e.g., lost profits from missed sales opportunities or lost enterprise value due to market share erosion).

152. For example, in a prominent recent case the First Instance Court of Madrid awarded legal interest to the claimant from the date legal proceedings were initiated. *Antena 3 v. LFP*, 2006 A.C. 172 (SJPI Madrid, Jun. 7, 2005) [hereinafter *Antena*].

153. White Paper, *supra* note 5, at § 2.5.

Assessing either type of damage will generally require detailed economic evidence to estimate what market conditions (price, market share) would have been but for the infringement. Several methods may be employed. Most straightforwardly, prices (or market shares, etc.) before and after the infringement can be compared, with the difference attributed to the anticompetitive conduct. Such a simple approach may, however, ignore other factors that can have important effects on the outcome such as macroeconomic trends or changes in the cost of inputs. In an effort to identify and eliminate such external variables, economists can compare the evolution of the relevant market to that in a “yardstick” or “benchmark” market that is (presumably) untainted by the effect of the infringement—the principal difficulty being to identify another market that can serve as a reliable benchmark. Alternatively, more sophisticated econometric techniques

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(regression analysis) can be employed to model the “but for” price based on multiple cost and demand variables in an effort to isolate the effect of the infringement. Such analyses are the most robust available method of calculating damages, but they are often limited by data availability, as well as being complex and subject to dispute by opposing economists.

Given the difficulty of constructing the “but-for world,” both claimants and defendants face tough practical choices in relation to the presentation of evidence regarding quantum of

damages. The most robust assessments of loss suffered based on complex econometric modeling can be difficult to present in straightforward terms that courts will find persuasive. On the other hand, simple, intuitive calculations may be more susceptible to rebuttal.

In view of such considerations it is not surprising that claimants often struggle precisely to quantify the amount of their loss. In most member states, however, this will not preclude the recovery of damages. For example, in England the court will simply do the best it can to quantify loss based on the evidence put before it. Similarly, in Italy, to the extent that the claimant cannot prove exactly how much damage was suffered, the judge is entitled to quantify the damage on an equitable basis. In Germany, the competition rules expressly permit the court to take into account cartel profits as a means of estimating the amount of overcharge suffered by the claimant. This applies where there is a *prima facie* case on the merits, which leads to a shift in the evidentiary burden of proving damage, making the issue easier for the claimant. By contrast, in Spain claimants normally face a higher burden of proving the exact amount of their loss.¹⁵⁴

154. See, e.g., *Antena*, *supra* note 152 (judicial standard to determine the loss of profits takes into account gains that were not merely a possibility, but were “very likely to have been obtained”

footnote 154 cont'd on next page

In recognition of these difficulties, the White Paper announces that, to facilitate the calculation of damages, the Commission intends to issue non-binding guidelines for quantification of damages in antitrust cases, including simplified rules on estimating the loss suffered as a result of the infringement.¹⁵⁵

3. Joint and Several Liability

The tort law regimes of most member states provide that undertakings that are parties to anticompetitive agreements are liable for the entire damage caused by these agreements. That is, the co-infringers are generally jointly and severally liable for the damage caused by their actions. A victim that suffered harm caused by an unlawful agreement may claim his entire damage not only against his direct trading partner(s), but also against any of the other parties to the unlawful agreement. Between the infringers, liability is several (i.e., the infringer who compensated the entire harm of a victim has the right to seek contribution from co-infringers). The ultimate liability shares of each infringer are determined at this contribution stage.

The specter of joint and several liability threatens to undermine cartel leniency programs by creating a strong disincentive for potential leniency applicants to come forward. In recognition of this disincentive, the White Paper puts forward for further consideration a rule whereby the civil liability of successful immunity applicants under leniency programs would be limited to claims by their direct and indirect contractual partners.¹⁵⁶ Such a rule would not grant an additional financial reward to the immunity applicant, since it would still be liable for the damage it had caused. The rule would, however, offer the successful immunity applicant two benefits. First, there would be a procedural advantage in follow-on damages litigation, since the firm would not need to seek contribution from other cartel participants. Second, the rule would insure against the insolvency or unavailability of one or more cartel members since the immunity applicant would not be required to bear the financial burden of compensating any victims other than its own direct and indirect trading partners (as opposed to the remaining solvent cartel members, who would be jointly and

footnote 154 cont'd

should the illegal conduct not have occurred). Note that this judgment was appealed and reportedly reversed, but the Appellate Court's judgment is not yet available. In another case, *Conduit v. Telefónica*, a standalone action based on a violation of Article 82 EC, the claimant was awarded EUR 639,000 in damages but the court declined to award damages for lost profits, on the grounds that reduction of Conduit's market share (which had been presented as a proxy for its lost profits) was not related to the abuse (refusal to supply), but to the level of Conduit's investment in advertising. *Conduit v. Telefónica*, 2006 A.C. 1881 (SAP Madrid, May 25, 2006).

155. White Paper, *supra* note 5, at § 2.5. In July 2008, the Commission opened a tender procedure for a study on the quantification of damages caused by competition law infringements, the results of which will presumably feed into the upcoming guidelines.

156. *Id.* at § 2.9.

severally liable for the entire damage award).¹⁵⁷ Such a rule would help allay the legitimate fear of potential leniency applicants that, by coming forward with evidence of an infringement, they would be open to liability for the whole loss caused by the cartel—a fear that would potentially undermine the incentive to apply for leniency.

4. The “Passing-on Defense” and the Standing of Indirect Purchasers

a) A pair of difficult issues

The inter-related questions of whether to recognize the “passing-on defense” and whether indirect purchasers should be entitled to sue for antitrust damages raise difficult issues of substance, procedure, and policy and can have a determinative effect on the availability or quantum of damages in many cases. The passing-on defense arises out of the compensatory principle of damages. In jurisdictions that allow it to be raised, defendants can argue that their direct customers should not be entitled to claim the full damage amounts to which they would otherwise be entitled (usually measured as the amount of overcharge attributable to a cartel or abusive pricing scheme) if they passed the higher price through to their own customers downstream.¹⁵⁸ The standing of indirect purchasers (purchasers who had no direct dealings with the infringer, but who nonetheless may have suffered harm because an illegal overcharge was passed on to them along the distribution chain) is linked directly to this issue, since if the overcharge has been passed on by the direct purchaser, indirect purchasers become the primary injured parties.

There are sound policy arguments favoring different approaches to these issues. Regarding the passing-on defense, the compensatory principle of damages counsels in favor of allowing defendants to raise it, since a claimant that passed overcharges through to its customers would be unjustly enriched if its damage award was not reduced correspondingly. On the other hand, the passing-on defense inevitably increases the complexity of litigation because it creates the need to analyze the distribution of an overcharge along the entire relevant product supply chain in order to determine damages. As the preceding section illustrates, estimating overcharges even at one level of distribution is difficult enough; forcing courts to scrutinize price effects along an entire vertical distribution chain may be too much to ask. Moreover, allowing the passing-on defense makes it more difficult for direct purchasers—precisely those who are most likely to have the greatest incentive and ability to bring private actions—to obtain antitrust damages, likely decreasing the overall level of private enforcement.

157. See Working Paper, *supra* note 6, at paras. 280-84.

158. Note that even if a direct purchaser passed the full amount of overcharge through to its own customers, it may still have suffered harm due to lost sales if demand for the relevant product is elastic.

Regarding indirect purchasers, the compensatory principle supports allowing standing, since they are, by assumption, the injured parties if the overcharge was passed on by the direct purchaser. It would seem paradoxical if the real victims of anticompetitive conduct could not seek compensation. On the other hand, the same problems of increased litigation complexity, with particularly difficult questions regarding causation and quantum of damages attributable to the infringement, are inevitable in indirect purchaser actions. Indirect purchasers also lack privity with the defendant, which remains a central principle of tort law in several jurisdictions.

Finally, the interplay between the two issues also creates difficulty: allowing the passing-on defense while denying standing to indirect purchasers could mean that unambiguously guilty defendants face no liability for damages they have caused. On the other hand, disallowing the passing-on defense while allowing indirect purchasers to sue may result in unjust enrichment of some plaintiffs and force defendants to pay for the same damage more than once. There are no simple answers to these issues.

b) One Approach: The U.S. Experience

In the United States, the Supreme Court settled on an approach in two landmark judgments, *Hanover Shoe*¹⁵⁹ and *Illinois Brick*.¹⁶⁰ First, in *Hanover Shoe*, the Court rejected the defendant's passing-on defense as a matter of law, reasoning that passing-on arguments would (i) generate unduly long, complex litigation and (ii) discourage lawsuits by making it more difficult for those best placed to bring them, thereby reducing the effectiveness of private actions as an antitrust enforcement tool. Second, nine years later in *Illinois Brick* the Court held that only direct purchasers from cartel members had standing to bring federal antitrust lawsuits for damage recovery. This time, the Court again cited the problem of litigation complexity in indirect purchaser actions (which raise the same practical difficulties as if the passing-on defense were allowed), but was also concerned about the risk of double liability for defendants—which would become six-fold liability given the mandatory trebling of damages under Section 4 of the Clayton Act—if indirect purchasers were allowed standing. Thus, under U.S. federal law, the Supreme Court established a compromise position: streamlining litigation and avoiding double recoveries against defendants, but potentially allowing unjust enrichment of plaintiffs and, more significantly, undermining the compensatory principle by denying potential “real victims” of the illegal conduct the right to bring claims.

Illinois Brick was unpopular and perceived as unfair in many state capitals, which reacted by introducing so-called “*Illinois Brick* Repealer” statutes. These

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

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

laws, which have been enacted in almost half of the U.S. states, entitle indirect purchasers to sue for treble damages under state antitrust laws—effectively circumventing the Supreme Court’s ruling by providing a remedy under state law that the Court denied under federal law.¹⁶¹ The end result—ironic in light of the rationale of the *Illinois Brick* judgment—is that antitrust defendants in the United States face the prospect of not only multiple recoveries for the same harm, but also extraordinarily complex, duplicative, and even inconsistent litigation in both federal and state courts based on the same underlying facts.

c) *The approach under EU law*

The Commission’s Green Paper¹⁶² signaled that the Commission was prepared to consider all options, inviting comment on four different possible approaches: (1) allowing the passing-on defense, with both direct and indirect purchasers entitled to sue; (2) excluding the passing-on defense, with only direct purchasers able to sue (the approach in the U.S. federal courts); (3) excluding the passing-on defense, with both direct and indirect purchasers able to sue (the *de facto* approach in the U.S. federal plus state court system); and (4) the introduction of a two-step procedure under which the passing-on defense is excluded in an initial procedure in which the defendant is sued for the total overcharge, then in later proceedings the damages are allocated among all parties (including direct and indirect purchasers) that suffered a loss. The Commission recognized at the time that given the complexity of these issues, a trade-off between justice (in the sense of full recovery for all those who have suffered a loss from an illegal practice) and efficiency is inevitable.

Consistent with its other positions, the White Paper proposes a course grounded in the compensatory principle of damages, based on option (1) above. First, the White Paper advocates granting standing to indirect purchasers. Taking a different position would have been difficult in view of the Court’s holdings in *Crehan* (in which the Court states that EU law leaves it “open to any individual to claim damages for loss caused to him”) and *Manfredi*, and would also have conflicted with the Commission’s consistently stated aim of using competition law to defend consumer interests. Second, the Commission proposes to allow defendants to raise the passing-on defense. The White Paper cites the potential adverse results of unjust enrichment and multiple compensation in support of this position.

At the same time, however, the Commission proposes to ease the burden of proof for indirect purchasers by granting them a rebuttable presumption that the illegal overcharge was passed on in its entirety. The burden would then shift to

161. The Supreme Court later rejected arguments to overturn the *Illinois Brick* repealer statutes as unconstitutional on federalism grounds. See *California v. ARC America Corp.*, 490 U.S. 93 (1989).

162. Green Paper, *supra* note 4, at 8.

the defendant to show that the overcharge was not, or was only partially, passed on to the claimant. This approach reduces the possibilities that direct purchasers who have passed on overcharges may be unjustly enriched and that defendants may be required to pay twice for the same harm, while also recognizing and seeking to address in part the difficulties of proof that indirect purchasers commonly face. Defendants in actions brought by direct purchasers will undoubtedly seek to have this pass-on presumption applied in those cases as well, and it remains to be seen how receptive courts will be to such arguments.

d) Member state approaches

At the member state level, approaches to the passing-on and indirect purchaser issues are based largely on the compensatory principle of damages, which counsels generally in favor of allowing the passing-on defense (since passing on of an overcharge would reduce a direct purchaser's actual loss) and allowing indirect purchasers to sue (since indirect purchasers suffer loss if they absorb passed-on overcharges).

For example, in France, courts have allowed defendants to raise passing-on defenses in a series of cases. The *Arkopharma*¹⁶³ and *Doux*¹⁶⁴ judgments discussed in Section II.D.1 above are notable examples. In each case, based on a passing-on defense, the court dismissed the claim in a follow-on action where the infringement had already been established by the European Commission. On similar facts, the courts each found that even if the claimants (direct purchasers of products from a cartel member) had not, in fact, passed the full amount of overcharge on to their own customers, they *could* have done so without suffering loss. Because all purchasers had been subject to the cartelized price and demand for the underlying products was relatively inelastic, the direct purchasers could have increased their own prices by the amount of the overcharge without losing sales.¹⁶⁵ The claimants had thus failed to establish that the infringement had caused them any loss.

In Germany, the passing-on defense is disfavored by statute. Damages arising from cartelized prices cannot be excluded simply on grounds that the plaintiff/direct purchaser passed on the overcharge to its customers.¹⁶⁶ When calculating damages, however, the court may take into account the mitigating effects of passing on higher prices by applying the “adjustment-of-benefits principle” (*Vorteilsausgleichung*) to prevent unjust enrichment. This principle shifts the

163. *Arkopharma v. Roche* (Nanterre Commercial Court, May 11, 2006).

164. *Doux Aliments v. Ajinomoto* (Paris Commercial Court, May 29, 2007).

165. See *also Juva v. Roche* (Paris Commercial Court, Jan. 26, 2007).

166. *GWB*, at § 33(3), sentence 2.

burden of proof onto the defendant to show, against a statutory presumption that the loss suffered coincides with the margin by which prices have been raised artificially, that damages would unreasonably enrich the claimant.¹⁶⁷ The Federal Cartel Office has sought to provide guidance, opining that the passing-on defense should be allowed only in exceptional cases where: (i) the damage has been passed on; (ii) the passing-on did not involve any economic risk for the damaged party; (iii) the passing-on required only minimal effort; and (iv) the passing-on did not result in a decline in sales.¹⁶⁸ It is not entirely clear whether indirect purchasers have standing to sue, but if the passing-on defense is allowed in some cases, the logical consequence is that the indirect purchaser at the next market level should (exceptionally) be entitled to claim damages.¹⁶⁹

In Italy, the passing-on defense has not been recognized expressly. However, under general civil liability principles, a claimant may only seek compensation for harm that it has actually suffered, and provided that it did not knowingly contribute to the harm. In the only antitrust precedent on this point, the Turin Court of Appeal found that a travel agency could not be awarded damages because it had willfully participated in an anticompetitive agreement with the intent to pass on the overcharge to final customers.¹⁷⁰

In England and Wales, any party suffering damage—including direct purchasers, indirect purchasers, and competitors—may commence an action. There have been no cases considering the possible admission of a “passing-on defense,” but the general principles on mitigation of loss suggest that, if a claimant has suffered no loss (e.g., because it has passed on an overcharge), it will not be entitled to recover any damages. In its 2007 recommendations, the OFT declined to take

167. In a judgment awarding EUR 1.6 million in damages to a direct purchaser (Storck) in a follow-on action against Hoffmann-La Roche AG, a member of the vitamins cartel, the Regional Court of Dortmund ruled that a defendant seeking to reduce the amount of damages to be awarded on the basis of the passing-on defense must prove that the cartelized prices were, in fact, passed on to the plaintiff's customers. Case 13 O 55/02 Kart - Vitaminkartell, EWS 2004 (Regional Court of Dortmund, Apr. 1, 2004), at 434-36. Two prior judgments by other courts in similar cases had taken a broader view of the passing-on defense, rejecting follow-on claims by vitamin purchasers and imposing the burden of proof on the plaintiff to show that higher prices had not been passed on. Case 6 U 183/03 - Vitaminpreise (Higher Regional Court of Karlsruhe, Jan. 28, 2004); and Case 7 O 326/02 - Vitaminpreise (Regional Court of Mannheim, Jul. 11, 2003).

168. These conditions might apply, for example, in connection with “cost-plus” contracts, in which the cost of inputs is passed directly through to the downstream purchaser and the intermediate producer's margins are fixed in advance.

169. See U. Böge & K. Ost, *Up and Running, or is it? Private enforcement - the Situation in Germany and Policy Perspectives*, 27 E.C.L.R. 197, 200 (2006); Bundeskartellamt, *Private Kartellrechtsdurchsetzung: Stand, Probleme, Perspektiven* (discussion paper) (Sep. 26, 2005), at 12, available at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Diskussionsbeitraege/05_Proftag.pdf.

170. *Indaba v. Juventus* (Turin Court of Appeals, Jul. 6, 2000).

a position on the issue of indirect purchaser standing and the passing-on defense, opting to wait for the White Paper.¹⁷¹

5. Availability of Interim Remedies

An interim remedy such as an interim injunction allows a claimant to force the defendant to amend or terminate allegedly anticompetitive behavior pending final resolution of the case at trial. Claimants will often seek interim injunctions in cases where the alleged harm is ongoing, such as those involving allegations of infringements such as abusive exclusionary conduct, predatory or below-cost pricing, or refusals to deal.

An application for interim relief may be brought prior to proceeding on the merits, although it is usually necessary to commence substantive proceedings within a specified period of time thereafter (e.g., within 60 days in Italy and Germany). As noted in Section II.B.1 above, subject to national jurisdictional rules, it may be possible to obtain an interim injunction even in a member state that does not have substantive jurisdiction on the merits of the case.

The test for granting interim relief appears at first blush to be very similar across most member states, but as explained below, this obscures important practical differences that may be determinative of injunctive relief availability. For example, national laws differ on issues such as the required strength of the claimant's case, the standard according to which the claimant must show that the alleged harm cannot be compensated by damages, and issues of timing (urgency, delay, maintenance of the status quo). Interim relief availability is therefore an important consideration in the jurisdictional strategy of both claimants and defendants. The approaches in several member states are summarized below.

a) England

In England and Wales, injunctive relief is an equitable remedy and is discretionary. It is necessary for the claimant to establish: (i) a "serious issue to be tried," such that the applicant has a real prospect of success (arguably a slightly lower standard than the more common prima facie case requirement); (ii) risk of irreparable harm, such that damages would not be an adequate remedy; and (iii) that the balance of convenience lies in favor of granting the injunction. This third factor requires the court to consider the harm that would accrue to each party from granting or not granting the injunction, having regard to factors such as the extent to which each party might suffer loss that is not compensable in damages, preservation of the status quo, delay in seeking an injunction, and whether the effect of the injunction would be oppressive or disproportionate.

171. OFT Discussion Paper, *supra* note 44, at paras. 12.8-12.15.

The ‘balance of convenience’ test provides considerable scope for discretion in determining whether to grant an injunction. For example, in the *Adidas* case,¹⁷² the Adidas sportswear company brought an action against the organizers of the four major international “Grand Slam” tennis championships, alleging that the organizers had applied their dress code rule in a discriminatory manner, in breach of Articles 81 and 82 EC. Adidas sought an injunction to prevent the application of the dress code to its three-stripes design, which would have prevented Adidas-sponsored players from wearing new Adidas clothing during the tournaments. Notwithstanding that the Grand Slams had given Adidas a year’s notice that its design would need to comply with the dress rule, the court held that the balance of convenience favored granting the injunction. The court noted in particular that damages would not be an adequate remedy (as it would be difficult to quantify Adidas’s lost sales if the dress rule had been enforced), that granting the injunction would not harm the tennis federations, and that maintenance of the status quo favored the injunction.

b) France

Interim or “preventive” relief may be obtained upon a showing that there is risk of imminent harm from obviously unlawful conduct. No separate proof of urgency is normally required. Alternatively, interim relief may be granted if the plaintiff shows urgency and the defendant does not seriously contest the underlying facts. In this case, it is not necessary for the plaintiff to establish an obviously unlawful act on the part of the defendant. In either case, injunctive relief may be granted even if damages would be an adequate remedy at trial, although the adequacy of damages will be taken into account in determining whether to grant the relief.

c) Germany

To obtain interim relief in Germany, the claimant must establish: (i) a prima facie case; (ii) urgency; and (iii) risk of harm. Further, if a preliminary ruling on the merits is the only means of protecting the applicant’s interests, the applicant must also show one of the following: substantial economic detriment for which any subsequent award of damages would be an inadequate remedy; a threat to the claimant’s economic existence; substantial competitive disadvantage; or that the balance of interest lies in granting the relief. Where the claimant is a small or medium-sized enterprise, there are rebuttable presumptions that reduce the evidentiary burden in actions based on an alleged abuse of dominance.¹⁷³ Accordingly, from a potential claimant’s point of view, Germany may be an attractive forum in which to seek interim relief.

172. *Adidas-Salomon AG v. Draper & Ors*, 2006 E.W.H.C. 1318 (Ch).

173. *GWB*, at § 20(5).

d) Italy

While the process of obtaining interim relief may be somewhat slower on average than in other member states, applications for interim injunctions are common in Italian antitrust cases. The applicant must demonstrate: (i) a prima facie case, (ii) urgency, and (iii) a risk of imminent serious and irreparable harm that is not readily compensable in damages.

e) Spain

Interim measures are available in Spain. For an injunction to be granted, the applicant must show that: (i) there is “appearance of good right” (*fumus boni iuris*, i.e., that the application is based on solid arguments); and (ii) there is a risk that the final decision will not, without an interim remedy, be enforceable (*periculum in mora*).

Spain was recently the subject of a major interim measures proceeding originating in the merger context. In September 2005, the Spanish gas company Gas Natural launched a hostile bid for the leading Spanish electricity company Endesa and, to eliminate anticipated competition concerns, agreed in advance to sell some assets to the second Spanish electricity company, Iberdrola. Amongst other defensive responses, Endesa applied to the commercial court in Madrid for an interim injunction blocking the takeover bid on grounds that it was the instrument for the execution of an unlawful agreement between Gas Natural and Iberdrola, in violation of Article 81 EC. Judge Miriam Iglesias granted the order and suspended the takeover bid on the basis that Endesa posted a €1 billion guaranty against damages to Gas Natural. Gas Natural and Iberdrola appealed the interim order, and the Audiencia Provincial of Madrid upheld the appeals, lifting the suspension on January 16, 2007—by which time the Supreme Court had also made an interim order suspending the bid following Endesa’s appeal of the merger clearance decision. In the end, Endesa and Gas Natural agreed to a settlement under which they mutually decided to withdraw proceedings.

III. Conclusion: What Is to Come?

Private competition law litigation in Europe is evolving from the state of “total underdevelopment” described in the 2004 Comparative Report. In the last few years there have been several highly publicized cases in multiple jurisdictions, and the White Paper has focused the European legal and business communities’ attention on the issue. Facilitating private enforcement as a complement to public enforcement has become a central plank of European Commission competition policy. Yet most of the essential issues still impeding actions for damages are under the responsibility of the member states. The Commission seems determined to exercise its legal and persuasive authority to promote development of national rules to facilitate private claims, but the extent to which these efforts will bring about meaningful change remains unclear.

The White Paper's recommendations will likely set the tone for the development of the legal systems governing private damages litigation across Europe over the coming years. It had been speculated that, following the 2005 Green Paper, which set forth a wide range of options for discussion, the White Paper might propose ambitious measures that would foster "U.S.-style" antitrust litigation, such as multiple damages, opt-out class actions, or extensive discovery rules. By and large, however, the Commission has not proposed measures contemplated in the Green Paper that would have been viewed as dramatic or controversial: the White Paper's recommendations fall largely within the scope of existing European civil law practice and principle. This appears implicitly to reflect the Commission's appreciation of the great inertia in the member states' legal systems of, particularly, the civil law member states, where resistance to changing legal traditions to promote competition law litigation will be stiff. The White Paper can be viewed as an effort by the Commission to set achievable goals based on relatively conservative measures that have a realistic chance of being widely adopted.

The White Paper repeatedly highlights the Commission's intention to preserve a "genuinely European approach" to the issue of damages actions that is "rooted in European legal culture and traditions."¹⁷⁴ The Commission does not indicate what the next step in its effort to promote private actions will be, but one possibility would be seeking to pass a Regulation, which would require support of the European Parliament and Council. The Parliament has already indicated its support in principle, having issued a Resolution in 2007 calling for the adoption of common measures at the EU level "to facilitate the bringing of 'stand alone' and 'follow on' private actions claiming damages for behaviour in breach of the Community competition rules."¹⁷⁵ In the meantime, the White Paper may already provide guidance to national judges who are asked to decide on an action for damages under Article 81 or 82 EC.

Perhaps more important, the EU jurisdictions in which antitrust damages litigation is most developed—particularly England—are already considering and implementing measures to promote private actions that in many respects go beyond the White Paper's recommendations. Other member states are also moving in this direction, as witnessed by the recent enactments of new laws expressly intended to facilitate private actions in countries such as Germany, Sweden, and France.

Market developments also point toward more damage actions in the near future. As described above, the Belgium-based CDC firm (as well as other similar enterprises such as the Germany-based Talionis) has had some initial success

174. White Paper, *supra* note 5, at § 1.2.

175. European Parliament resolution of 25 April 2007 on the Green Paper on Damages actions for breach of the EC antitrust rules - 2006/2207(INI).

using a model to bring collective damages actions based on claims acquired from the injured parties. In addition, the major U.S. plaintiff's firm Cohen, Milstein, Hausfeld & Toll set up its first European office in London in 2007 and is reportedly pursuing follow-on actions for damages relating to several Commission cartel decisions. Such firms will have been disappointed by the White Paper's conservative recommendations. The establishment in Europe of an active plaintiff's bar, however, under these or other models will no doubt result in more damages actions being brought.

The form that such actions will take is not clear. The White Paper strongly favors a model for collective actions brought by representative organizations under an opt-in structure, but recent comments by the U.K. consumer organization Which?, following its negotiated settlement in the *JJB Sports* case, call into question the financial viability of this model. The emerging plaintiff's bar will likely focus on follow-on litigation on behalf of direct purchasers from cartel participants, but these actions will also face hurdles such as widespread recognition of the passing-on defense (as recommended by the White Paper), general unavailability of punitive damages, and continued resistance to contingency fees for lawyers (which is at odds with the "acquisition of claims" model being pursued by CDC). Significant obstacles for plaintiffs remain, and no predominant model for bringing damage actions has yet emerged.

Despite such obstacles, the high level of cartel enforcement activity by the European Commission and national authorities—by some reports over 150 immunity applications, each of which potentially indicates a separate upcoming cartel decision, are pending at DG COMP alone—will ensure a rich supply of new potential targets for damage claimants over the coming years. Follow-on actions of some form, brought in countries with the most plaintiff-friendly rules of civil procedure, thus seem likely to comprise the bulk of private damage claims for the foreseeable future. However, while such actions may be appropriate in gaining compensation for victims, it seems unlikely that they contribute significantly to overall competition law enforcement, since by definition the infringement has already been discovered and the offenders punished. As the Commission has recognized, private enforcement will only be a true complement to public enforcement if it "extend[s] the scope of enforcement beyond the cases already dealt with by public authorities,"¹⁷⁶ which means that focusing on measures to facilitate standalone damages claims, rather than follow-on actions, is the appropriate policy priority. ▼

176. Kroes (2007), *supra* note 30.