

**Will the proposals of the European Commission in its White Paper
on Damages actions for breach of EC antitrust rules
facilitate private damage claims?**

BY DR. TILL SCHREIBER

**CONFERENCE DU JEUNE BARREAU DE BRUXELLES
ACTUALITES EN DROIT DE LA CONCURRENCE (12 FEVRIER 2009)**

CDC CARTEL DAMAGE CLAIMS

Avenue Louise 475
B – 1050 Brussels

Telephone +32-(0)2-213 49 20
Facsimile +32-(0)2-213 49 21

www.carteldamageclaims.com

Will the proposals of the European Commission in its White Paper on Damages actions for breach of EC antitrust rules facilitate private damage claims?

When the "Study on the conditions of claims for damages in case of infringement of EC competition rules" was published in August 2004, it concluded that state of private enforcement of competition law in the EU was characterised by "total underdevelopment" and an "astonishing diversity" in the approaches taken by different Member States.¹ As a reaction to this gloomy picture for the prospects of private enforcement in the EU, the European Commission published a Green Paper which aimed to identify the main obstacles to a more efficient system of damages claims and set out different options for further reflection and possible improvements.² After a public consultation on the Green Paper and the commissioning of an extensive economic study on the welfare impact of more effective private damage actions,³ the Commission published its long awaited White Paper on Damages actions for breach of EC antitrust rules on 2 April 2008.⁴ Together with the White Paper, the Commission published a detailed Staff Working Paper,⁵ which provides the legal background, as well as an Impact Assessment Report,⁶ which provides the economic analysis of different potential private enforcement scenarios. While the White Paper is rather short and comprehensive, the thinking behind the approach of the Commission as well as the specific measures proposed in the White Paper only become clear in interaction with the accompanying documents. Although it is evident that the Commission has put a lot of internal and external efforts into the analysis of the current shortcomings of antitrust damages actions in the EU, it still remains to be seen whether the adoption of the proposals set out in the White Paper will provide in practice for efficient remedies for victims of anticompetitive conduct. This article aims to contribute a constructive criticism from a practitioner's point of view. In this respect the first part sets out some general elements contained in the White Paper and the accompanying documents which will play a key role for the future development of pri-

¹ Study on the conditions of claims for damages in case of infringement of EC competition rules, by Ashurst, published in August 2004, available at <http://ec.europa.eu/competition/antitrust/actionsdamages/study.html>.

² Green Paper Damages actions for breach of the EC antitrust rules, COM (2005) 672, 19 December 2005, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0672:FIN:EN:PDF>.

³ Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios, Final Report by the Centre for European Policy Studies, the Erasmus University Rotterdam and Luiss Guido Carli, 30 March 2008, available at http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf.

⁴ White Paper on Damages actions for breach of EC antitrust rules, COM (2008) 165, 2 April 2008, available at http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf.

⁵ Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, SEC (2008) 404, 2 April 2008, available at http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/working_paper.pdf.

⁶ Commission Staff Working Document, Accompanying document to the White Paper on Damages actions for breach of the EC antitrust rules, Impact Assessment, SEC (2008) 405, 2 April 2008, available at http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_report.pdf.

vate enforcement in the EU, independently of whether the proposals of the Commission will be adopted by the EU legislator or not (part A.). The second part of this Article assesses the specific measures and policy choices proposed by the Commission in its White Paper (part B.).

A. Key elements for the future development of private enforcement in the EU

Without particularly emphasising them, the White Paper and the accompanying documents contain a number of key elements which will facilitate the development of a more efficient system of private enforcement in the EU. These elements are namely (i) the economic analysis of the overall damage currently resulting from anticompetitive conduct in the EU, (ii) the confirmation that the legal basis for the right to claim damages for the infringement of EC antitrust rules is enshrined in Community law, (iii) the obligation of national courts to interpret relevant national provisions in line with the Community law principles of equivalence and effectiveness, and (iv) the establishment of the guiding objective of full and effective compensation of victims for the harm suffered by infringements of EC antitrust rules. These elements are part of the *acquis communautaire* and are already today directly applicable in damage actions before national courts. They will therefore have a positive impact on the development of a more effective system of private enforcement in the EU, independently of whether or not the EU legislator will eventually adopt the proposals set out in the Commission's White Book or not.

1. Economic analysis of the overall damage resulting from anticompetitive conduct

The question of whether or not to launch a damage action is mainly driven by an economic cost/risk analysis. The success of private enforcement will therefore ultimately depend on whether market participants consider antitrust damage claims as potentially valuable assets. The overall limited number of antitrust damage actions in the EU evidences that this is currently not yet the case. The Impact Assessment Report of the Commission, however, clearly indicates that the size of damages caused by infringements of competition law in the EU, and thus the damage claims which victims currently forego, does not justify such a reserved approach. According to the Report, EU-wide and domestic hardcore cartels alone result in annual damages of between € 25 billion and € 69 billion.⁷ Given the average duration of hardcore cartels of eight years, the potential volume of recovery claims currently amounts to between € 200 billion and € 552 billion plus interest. These damages directly result in an unjust enrichment of companies engaging in anticompetitive conduct to the detriment of their direct and indirect customers. The Impact Assessment Report estimates that the total amount of compensation (single damages plus pre-judgment interest) that victims of anticompetitive infringements are currently foregoing amounts to approximately € 5.7

⁷ Commission Staff Working Document, Accompanying document to the White Paper on Damages actions for breach of the EC antitrust rules, Impact Assessment, SEC (2008) 405, 2 April 2008, paragraph 43, page 14.

billion to € 23.3 billion each year across the EU.⁸ Given these impressive figures it seems less likely that victims of anticompetitive conducts will in future decide not to pursue their potential damage claims. This is in particular the case for larger, possibly listed companies, which are bound by corporate law and corporate governance obligations to pursue damage claims in order to safeguard the company's and the shareholders' interests.⁹

2. The legal basis for damage claims is rooted in Community Law

The Commission rightly points out that in accordance with the case law of the European Court of Justice ("ECJ") the right of victims to damages is directly conferred by Community law. In the groundbreaking judgment *Courage and Crehan*,¹⁰ the ECJ laid down that "the practical effect of the prohibition laid down in Article 81 (1) 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." In *Manfredi*¹¹ the ECJ further clarified the right of victims of infringements of EC antitrust rules to claim damages: "It follows that any individual can claim compensation for the harm suffered where there is a causal relationship between the harm and an agreement or practice prohibited under Article 81 EC." Neither the ECJ, nor the Commission have, however, yet clarified whether the right to claim damages is directly enshrined in Articles 81 and 82 EC or in the general legal principles of Community law. A comparison with the case law of the ECJ concerning the liability of the Member States to individuals for a breach of EC law¹² implies that the latter is more likely to be the case. From a practical point of view this does, however, not make any difference as it is clear from the foregoing that Community Law provides for the legal base on which any victim of an infringement of EC antitrust law may directly claim damages if following three conditions are fulfilled: (i) there is an infringement of Article 81 or 82 EC, (ii) the individual has suffered a damage and (iii) there is a causal relationship between the harm and the infringement. Thus, even if national competition law or tort law do not provide for a right to claim damages for the infringement of EC competition law rules, or these national rules are more restrictive than the conditions set out by the ECJ, victims can base their claim before national courts directly on Community Law.

⁸ Commission Staff Working Document, Accompanying document to the White Paper on Damages actions for breach of the EC antitrust rules, Impact Assessment, SEC (2008) 405, 2 April 2008, page 15 at para. 45.

⁹ See for example in relation to the corporate law obligation of managers under German law to pursue damage claims for the infringement of national and EC competition law: *Franz/Jüntgen*, Die Pflicht von Managern zur Geltendmachung von Schadensersatzansprüchen aus Kartellverstößen, Betriebs-Berater 2007, Heft 32, pages 1681-1687.

¹⁰ Case C-453/99 *Courage and Crehan*, ECR [2001] I-6297, paragraph 26.

¹¹ Joined Cases C-295/04 to C-298/04 *Manfredi*, ECR [2006] I-6619, paragraph 61.

¹² According to the ECJ in *Francovich*, "the full effectiveness of Community law rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain compensation when their rights are infringed by a breach of Community law for which a Member State can be held responsible." See Case C-6/90 and C-9/90 *Francovich and Bonifaci v Italy*, ECR [1991] I-05357, at paragraph 33.

3. National law has to interpreted in line with the Community principles of equivalence and effectiveness

The guiding objective of the White Paper is to ensure that “all victims of infringements of EC competition law have access to effective redress mechanisms so that they can be fully compensated for the harm they suffered”.¹³ This objective echoes two legal principles which the ECJ established in the context of damage actions for the breach of EC competition law and which are of significant practical importance: the principles of equivalence and effectiveness. In *Manfredi*, the ECJ held that “in the absence of Community rules, it is for the domestic legal system of each Member State to lay down the detailed material and procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).”¹⁴ In particular the principle of effectiveness may require national judges to adopt a lenient interpretation or set aside national provisions in order to enable victims an effective enforcement of their right to damages conferred by Community law, even if this would *a priori* not be in line with the wording of the provision or established domestic case law. One example where this may be the case are overly severe limitation periods in national law which do not take account of the specific circumstances of the often clandestine infringements of EC antitrust rules.¹⁵

4. Principle of full compensation of damages

Damage claims represent an economical value and are therefore protected by the right of property enshrined in the fundamental principles of Community law as set out in Art. 17 (1) of the Charter of Fundamental Rights of the EU.¹⁶ The Commission is therefore right to establish the principle of full compensation as the foremost guiding principle in the context of damage claims for competition law infringements. The European approach thus significantly differs from the US, where private damage actions are fundamentally designed to deter future infringements. In line with this approach, the Commission has avoided to propose measures in its White Paper such as US-style punitive damages.¹⁷ In practice, the differences in the approach may, however, be less important than one thinks at the outset: Given the long average duration of cartels in the EU combined with the right to claim interest as of the first day of infringement, damages easily amount to twice the actual damage so that any “gap” with the US-approach is in reality much smaller than perceived.

¹³ White Paper on Damages actions for breach of EC antitrust rules, COM (2008) 165, section 1.2, page 2.

¹⁴ Joined Cases C-295/04 to C-298/04 *Manfredi*, ECR [2006] I-6619, at paragraphs 62, 72 and 81.

¹⁵ See Section B. 4. below for details.

¹⁶ Charter of Fundamental Rights of the European Union, 18 December 2000, OJ [2000] C 364/1.

¹⁷ Interestingly the Commission had still proposed double damages for horizontal cartels in its Green Paper, see Green Paper Damages actions for breach of the EC antitrust rules, COM (2005) 672, Section 2.3, page 7, option 16. This proposal was dropped by the Commission in its White Paper in order to underline the genuinely European approach and avoid a too strong reliance on the US-model for which it was heavily criticised in the consultation process of the Green Paper.

According to the ECJ, the damage to be compensated under Community law encompasses three factors: (i) the actual loss, (ii) loss of profit and (iii) the right to interest.¹⁸ While the ECJ has again established very important basic principles in this respect, a codification of the scope of damages and economic models for their establishment as proposed by the Commission¹⁹ would be of significant practical value as it would provide for an overall framework on which victims of antitrust infringements as well as national courts could rely for the establishment of the damages to be awarded under Community law. In accordance with the principle of full compensation, the guidelines should clarify that all damage elements have to be compensated as from the first day of the infringement until the date on which the capital sum awarded is actually paid to the victim. Similar to the situation in merger control cases, where competition authorities assess the hypothetical future impact of an economic concentration, the guidelines should provide for the use of proxies or economic presumptions for the establishment of the hypothetical competitive price. Given the complexity and likely lack of clear-cut evidence, only such proxies and presumptions, based on sound economic methods, will ensure the effectiveness of the victims' right to full compensation of damages as required by the ECJ.²⁰

B. Specific measures proposed in the European Commission's White Paper

In its White Paper the Commission has identified nine areas which require legislative action in order to overcome the current ineffectiveness of antitrust damage actions.²¹ For each of these areas the Commission proposes specific measures and policy choices. Overall, the measures proposed in the White Paper are an important step towards an effective legal framework for damage actions for breach of EC antitrust law. Even if they are not adopted on the Community level, they may provide important blueprints for the adoption of measures aimed at facilitating private antitrust damage actions at national level. In this respect, in particular the establishment of an *aquis communautaire* which clarifies for each of the nine areas the rights conferred by Community law on which victims of infringements of Art. 81 and 82 EC can rely upon before national courts at the current stage, provides for a significant improvement of legal certainty and standing of potential claimants. However, the proposals are overall not sufficient and are partly even detrimental to attain the objective of achieving an effective enforcement of antitrust damage claims. In this respect the proposals in the White Paper relating to following areas merit a closer comment: (i) Indirect purchasers and collective redress, (ii) access to evidence: disclosure *inter partes*, (iii) passing-on over-

¹⁸ Joined Cases C-295/04 to C-298/04 *Manfredi*, [2006] ECR I-6619, at paragraph 95.

¹⁹ White Paper on Damages actions for breach of EC antitrust rules, COM (2008) 165, section 2.5, page 7. The Commission has issued a tender for an economic study in this respect and plans to issue guidelines based on that study, even if the White Paper should not be adopted by the EU legislator in its current form, see http://ec.europa.eu/dgs/competition/proposals2/#call_2008a510.

²⁰ See also the statement of Rainer Becker, European Commission, in *Global Competition Review*, Vol. 11 Issue 9 of October 2008, page 13.

²¹ These areas are: (i) standing: indirect purchasers and collective redress, (ii) access to evidence: inter partes disclosure, (iii) binding effect of decisions adopted by competition authorities, (iv) fault requirements, (v) damages, (vi) the passing-on of overcharges, (vii) limitation periods, (viii) costs of damage actions, and (ix) interaction between leniency programmes and actions for damages.

charge, (iv) limitation periods, and (v) interaction between leniency programmes and actions for damages.

1. Indirect purchasers and collective redress

The Commission rightly acknowledges the general standing of indirect purchasers to bring damage claims. In *Courage and Crehan* the ECJ clearly stated that “the practical effect of the prohibition laid down in Article 81(1) EC would be put at risk if it were not open to *any individual* to claim damages for loss caused to him...”.²² However, in the event of small damage claims, typically on the end-consumer level, it is unlikely that the victims will actually make use of their right to claim damages on an individual level. For most individuals it is simply not worth going through the hassle and bearing the costs of legal proceedings, if the potential damage to be awarded is not substantial.²³ The Commission tries to overcome this fundamental dilemma by combining collective redress mechanisms with a general presumption that cartel-related price overcharges are entirely passed on to the end-consumer.²⁴ However, the strong focus on and the favourable treatment of end-consumers – which seems not competition law related but enshrined in a wider policy initiative of the Commission²⁵ – implies a number of practical problems which in case of their adoption would not foster, but hinder the development of an effective private enforcement system and thus the full compensation of victims.

(a) Low incentive of end-consumers to bring damage actions despite the availability of collective redress

In the first place, the Commission seems to underestimate the costs and administrative burden implied in the collective enforcement of antitrust damage claims. For example, Cartel Damage Claims SA (CDC) has in the last five years spent more than € 2.5 million for the preparation and enforcement of damage claims purchased from 36 cement consuming companies against the members of the German cement cartel. Despite these very considerable costs, the substance of the action is still pending before the first instance court, while the admissibility of the action has been confirmed in second instance.²⁶ As a result of the

²² Case C-453/99 *Courage and Crehan*, [2001] ECR I-6297, at paragraph 26.

²³ According to a survey, more than 50% of European consumers stated they will not go to court to seek redress for claims of less than € 200, see “Proposal for EU-wide class action finds no favour with UK practitioners”, article published in *The Lawyer* on 15 December 2008, available at <http://www.thelawyer.com/cgi-bin/item.cgi?id=136067>.

²⁴ For details on the passing-on of overcharges see section B.3 below.

²⁵ The Commission (DG Health and Consumers) has published a Communication on the strengthening of consumer rights, including proposals for collective redress mechanisms, see Commission Communication ‘EU Consumer Policy strategy 2007-2013: empowering consumers, enhancing their welfare, effectively protecting them’, COM(2007) 0099, 30 March 2007. Due to these parallel activities, the European Parliament suggests to wait for the communication of DG Health and Consumers on the subject of collective enforcement mechanisms and then enter into a discussion on a horizontal instrument for collective enforcement instruments, including damage claims for the infringement of antitrust rules, see Draft Report on the White Paper on damages actions for breach of the EC antitrust rules by Rapporteur Klaus-Heiner Lehne, 2008/2154 (INI), 19 September 2008, page 7.

²⁶ Judgment of the Higher Regional Court (“Oberlandesgericht”) Düsseldorf of 14 May 2008, VI U (Kart) 14/07, available (in German) at http://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2008/VI_U__Kart__14_07urteil20080514.html.

cost- and time-intenseness of antitrust damage actions on the one hand and the low average damage amount, the economic incentive to start damage actions at end-consumer level will be limited. This will not change significantly, even if the Member States adopt the Commission proposal and introduce the possibility of (i) representative actions for damages brought by qualified entities, and (ii) opt-in collective actions.²⁷ Such actions would only be economically viable if the average damage suffered by the end-consumers were significant or if a very large number of end-consumers would actively bundle damage claims. Both scenarios are, however, rare in practice and the overall burden will remain high and cost intensive. This is affirmed by the experience in jurisdictions which already provide for representative or opt-in collective redress at end-consumer level, such as the UK or Germany. In the UK for example, the consumer organisation Which? was granted the right to bring collective actions against companies that were found to have breached UK competition law in 2005. It was not until 2007 that Which? brought its first collective action against the sports retailer JJB Sports for price fixing of football replica shirts. Despite a large media campaign and significant internal efforts, Which? was only able to name 500 individuals in its representative action. The total damage awarded at the end of the proceedings amounted to around 18,000 Pounds, resulting in an individual payout of 20 Pounds. The head of legal of Which? concluded that the low value of the payout, combined with the hassle to provide court-prove evidence makes it very unlikely that the consumer organisation would bring another action soon.²⁸ Also in Germany, where associations and consumer organisations are allowed to recover illegal gains from the infringers of EC and domestic competition law,²⁹ no such proceeding has ever been initiated.

(b) Lack of court-proof evidence at end-consumer level

Any action for damages will only be successful if the claimant(s) can substantiate and evidence the damage suffered and the causal link between the damage and the infringement. The burden of proof lies with the claimant(s) and typically requires evidence on price overcharges relating to the purchase of the product or service subject to the anticompetitive conduct. However, end-consumers do not typically retain such court-proof evidence (e.g. purchase invoices), at least not for a long period. In view of the often long-lasting competition law infringements, this situation results in a lack of court-proof evidence at the end-consumer level and thus a perpetuation of the unjust enrichment of the infringers, in particular in long-lasting hardcore cartels. This is confirmed by the experience of UK consumer organisation Which? in the football replica shirt case. Only very few individuals were in a position to proof the purchase of the shirts between 2000 and 2001, i.e. the period in which

²⁷ White Paper on Damages actions for breach of EC antitrust rules, COM (2008) 165, section 2.1, page 4. For a detailed explanation of the Commission proposals of collective redress mechanisms, see Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, SEC (2008) 404, at paragraphs 48 to 60.

²⁸ “Class action is one big headache, says Which?”, article published on 1 December 2008 in The Lawyer, available at <http://www.thelawyer.com/cgi-bin/item.cgi?id=135901>.

²⁹ See Section 34a of the German Act against Restraints of Competition (“Gesetz gegen Wettbewerbsbeschränkungen”). An English version of the Act against Restraints of Competition is available at the website of the Federal Cartel Office at http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/0712_GWB_mitInhaltsverzeichnis_E.pdf.

the infringement took place, at the time of the start of the collective action in 2007.³⁰ The potential availability of disclosure *inter partes* as proposed in the White Paper would not remedy this situation. Due to the existence of one or more market levels between the infringer and the end-consumer, the infringer is typically not in a position to provide the court-proof documentation and information necessary to evidence the damage and the causal link with the infringement at end-consumer level. The situation may get even more difficult where the cartelised product (e.g. a chemical commodity) is used as component in a large number of different end-products.

(c) *Some form of collective redress is required for effective damage claims enforcement*

The practical experience in Europe confirms the Commission's view that most antitrust damage claims can only be effectively collectively in one single action. This is particularly the case for SMEs and end-consumers, but also for larger corporations. In the German cement cartel case for example, CDC has purchased and collectively enforced the damage claims of 36 companies. Due to the significant costs involved, the long duration and the difficulty to evidence the damage, none of these companies, most of them SMEs or family owned businesses, would have brought a damage action on their own account. The main factors correctly identified by the Commission which entail the necessity of collective redress³¹ are:

- the deterrence of individual actions by victims given the costs, delay and burden involved in antitrust damage actions, compared to the value of their individual claim;
- the disadvantage of individual victims to evidence the infringement and the damage, given the often clandestine nature of the competition law infringement;
- the current uncertainty of outcome and the lack of clear legal precedents;
- the effectiveness of the national court systems would be hampered if national courts would have to handle a multitude of scattered low-value claims.

These disadvantages can only be overcome if victims can – in one form or another – share risks and costs associated with antitrust damage actions. The Commission also rightly points out that allowing an aggregation of claims not only ensures the victims' right of access to justice, but also considerably strengthens the position of the victims in potential out-of-court/settlement discussions.³² However, the availability of court proof evidence and the generally higher damage amounts at stake imply that collective actions at the direct purchaser level may be the most effective way of ensuring a successful compensation of victims. If one really aims to achieve full compensation of widely scattered and low-value damages at end-consumer level, an opt-out model is likely to be the more effective tool. Finally, already existing possibilities to collectively enforce claims, such as the assignment of dam-

³⁰ "Class action is one big headache, says Which?", article published on 1 December 2008 in *The Lawyer*, available at <http://www.thelawyer.com/cgi-bin/item.cgi?id=135901>.

³¹ Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, SEC (2008) 404, at paragraphs 39 to 42.

³² Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, SEC (2008) 404, at paragraph 41.

age claims to a company specialised in enforcing antitrust damage claims, provide alternative solutions, even in the absence of the adoption of the White Paper.³³

2. Access to evidence: disclosure *inter partes*

One of the key requirements to ensure the effectiveness of antitrust damage actions is access of victims to relevant evidence held by the defendants or third parties. In order to overcome the currently asymmetric availability of evidence in antitrust damage actions, the Commission proposes a minimum level of *inter partes* disclosure, based on fact pleading combined with judicial control of relevance and proportionality.³⁴ According to the ECJ in *Laboratoires Boiron*, national courts are already today required to use all procedures available under national law, including that of ordering the production of a particular document by one of the parties or a third party, in order to comply with the principles of equivalence and effectiveness.³⁵ Jurisdictions which provide for broad discovery rules under national law may therefore be an interesting forum for bringing damage actions relating to the breach of EC competition law. On the other hand, domestic rules relating to the access to evidence which make the exercise of the right to compensation excessively difficult must not be applied to cases of damages for the infringement of EC antitrust rules.³⁶

(a) *The proposals of the Commission require additional clarifications*

While the proposals of the Commission strike a fair balance between the right of the victims to obtain relevant information and the rights of defence of defendants, they may cause certain practical problems. The legal terms used are very broad and not sufficiently precise (e.g. “reasonably available facts”, “sufficient evidence”, “plausible claim”). This implies the risk of lengthy disputes as to whether or not the conditions are fulfilled. Furthermore, as the disclosure mechanism shall not only be available to claimants (to support the claim), but also to defendants (to support defences), the latter may misuse the right to disclosure in order to block or delay ongoing proceedings. Defendants should therefore only be allowed to rely on disclosure orders in cases where claimants have done so (*ad quo*). An alternative may be that the court appoints a third party expert who then gathers the necessary information and data from both parties, e.g. in order to provide an objective damage estimation

³³ In the German cement cartel case, CDC for example purchased damage claims by assignment and enforced the aggregated claims in its own name and on its own account and risk. The damage claims were substantiated following a centralised collection and analysis of purchase and market data. By judgment of 14 May 2008 the Higher Regional Court (“Oberlandesgericht”) Düsseldorf declared the damage action of CDC against the members of the German cement cartel admissible, VI U (Kart) 14/07.

³⁴ White Paper on Damages actions for breach of EC antitrust rules, COM (2008) 165, section 2.2, pages 4-5. For a detailed explanation of the Commission proposal of *inter partes* disclosure see Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, SEC (2008) 404, at paragraphs 93 to 97. The details of the right to *inter-partes* disclosure are based on the approach developed by the Commission under Directive 2004/48/EC (IP Directive).

³⁵ Case C-526/04 *Laboratoires Boiron*, ECR [2006] I-07529, at paragraph 55. The Commission echoes this ruling in the *acquis communautaire* relating to disclosure rights in the Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, SEC (2008) 404, at paragraph 82.

³⁶ See Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, SEC (2008) 404, at paragraph 83.

without the parties relying on mutual discovery orders. For practical reasons, the Commission should ensure that (i) discoverable documents and data can be provided and relied on in electronic format and (ii) procedural rules foresee for “black box” and similar solutions where certified accountants or economists provide on the basis of confidential data, aggregated industry-wide and non-confidential summaries. In order to avoid future dispute, the Commission should also precise the type and category of facts and evidence which would reasonably have to be disclosed. Such minimum level of disclosure would have to comprise in particular all documents relating to the cost and price structure of the products or services affected by the anticompetitive behaviour, not only during the entire period of the infringement, but also before and thereafter. This clarification could be included in the codification of the scope of damages and economic models for their establishment.³⁷

(b) *Community law requires public authorities to support private damage actions*

Only detailed decisions setting out the precise facts of antitrust infringements allow victims to effectively assess the harm suffered. The Court of First Instance (“CFI”) specifically recognised the necessity “of persons harmed by the infringement [of] being informed of the details thereof so that they may, where appropriate, assert their rights against the undertakings punished”³⁸. Under its current practice, the Commission does, however, exclude all substantial facts provided in the context of a leniency statement from its publicly available decision. This practice is difficult to reconcile with the requirement of a high degree of transparency established by the European Courts. The requirement of a detailed and substantiated description of the infringement should also be taken into account by the Commission in the context of its new settlement procedure for cartels.³⁹

The Commission is right to state that the protection of confidential information may not *de facto* preclude the exercise of the right to compensation.⁴⁰ For the avoidance of discrepancies between the various EU jurisdictions, it would be advantageous to introduce a uniform and clear definition of the information that can legitimately be regarded as “confidential” in the context of the proposed disclosure procedure. This definition should clarify that only specific classes of commercially sensitive or private documents are excluded from disclosure and that the mere fact that information could be used in the context of private damage litigation does not make it in itself “confidential”.

Finally, independently of the adoption of the White Paper, the Commission, as any other European institution is pursuant to Article 10 EC under an obligation of sincere cooperation with the judicial authorities of the Member States. According to the ECJ in *Zwartveld*, the Commission is therefore – within certain limits – obliged to produce relevant documents or authorize its officials to be examined as witnesses before national court proceedings con-

³⁷ See White Paper on Damages actions for breach of EC antitrust rules, COM (2008) 165, section 2.5, page 7.

³⁸ Case T-198/03 *Bank Austria Creditanstalt*, ECR [2006] II-01429, at paragraph 78.

³⁹ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, OJ C 167, 2 July 2008, pages 1–6.

⁴⁰ See Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, SEC (2008) 404, at paragraph 114.

cerning the infringement of EC competition law.⁴¹ The European Parliament is therefore right to require that victims must be allowed access to Commission documents, unless interests pressingly in deed of protection are endangered in the process.⁴²

3. Passing-on overcharge

According to economic theory and depending on a number of economic variables, direct purchasers may pass on part or all of the illegal price-overcharge to the next (indirect) purchaser in the chain, e.g. a retailer or consumer. In legal terms, the possibility of defendants in antitrust cases to invoke the claimant's passing on in order to limit his liability for compensation is referred to as "passing-on defence". Inversely, the possibility of indirect purchasers to bring damage claims for the damage suffered as a consequence of the (partial) passing-on of the price overcharge is known as "passing-on offence". In its White Paper the Commission advocates to allow both legal concepts.⁴³

(a) *The passing-on defence*

From an economic point of view the passing-on defence is not a viable means to improve the effectiveness of antitrust damage actions, as the incentive for such actions is essentially driven by the aim of direct purchasers to recover significant damage amounts. This economic presumption lead to the adoption of the "*Illinois Brick*" doctrine in the US, according to which damage claims by indirect purchasers are generally excluded at federal level.⁴⁴ The principle of an effective and full recuperation of damages as postulated by the ECJ therefore implies that the application of the passing-on defence should be the exception and not the rule. It should be limited to concrete cases in which a passing-on is likely to have occurred, for example market structures characterised by vertically integrated companies or industries which typically price on a "cost plus" basis.⁴⁵

It also seems necessary to avoid situations where by relying on the passing-on defence, infringers could effectively block the enforcement of legitimate damage claims. In this respect the Commission should clarify that the resale of a cartelised good or service does not in itself preclude the existence of a damage of direct purchasers and thus their standing in a court procedure.⁴⁶ The further allocation of the damages in the distribution chain should then be dealt with according to the principles on the balance of advantages which are com-

⁴¹ Case C-2/88 *Zwartveld*, ECR [1990] I-03365, paragraphs 25-26.

⁴² This right derives from Article 255 EC and the Transparency Regulation 1049/2001, see Draft Report on the White Paper on damages actions for breach of the EC antitrust rules by Rapporteur Klaus-Heiner Lehne, 2008/2154 (INI), 19 September 2008, page 8.

⁴³ White Paper on Damages actions for breach of EC antitrust rules, COM (2008) 165, at paragraph 2.6.

⁴⁴ US Supreme Court *Illinois Brick Co v Illinois*, 431 US 720 (1977).

⁴⁵ See also Draft Report on the White Paper on damages actions for breach of the EC antitrust rules by Rapporteur Klaus-Heiner Lehne, 2008/2154 (INI), 19 September 2008, page 9.

⁴⁶ Such clarification is contained for example in Section 33(3)(2) of the German Act against Restraints of Competition. This provision clarifies that the passing-on defence is not excluded as a matter of German civil law, but that the facts underlying that defence have to be proven by the defendant, see Deutscher Bundestag – 15. Wahlperiode, Drucksache 15/5049, page 49.

mon to most European tort law systems.⁴⁷ However, infringers should not benefit in the context of the passing-on defence from the successful and economically justified efforts of direct purchasers to sell their products or services to the next market level at the highest price possible.

(b) *The presumption of passing-on for indirect purchasers (the passing-on offence)*

In order to lighten the burden for indirect purchasers to bring damage actions, the Commission proposes that indirect purchasers should be able to rely on a rebuttable presumption that the illegal overcharge was passed on to them in its entirety.⁴⁸ This proposal is clearly not based on economic considerations, but on the overall political incentive of the Commission to strengthen the standing of end-consumers in damage proceedings.⁴⁹ However, as the Rapporteur of the European Parliament in its draft report on the White Paper rightly points out “there is no scientific evidence to suggest that the harm is as a general rule passed on to the indirect purchaser.”⁵⁰ This is in particular true for SMEs and other players without significant market power, which have to pay artificially inflated prices for the purchase of the cartelised good, but are not in a position to pass-on illegal overcharges to their customers. The European Parliament has therefore indicated that it rejects the proposal of a rebuttable presumption and is of the opinion that the Commission has so far been not been able to demonstrate that a general lightening of the burden of proof for indirect purchasers is justified.⁵¹ Furthermore, as recognised by the Commission, the operation of the presumption entails a risk of multiple liability for damages.⁵² This risk is at odds with the compensatory principle on which the White Paper is founded.⁵³ From a practical point of view, the proposal of a rebuttable passing-on presumption does also not appropriately outweigh the various problems indirect purchasers face when bringing a damage action. The presumed passing-on of damages would in particular not remedy the dilemma of very low and scattered damage amounts at end-consumer level. It seems for example more than questionable, that the representative action by Which? in the UK football shirt case would have been more successful in case of the general presumption that the damage had been entirely passed on to the football shirt customers.

Given the generally wide geographic scope of infringements of EC competition law, damage claims will inevitably be brought before different courts and even jurisdictions. Against this

⁴⁷ This principle, referred to as „*Vorteilsausgleich*“ is for example the basis for the allocation of damages under Section 33 of the German Act against Restraints of Competition, as amended by the 7th amendment in July 2005.

⁴⁸ See White Paper on Damages actions for breach of EC antitrust rules, COM (2008) 165, Section 2.6, pages 7-8.

⁴⁹ See Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, SEC (2008) 404, at paragraphs 62-64.

⁵⁰ Draft Report on the White Paper on damages actions for breach of the EC antitrust rules by Rapporteur Klaus-Heiner Lehne, 2008/2154 (INI), 19 September 2008, page 9.

⁵¹ Draft Report on the White Paper on damages actions for breach of the EC antitrust rules by Rapporteur Klaus-Heiner Lehne, 2008/2154 (INI), 19 September 2008, page 9.

⁵² Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, SEC (2008) 404, at paragraph 217.

⁵³ See Comments on the White Paper by the Association of European Competition Law Judges, at paragraph 7, available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/judges_en.pdf.

background, a presumption of passing-on would raise serious procedural and jurisdictional problems and have an impact on the incentive of direct purchasers to bring damage actions:

- In order to bring a successful damage action, direct purchasers would not only have to potentially rebut the passing-on defence by defendants, but also the (statutory) presumption that overcharges were passed-on in their entirety to the end consumer level. It is unrealistic to assume that national judges would not take into account such presumption, even if indirect purchasers would not start any damage claim. Judges may even be required to do so under the principle of uniformity of the legal order.
- In case of a subsequent action by indirect purchasers, direct purchasers could lose standing in an ongoing procedure as a result of the assumption that the damage had been automatically passed-on. This is also true for joint actions by purchasers from different levels in the distribution chain, as it would be contradictory for a judge to acknowledge the concurrent and joint standing of indirect purchasers (applying the presumption that the damage has been passed-on in its entirety) and direct purchasers to bring a damage action.
- It is not clear how and based on which evidence the presumption of passing-on may be rebutted. In practice, due to the various market levels between them and the indirect purchasers, the defendants will generally lack the evidence to rebut the presumption. The abstract group of direct purchasers which could have the relevant evidence is not a party to the proceedings. The proposal to involve third parties in a lawsuit (e.g. direct purchasers providing evidence)⁵⁴ is not compatible with the basic principles of civil procedural law according to which the responsibility for submitting the facts of the case lays exclusively with the parties to a proceeding.
- With regard to parallel and consecutive actions by direct and indirect purchasers in one jurisdiction, the Commission rightly points out that judgements are not binding for other cases, as the parties in those actions are generally not identical.⁵⁵ This is even more the case for actions brought in different jurisdictions. National as well as international civil procedural law does not provide for binding mechanisms for the concentration of parallel actions in one court, nor do they stipulate the material content of judgments, where the parties are not identical. The Commission tries to overcome this dilemma by “encouraging” national courts to use “whatever mechanism under national, Community or international law” to avoid under- or over-compensation.⁵⁶ However, in the absence of such procedural mechanisms at international and national level, this approach not only runs counter to the principle of legal certainty, but also imposes an excessive burden on national judges who would

⁵⁴ See Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, SEC (2008) 404, at paragraph 219.

⁵⁵ See Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, SEC (2008) 404, at paragraph 225.

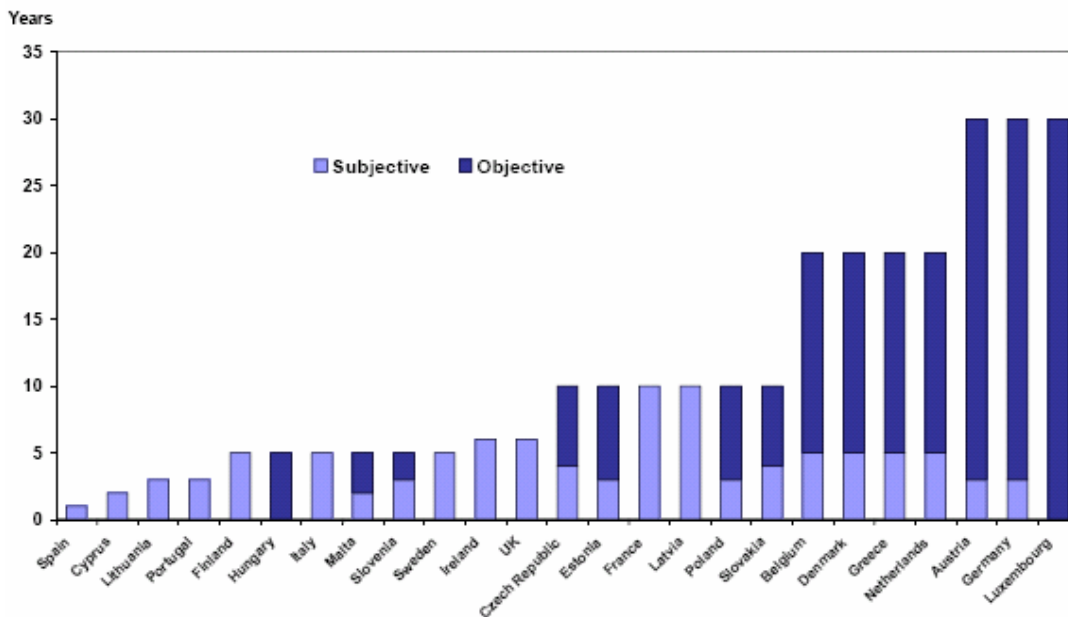
⁵⁶ Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, SEC (2008) 404, at paragraph 223.

have to assess judgments between different parties in up to 27 different national jurisdictions, as to whether they may or may not have an impact on the material assessment of the passing-on defence/offence in the case at hand.⁵⁷

Overall, the proposed presumption of passing-on therefore creates potentially very complicated jurisdictional and procedural issues and fosters a “race for justice” between direct and indirect purchasers. These practical problems would be a significant disincentive for direct purchasers to bring legitimate damage claims and thus significantly weaken the overarching aim to achieve an effective system of private antitrust damage claims in the EU.

4. Limitation periods

The Commission rightly refers to national limitation periods as a significant obstacle to an effective recovery of damages caused by infringements of antitrust rules in the EU.⁵⁸ As the table⁵⁹ below shows, limitation periods for damage claims differ widely across the EU. This is not only true with regard to the periods itself, but also whether the limitation periods are subjective (i.e. starting as of the date when the plaintiff became or could have become aware of the harm) or objective (i.e. independent of subjective knowledge of harm).



⁵⁷ See practical problems implicit in the Commission proposal for national competition judges is confirmed in the Comments on the White Paper by the Association of European Competition Law Judges, at paragraph 8.

⁵⁸ White Paper on Damages actions for breach of EC antitrust rules, COM (2008) 165, Section 2.7, page 8.

⁵⁹ The table is reproduced from the Study “Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios”, Final Report by the Centre for European Policy Studies, the Erasmus University Rotterdam and Luiss Guido Carli, 30 March 2008, page 533. The table is based on the Ashurst Study of August 2004.

Appropriate limitation periods preserve the possibility of follow-on actions. This was clarified by the ECJ in *Manfredi* where it held that the principle of effectiveness requires limitation periods not to run from the date on which the anticompetitive practice was adopted.⁶⁰ In the case of continuous and repeated infringements, the limitation period should therefore not start to run before the infringement ceases. Furthermore, as victims, in particular in the case of clandestine hardcore cartels are generally not aware of the existence and the end of infringements, the limitation period should not start to run before the victim can reasonably be expected to have knowledge of both the infringement and the harm suffered. A subjective limitation period (possibly combined with a longer objective limitation period) therefore seems more in line with the principle of effectiveness as stipulated by the ECJ. However, it is obvious that in the absence of a formal decision, potential claimants will generally not be in a position to assess whether they were affected by the infringement. Only detailed decisions and not just mere press releases allow victims to effectively realise that they may have suffered harm. The requirement of a detailed decision for the assessment of potential damage claims was also stressed in the *Bank Austria Creditanstalt* case⁶¹. Overall, the principle of effectiveness therefore requires that national limitation periods should not start to run before the infringement decision was published and are long enough (i.e. a minimum of two years)⁶² to allow for an effective recuperation of damages in follow-on actions.

5. Interaction between leniency programmes and actions for damages

The Commission is in particular concerned that the strengthening of private follow-on damage claims may have a negative impact on the willingness of infringers to cooperate under the Commission's leniency programme.⁶³ The leniency programme has resulted in the discovery of a large number of hard-core cartels in recent years and it is understandable that the Commission aims to protect its stellar instrument in the fight against cartels. However, while leniency programmes are an important and powerful tool to unearth clandestine cartels, a careful balance has to be struck between the general interest to sanction past and avoid future infringements on the one hand and the legitimate rights of victims to have their damages fully and effectively compensated on the other hand. This is even more the case,

⁶⁰ Joined Cases C-295/04 to C-298/04 *Manfredi*, ECR [2006] I-6619, at paragraph 79.

⁶¹ Case T-198/03 *Bank Austria Creditanstalt*, ECR [2006] II-01429, paragraph 78.

⁶² According to the Commission, a two year period is sufficient to enable claimants to effectively bring their claims, see Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, SEC (2008) 404, at paragraph 240. From a practical point of view a two year period is relatively short for the preparation of a damage action with a complete damage analysis, but sufficient for the preparation of an action for a declaratory judgment, possibly combined with an application for disclosure.

⁶³ Commission Notice on immunity from fines and reduction of fines in cartel cases (hereinafter the "Leniency Notice"), OJ 2004 C 298/17.

as the supposed negative effects of private enforcement to leniency applications have not really been demonstrated by the Commission.⁶⁴

(a) *Fundamental right of victims requires full and effective compensation*

The Commission proposes that all corporate statements submitted by all applicants for leniency, regardless of whether the application is accepted, rejected or leads to no decision by a competition authority, should be protected against disclosure in private actions for damages.⁶⁵ However, in balancing the rights involved one has to take into account that the Leniency Notice is a purely administrative act while the right of the victims of anticompetitive conduct to compensation is a fundamental right recognised by Community and national law. Any confidential content in corporate statements and annexes can easily be deleted. In view of the substantial administrative fines imposed by the Commission which successful leniency applicants can avoid or reduce, the proposal does also not seem to be necessary in order to ensure the overall attractiveness of leniency programmes. Furthermore, the corporate statements of leniency applicants together with their annexes are property of the leniency applicants and are therefore *a priori* subject to disclosure orders by national courts or to disclosure on a voluntary basis. Finally, the suggestion of the Commission seems contradictory to its obligation to provide internal documents and witness statements in national court proceedings.⁶⁶ Overall, the issue of whether or not corporate statements are subject to disclosure should be left to the discretion of the competent national judges.⁶⁷

(b) *Joint and several liability is an important element to ensure full compensation*

The Commission furthermore proposes to limit the civil liability of successful leniency applicants to claims by the direct and indirect contractual partners.⁶⁸ In cartels with price effects, all cartel members, irrespective of their market position, are, however, equally responsible for the price increase as the price overcharge is the result of their coordinated behaviour. Under civil joint and several liability rules, each cartel member is therefore responsible for the entire harm suffered by each victim, irrespective of the existence of commercial relationships between them. The proposed limitation of the civil liability of successful leniency applicants would directly limit the right of victims to full compensation against each infringer and run counter to the fundamental principles of civil responsibility in the legal orders of the Member States. Such statutory privilege does therefore not correspond to the functioning of civil damage proceedings which is to allow for corrective justice and full compensation. Furthermore, a limitation of the civil liability would also make out-of-court settlements (which the Commission wants to foster for efficiency reasons⁶⁹) significantly more difficult. Joint and several liability of each infringer for the entire damage amount is an important driver for

⁶⁴ See also Comments on the White Paper by the Association of European Competition Law Judges, at paragraph 18.

⁶⁵ White Paper on Damages actions for breach of EC antitrust rules, COM (2008) 165, Section 2.9, page 10.

⁶⁶ ECJ, Case C-2/88 *Zwartveld*, ECR [1990] I-03365, paragraphs 25-26.

⁶⁷ Also the Association of European Competition Law Judges is in favour of a case-by-case approach instead of a hard-and-fast rule as proposed by the Commission, see Comments on the White Paper by the Association of European Competition Law Judges, at paragraph 17.

⁶⁸ White Paper on Damages actions for breach of EC antitrust rules, COM (2008) 165, Section 2.9, page 10.

⁶⁹ Commission Staff Working Document, Accompanying document to the White Paper on Damages actions for breach of the EC antitrust rules, Impact Assessment, SEC (2008) 405, paragraph 45, page 17.

such settlements, in particular in the current absence of an effective private enforcement system.

(c) Compensation of victims as decisive factor for leniency and fine calculation

A possible solution for balancing public and private enforcement could be that the Commission makes the effective compensation of victims or the commitment thereto a precondition for granting immunity or a reduction of fines under its Leniency Notice. The Commission itself proposed in its Green Paper⁷⁰ that successful leniency applicants could benefit from a reduction of the damage claims, if it enables the victims to pursue their claims against the other infringers (e.g. by providing evidence).⁷¹ Finally, with regard to companies which do not benefit from a reduction of fines under the Leniency Notice, the Commission could account for efforts of effective compensation of victims in the context of its fine calculation.

C. Conclusion

In its White Paper on damages actions for breach of the EC antitrust rules, the Commission has managed to provide a consistent and genuinely European approach to a more effective enforcement of antitrust damage claims in the EU. In particular the accompanying documents which set out the legal and economic background of the Commission's approach contain a number of elements which are already relevant today and which are key for a further development of private enforcement in the EU, irrespective of whether the White Paper will be adopted or not. This is in particular true for (i) the economic analysis of the overall damage resulting every year from anticompetitive conduct in the EU, (ii) the confirmation that the legal basis for the right to claim damages for the infringement of EC antitrust rules is enshrined in Community law, (iii) the obligation of national courts to interpret relevant national provisions in line with the Community law principles of equivalence and effectiveness, and (iv) the establishment of the guiding objective of full and effective compensation of victims for the harm suffered by infringements of EC antitrust rules.

The Commission has furthermore managed to identify the main hurdles for an effective damages claims system in the EU. The specific measures and policy choices proposed in the White Paper are generally an important step to overcome the current shortcomings and achieve a more effective legal framework for damage actions for breach of EC antitrust rules. However, in case of their adoption some of the proposals will generate new or additional problems in the future. This is particularly the case for the proposed introduction of a rebuttable presumption that the entire damage has been passed on to the indirect customers. Also the proposals of the Commission aimed at protecting its leniency programme do

⁷⁰ Green Paper Damages actions for breach of the EC antitrust rules, COM (2005) 672, Section 2.7, Option 29 page 10.

⁷¹ In a similar manner, the LeniencyPLUS+ programme of CDC tries to strike a balance between legitimate damage actions by victims and the interest of leniency applicants to benefit from a reduction of exposure in private damage actions without undermining the leniency programmes by competition authorities. Based on the principle of joint and several liability and game theory aspects, CDC undertakes not to enforce its damage claims against a cartel member if it provides detailed information and data on the price effects and damages caused by the cartel.

not take sufficient account of the fundamental right of the victims under Community law to effective compensation.