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Comments of the Max Planck Institute for Intellectual Property, Competition and Tax Law (Munich)[1]

on the DG Competition Green Paper of December 2005 on Damages actions for breach of the EC antitrust rules[2]

The Max Planck Institute for Intellectual Property, Competition and Tax Law is a research institute within the Max Planck Society for the Advancement of Arts and Science. With its expertise in these areas of law, and an emphasis on comparative analysis, it takes the economic and technological aspects of the law into account. The Max Planck Institute contributes to answering fundamental legal questions and provides impulses for legal developments on the national, European, and international levels. These are the Institute's comments on the Green Paper.

Overview of replies

Question A: Adopt *Option 2,* supplemented by *Options 4* and *5.*

Question B: Instead of *Option 6,* amend Article 15(1) Regulation 1/2003 to allow national courts to require information from other Member States' competition authorities.

Question C: Adopt *Option 8* with a distinction between decisions that have been subject to judicial review and those that have not; adopt *Option 10;* reject *Option 9.*

Question D: Adopt *Option 13* on the understanding that the burden of proof is on the defendant.

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[2] COM(2005) 672 final, Brussels, 19.12.2005, http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/gp_en.pdf.

Question E: Combine *Options 14 – 16* to the effect that the higher amount of either the damage caused, or the surplus reaped, would be doubled at the discretion of the court. Damages should carry interest from the date of infringement if the private action preceded any intervention by the competition authority.

Question F: Courts should take an equitable approach to the quantification of damages; *Options 19* and *20* should be adopted.

Question G: The passing on defence should be excluded but customers further removed from the infringement should be given the right to sue if direct customers are unwilling or unable to bring an action. Direct customers should share the damages with customers further removed.

Question H: No registration or authorisation scheme is required for consumer associations (in that respect, reject *Option 25*), but special rules should make sure that as many consumers as possible mandate consumer associations to bring an action on their behalf (adopt *Option 26*).

Question I: Cost rebates should be at the discretion of the courts.

Question J: Reject *Options 28* and *29;* adopt *Option 30.*

Question K: Reject *Options 31–34,* and harmonise the substantive and procedural law of claiming damages for competition law infringements instead.

Question L: It should be left to the Member States whether the courts appoint experts, or whether the parties nominate them.

Question M: The action should be time-barred after five years, or one year after the finding of an infringement by a competition authority can no longer be challenged, whichever is the earlier.

Question N: Clarification is not required in view of the substantive convergence among national systems.

Question O: A Regulation should be adopted, based on Article 83 EC, in order to harmonise the substantive and procedural laws of the Member States with regard to damages actions for the breach of EC antitrust rules; some particular aspects in connection with Article 82 EC might, however, require further reflection.

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

Option 1: Disclosure should be available once a party has set out in detail the relevant facts of the case and has presented reasonably available evidence in support of its allegations (fact pleading). Disclosure should be limited to relevant and reasonably identified individual documents and should be ordered by a court.

Option 2: Subject to fact pleading, mandatory disclosure of classes of documents between the parties, ordered by a court, should be possible.

Option 3: Subject to fact pleading, there should be an obligation on each party to provide the other parties to the litigation with a list of relevant documents in its possession, which are accessible to them.

Option 4: Introduction of sanctions for the destruction of evidence to allow the disclosure described in options 1 to 3.

Option 5: Obligation to preserve relevant evidence. Under this rule, before a civil action actually begins, a court could order that evidence which is relevant for that subsequent action be preserved. The party asking for such an order should, however, present reasonably available evidence to support a *prima facie* infringement case.

Option 1 presupposes access on the part of the claimant to a substantial amount of information. Otherwise the court could not, as a result of the fact pleading, assess which documents are "relevant", let alone "reasonably identify individual documents". Disclosure is, in other words, a function of the preceding fact pleading. Proving the gravest infringements of EC competition law,[3] however, depends on secret information which undertakings normally go to some length to conceal – hence the insertion, in Reg. 1/2003, of the power to search the homes of persons in the employment of an alleged infringer. This is true no matter whether the infringement is the result of a clandestine cartel (Article 81 EC) or of an abuse of a dominant position (Article 82 EC). Merely ordering that the defendant companies lay open their business books, as would appear the most obvious choice to the court, will hardly reveal the infringement. From this follow two problems:

First, it will be difficult for the court "reasonably to identify individual documents". It is doubtful whether this description would fit an order to disclose the entire correspondence, or all notes of meetings, between several defendants allegedly participating in a cartel, or all internal memoranda of a single dominant undertaking (or several jointly dominant oligopolists). This would amount to the kind of "fishing expeditions" which would not, at least not in continental procedural law, be allowed to a claimant.[4] On the contrary, it would indicate that the fact pleading was deficient.

[3] By contrast with the English version, the German title of the Green Paper speaks of "EU-Wettbewerbs-recht", but the EU as such has no competition law.

[4] This is in conformity with the findings of the Commission Staff Working Paper – Annex to the Green Paper: Damages for breach of the European Community antitrust rules, SEC(2005) 1732 of 19.12.2005, http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/sp_en.pdf (hereinforth "Staff Working Paper"), para. 60, 61.

Secondly, one might see a problem with respect to self-incrimination. This problem is, however, more apparent than real. It has been dealt with extensively in the Courts' jurisprudence on the Commission's investigative powers under the implementing regulations (until April 2004, Reg. 17 of 1962; Reg. 1/2003 thereafter): the Commission must not prod undertakings to "confess" breaches of Articles 81 and 82. Nevertheless, companies are under an obligation to reveal documents even if such breaches are apparent from the documents.[5] There is no reason to treat differently the disclosure of incriminating documents in the context of civil proceedings. Disclosure in this context would not require self-incrimination, either. The same rules should apply, however, to correspondence between the defendant(s) and their lawyers: here as under Regulation 1/2003,[6] such correspondence is privileged, i.e. not subject to disclosure.

Option 2 would overcome any information deficit on the part of the claimant. It might, conversely, make "fishing expeditions" possible (see above comment on *Option 1*). Safeguards against this would hence be necessary (this also applies, if to a lesser degree, to *Option 1*). Here again, one can draw on the case-law under Regulation 1/2003 and its predecessor. According to the Community courts' jurisprudence, the Commission must not grant access to its file to undertakings subject to an investigation to the extent that this would reveal business secrets or other confidential information of third parties.[7] The position is different only if otherwise, the infringement cannot be proven.[8] In this case, according to Article 15(4) Regulation 772/2004 the information obtained about third parties must only be used for the purposes of other proceedings (be they administrative, or in national courts) seeking to establish infringements of Articles 81 and 82 EC. It must not be used for political retaliation[9] or in order to instigate criminal prosecution.[10]

This can be adapted to civil procedures in the Member States' courts: the defendant would have to disclose information regarding its own conduct. The "classes" of documents to be divulged would have to be defined by the national court in the light of the fact pleading. The same applies to information about the conduct of any co-

[5] Case T-112/98 *Mannesmannröhren-Werke* v. *Commission* [2001] ECR II-729, para. 60–67; Joined Cases T-236 *et al.*/01 *Tokai Carbon* v. *Commission* [2004] ECR II-1181, para. 405–408.
[6] Case 155/79 *Australian Mining and Smelting (AM&S) Europe* v. *Commission* [1982] ECR 1575, para. 24, 27; Joined Cases T-125, 253/03 R *Akzo und Akcros* v. *Commission* [2003] ECR II-4771, para. 102–109, 115–116, partially annulled by the judgment in Case C-7/04 P(R) *Commission* v. *Akzo and Akcros* [2004] ECR I-8739, para. 37–43.
[7] According to the 13th recital to 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] OJ L 123/18, "[t]he category of 'other confidential information' includes information other than business secrets, which may be considered as confidential, insofar as its disclosure would significantly harm an undertaking or person."
[8] Cf. Article 15(2) and (3) Reg. 773/2004: "… necessary to prove an infringement …".
[9] Case T-213/01 R *Österreichische Postsparkasse* v. *Commission* [2001] ECR II-3963, para. 77–79.
[10] Case 145/83 *Adams* v. *Commission* [1985] ECR 3539.

defendant(s). Information regarding third parties without any (alleged) involvement in the subject-matter of the action, however, would not be subject to disclosure. This is because they do not have the opportunity, in the pending action, to shed a different light on the fact pleading by the claimant. Information about them would be exempt from disclosure unless and until they were made co-defendants.

This is not contradicted by the Court's jurisprudence according to which the Commission may use evidence against undertakings in the course of proceedings pending with the Com-mission, even if the Commission has become aware of the undertakings' participation in an infringement only through fortuitous finds which it made with another undertaking. This is because the Commission may involve undertakings whose infringement has newly come to light in proceedings already instigated only if the infringement is the same regarding the relevant market and/or the agreement or abuse at the heart of the infringement. Otherwise, entirely new proceedings have to be initiated. Should the infringement be the same, the third undertakings enjoy all rights of the defence in the continuing proceedings. When private parties obtain incriminating information by coincidence, no such limitations obtain.

Option 3 is similar to the solution that currently applies to documents not attached to the Commission's file on an undertaking under investigation. The undertaking is granted access to the file (with some of the exceptions mentioned above). The file, however, need not contain all the material discovered by the Commission with regard to the subject-matter of the proceedings. Instead, the Commission draws up a list of documents not attached to the file. This is meant to give the undertaking an opportunity to discover what might be exonerating documents in the Commission's possession.[11] *Option 3,* however, does not allow any selection of documents to be revealed; for want of any qualification, "a list of relevant documents" will have to be read as "a list of *all* relevant documents".

The difference between *Option 2* and *Option 3* seems to be that in the latter, the national court would not specifically have to order the exchange of lists. Parties would have to swap lists in any case; the documents referred to therein would then be accessible to the other side. This seems but a roundabout way of achieving the same result as under *Option 2,* but appar-ently without the court's involvement. Such involvement, however, is advisable, not least in order to secure the exceptions to disclosure mentioned above. If the court became involved, the difference be-

[11] If a document is incriminating and the undertaking has not had the chance to express its views on it, the Commission must anyway not base its decision on it, or else the decision will be susceptible to annulment under Article 230 EC to the extent that the Commission has so based its decision; Article 27(1), second sentence Regulation 1/2003, Article 11(2) Regulation 773/2004 (fn. 7). These provisions codify the courts' jurisprudence to this effect, see, e.g., Case 107/82 *AEG-Telefunken* v. *Commission* [1983] ECR 3151, para. 26; Joined Cases T-25 *et al.*/95 *Cimenteries CBR* v *Commission* [2000] ECR II-491, para. 383; Joined Cases T-191 et al./98 *Atlantic Container Line* et al. v. *Commission* [2003] ECR II-3275, para. 336–340.

tween the two options would dwindle to that between (all) "relevant docu-ments" and "classes of documents" – each, however, "[s]ubject to fact pleading". The "classes of documents" will, hence, also consist of relevant documents and moreover, of *all* relevant documents in the class. In all, therefore, *Option 3* seems dispensable.

On balance, *Option 2* appears preferable to *Option 1*. Because of the clandestine nature of the gravest infringements, courts will find it hard "reasonably to identify individual docu-ments" which might be apt to prove the claimant's case.

Options 4 and *5* complement whichever of *Options 1–3* is eventually chosen. *Options 4* and *5* should therefore be adopted regardless. Which documents must not be destroyed (*Option 4*) or would be subject to an injunction (*Option 5*) would, of course, depend on which of *Options 1–3* were chosen.

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

Option 6: Obligation on any party to proceedings before a competition authority to turn over to a litigant in civil proceedings all documents which have been submitted to the authority, with the exception of leniency applications. Issues relating to disclosure of business secrets and other confidential information as well as rights of the defence would be addressed under the law of the forum (i.e. the law of the court having jurisdiction).

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

By making litigants address their request for information to the parties to proceedings before a competition authority, *Option 6* seems to introduce an unnecessary complication. If any party to proceedings can be the addressee of the request, and all the information is held by the competition authority, it would be simpler to direct the request to that authority. A litigant might know of one party's involvement in the proceedings but not of another's. This is a more or less fortuitous circumstance. According to *Option 6,* any party to the proceedings could be called upon to disclose information. A party cannot, hence, entertain any legitimate expectation that it would not be so called upon, merely because their involvement in the proceedings had not come to the notice of the litigant.

What is more, it is not readily apparent on what basis private parties should succumb to the demand by another private party when they have not even purportedly caused that other party any harm. The proper way to allow the addressee of the request to safeguard its rights would be to draw them into the litigation. This, however, *Option 6* seems not to contemplate. Time, expense, spatial distance and language differences would militate against such a solution in any case.

Option 6 contains a further detail worth reconsidering, that is the transmission of the information between one or more parties to competition proceedings and the litigant(s). This may cause the very concerns about confidentiality which the last subclause of the first sentence and the second sentence of *Option 6* address. In order to quell these concerns, one might contemplate a solution whereby litigants communicate their request to the court in which the action is pending. This court would, in turn, pass the request on to the competent court in another Member State, under Article 4(1)(f) Regulation 1206/2001.[12] The latter court would obtain the required information from the competition authority and pass it on to the first court which would divulge the information to the litigants, with any applicable exceptions (on information contained in leniency applications, see **Question J**).

This method may seem overly complicated. Proceedings would, however, take a very similar course if the addressee were to refuse the litigant's demand. To enforce the request would require a judgment by a national court. If the addressee of the request were established in another Member State, this judgment would have to be enforced, in accordance with the provisions of Chapter III of Regulation 44/2001,[13] in that other Member State. Competition authorities can be presumed to be more accommodating, not least because they are under the obligation of mutual assistance pursuant to Article 10 EC.[14] They are, thus, the safer bet from the outset.

As an alternative to this method, Article 15(1) Regulation 1/2003 could be amended to allow national courts to require information from other Member States' competition authorities. Again, this would be no more than a specific implementation of Article 10 EC.[15] Within the European Competition Network, Article 11 Regulation 1/2003 already provides for a wide-ranging exchange of information.[16] If anything, courts offer better guarantees of the rights of litigants and of third parties. It would, therefore, seem but a small step to give them a right of access to the information in the possession of competition authorities, including those of other Member States.

Option 6 further suggests that regarding the disclosure of business secrets and other confidential information as well as rights of the defence, the law of the *forum* be applicable. This would have the advantage of simplicity and familiarity to the parties. As the same option, however, envisages the litigants' drawing on third parties anywhere in the Community, there should be a correspondingly Community-wide,

[12] Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, [2001] OJ L 174/1.
[13] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2001] OJ L 12/1.
[14] See Case C-251/89 *Athanasopoulos* [1991] ECR I-2797, para. 57 for the relationship between authorities of different Member States *inter se;* arguably, the same applies to administrative bodies *vis-à-vis* the courts.
[15] See preceding fn.
[16] On this, see also the Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/03), [2004] OJ C 101/43.

uniform set of rules, and of safeguards in particular. Again, the practice of the Commission and the Community courts could serve as a common point of reference.

Option 7 is not for an academic institute such as the Max-Planck-Institute to comment on. Nevertheless, the rules which govern the preservation of confidentiality within the European Competition Network[17] might be drawn on.

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

Option 8: Infringement decisions by competition authorities of the EU Member States to be made binding on civil courts or, alternatively, reversal of the burden of proof where such an infringement decision exists.

Option 9: Shifting or lowering the burden of proof in cases of information asymmetry between the claimant and defendant with the aim of redressing that asymmetry. Such rules could, to a certain extent, make up for the non-existent or weak disclosure rules available to the claimant.

Option 10: Unjustified refusal by a party to turn over evidence could have an influence on the burden of proof, varying between a rebuttable presumption or an irrebuttable presumption of proof and the mere possibility for the court to take that refusal into account when assessing whether the relevant fact has been proven.

Option 8, first sub-option (decisions by competition authorities binding on courts) would considerably lighten plaintiffs' burden of proof. In this respect, it would certainly help to make competition law enforcement more effective. Questions arise, however, with regard to the protection of defendants' rights, and with what is commonly termed "national sovereignty". Administrative decisions being binding on national courts are not unheard of. Such a binding effect allows for a rational division of labour and allocation of resources between courts and specialised agencies. It also thwarts attempts at circumventing the time limits for initiating proceedings of judicial review of administrative decisions.[18]

Within one and the same Member State, this is acceptable. The level of protection of rights afforded by administrative agencies and ultimately the administrative courts on the one hand, and by the civil courts on the other, is seen as roughly commensurate. Also, the administration and the courts in the same Member State derive the authority to enforce their decisions from the same sovereign, be it the people or the crown.

The same is not true as between Member States. The level of protection afforded to individual rights can differ. Undistorted competition as protected by Articles 81 and

[17] See Article 12 Regulation 1/2003 and the Commission Notice mentioned in the previous fn.

[18] A similar mechanism to stop such circumventions was introduced by the ECJ in Case C-188/92 *Textilwerke Deggendorf* [1994] ECR I-833; see also Case C-408/95 *Eurotunnel plc.* v. *Seafrance* [1997] ECR I-6315.

82 EC, however, serves the Member States and their peoples as much, if in different ways, as the various emanations of national sovereignty. The Member States have, at any rate, already pooled some of their sovereignty when they created the Community (and later the Union).[19] What is more, membership of the Union requires, by virtue of Articles 6 and 7 EU, a high standard of protection of human rights in the Member States. With some generality, it can be said that these standards do not differ so much from Member State to Member State as to rule out the proposed binding effect.

What is more, in all Member States administrative decisions are open to some form or other of judicial review. Often, therefore, what would be made binding on the courts of other Member States under *Option 8* is the decision *as reviewed* by at least one instance of courts or another independent adjudicative body. Between the courts of different Member States ("horizontally", as it were), the level of rights protection will be even less different than between courts in one, and administrative bodies in another Member State ("diagonally").

Lastly, it must not be forgotten that the findings of one authority typically refer to infringements occurring within its territorial jurisdiction only. In any case, for the binding effect envisaged in the first sub-option, such a limitation could be provided, as is the prevailing interpretation (if not obviously the wording) of the new section 33(4) of the German Act against Restraints of Competition (*GWB*).[20] Either way, it is quite clear that a court in another Member State would not be in the best position to investigate abroad and after even more time had passed since the alleged infringement. Seen in this light, the binding effect suggested in *Option 8* merely acknowledges the severe obstacles national courts would have to overcome.

In all likelihood, *Option 8,* second sub-option would yield the same result as the first sub-option. A negative proof will be difficult for the defendant, particularly if the decision has already been the subject of judicial review. In this case, there would also arise a conflict with Article 36 Regulation 44/2001which provides that "under no circumstances may a foreign judgment be reviewed as to its substance." Articles 34 and 35 of the Regulation provide for some checks as to procedural irregularities, but these are unlikely to occur too often in antitrust cases of some importance. The second sub-option might thus lead to a situation where one national court – the one in whose jurisdiction the enforcement falls – rubber-stamps a judgment from another Member State, while in a different court of the same Member State – the one where the antitrust damages litigation is pending – the substantive correctness of the same judgment is being called into question.

[19] Case 26/62, *van Gend en Loos,* [1963] ECR 1 at 12; Case 6/64, *Costa* v. *ENEL,* [1964] ECR 585 at 593, 594.

[20] Gesetz gegen Wettbewerbsbeschränkungen, as amended and newly promulgated in *Bundesgesetzblatt* (BGBl.) of 15 July 2005, vol. I p. 2114 and last amended as in [2005] BGBl. vol. I, p. 2676; in German under http://bundesrecht.juris.de/bundesrecht/gwb/gesamt.pdf.

There appear to be two ways to solve this problem. First, one could distinguish between decisions that have, and those that have not, been reviewed judicially. The first sub-option would apply to those which have been so reviewed, the second to those which have not. Secondly, one might extend (with any necessary adaptations) the standards of Articles 34 and 35 Regulation 44/2001 to administrative decisions. So qualified, *Option 8* would be complicated but palatable even to those who attach overriding importance to the notion of national sovereignty: it merely transposes a mechanism already in existence to the field of competition law litigation.

Option 9, suggesting to lower the standard of proof in order to make up for deficiencies in the rules of disclosure, puts the cart before the horse: the lower the standard of proof, the higher the chance that a judgment is "wrong" (or inadequate or insufficiently reasoned) in substance. Such a judgment would also be unfortunate from a policy perspective, as it might indicate that all transactions of a certain type are vulnerable. In practice, a lower burden of proof might induce more voluntary disclosure, as defendants desperately try to shed a different light on the facts and thus to undermine what little conviction is required on the part of the court. This is, however, not likely to happen (let alone to work). At any rate, sloppy judicial reasoning would be too high a price to pay for the experiment. *Option 9* should not be pursued.

Options 8 and *10* are mutually complementary. Seeing that some documents are already exempt from disclosure (see above Question A) and that *Option 10* is premised on an "unjustified" refusal, the most draconian consequence of an unrebuttable presumption seems apposite.[21] This will also provide an incentive voluntarily to disclose. An unjustified refusal which is later dropped, and the evidence disclosed after all, can still be taken into account in the court's assessment, should any doubts remain about its interpretation.

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

Option 11: Proof of the infringement should be sufficient (analogous to strict liability).

Option 12: Proof of the infringement should be sufficient only in relation to the most serious antitrust law infringements.

Option 13: There should be a possibility for the defendant to show that he excusably erred in law or in fact. In those circumstances, the infringement would not lead to liability for damages (defence of excusable error).

[21] This is, incidentally, the solution adopted by the German Code of Civil Procedure (*ZPO*), see, *e.g.,* secs. 371(3) and 427 *ZPO*; but see also sec. 446, where the refusal by a litigant to give oral testimony at the behest of the other party will only be assessed taking into consideration all relevant circumstances of the case.

Option 11 goes one step further than the current jurisprudence of the Community judiciary. According to this, it is not required for a company to know that it breaches Articles 81 or 82, merely that its conduct is anti-competitive. What is more, it is enough that the company ought to have known that its conduct would have to be so classified.[22] Large companies in particular may not even rely on the assessment of their advisors,[23] and any attempt by companies at concealing their cooperation will be taken to indicate intent.[24]

This comes close to strict liability but leaves a small margin of (excusable) error to companies, as in *Option 13.* As for any defence, the burden of proof is on the defendant. It is not clear, though, which circumstances would make an error excusable. In cases of Member State liability for breaches of Community law ("*Francovich*"-liability),[25] the ECJ has not found the required "sufficiently serious breach" of Community law where Community law was ambiguous,[26] and/or where other Member States[27] or the Commission[28] had adopted the same erroneous interpretation.[29] This could best be characterised as an objective test: it is immaterial whether specifically the defendant found the law unclear, but whether the ECJ thought it was insufficiently clear. The same should be true of errors of fact, not least because law and fact blend indistinguishably in some instances. For example, Art. 81(1) and Art. 82 EC are only applicable where a quantitatively defined *de minimis*-threshold is passed.[30]

As far as competition law is concerned, since the abolition by Regulation 1/2003 of the Commission's monopoly of granting exemptions under Article 81(3) EC, no guidance will be forthcoming from the Commission anymore, except in very narrowly circumscribed conditions.[31] The Commission's notices on substantive issues of EC competition law[32] will also leave many questions unanswered. In these cir-

[22] Joined Cases T-5, 6/00 *FEG* v. *Commission* [2003] ECR II-5761, para. 396; Joined Cases T-49–51/02 *Brasserie nationale* v. *Commission* [2005] ECR II-0000, para. 155–158.
[23] Case T-175/95 *BASF Coatings* v. *Commission* [1999] ECR II-1581, para. 152.
[24] Case T-224/00 *Archer Daniels Midland* v. *Commission* [2003] ECR II-2597, para. 347.
[25] As in Case C-6&9/90 *Francovich and Bonifaci* [1991] ECR I-5357.
[26] Case C-319/96 *Brinkmann Tabakfabriken* [1998] ECR I-5255.
[27] Joined Cases C-283 etc./94 *Denkavit* [1996] ECR I-5063.
[28] Case C-392/93 *British Telecom* [1996] ECR I-1631.
[29] According to Article 220 EC, only the ECJ's and CFI's interpretation of Community law is authoritative.
[30] See Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) (2001/C 368/07), [2001] OJ C 368/13.
[31] Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) (2004/C 101/06), [2004] OJ C 101/78.
[32] Commission Notice – Guidelines on Vertical Restraints (2000/C 291/01), [2000] OJ C 291/1; Commission Notice – Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (2001/C 3/02), [2001] OJ C 3/2; Commission Notice – Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements (2004/C 101/02), [2004] OJ C 101/2; Commission Notice – Guidelines on the effect on trade concept contained in

cumstances, situations are conceivable where an error about the anti-competitive nature of an undertaking's conduct might arise. *Option 13* is, therefore, preferable to *Option 11.*

Option 12 adopts a position midway between *Options 11* and *13.* It would be easy to establish a consensus that price fixing and market sharing are "the most serious antitrust law infringements", as they are most obviously opposed to EC competition law's aims of fostering consumer welfare and market integration. They have also consistently and severely been reproached by the Commission and by the European courts.[33] Conversely, no defence of ignorance will be available in these cases. Classification as a core restriction may not, however, always be easy. As a general clause, *Option 12* would not clarify anything: if a hard-core infringement is established, fault is beyond doubt; if a codification of the case-law were attempted in *Option 12*, the resulting provision might become unwieldy, or too rigid to accommodate developments in jurisprudence and secondary legislation, or both. *Option 12* should, therefore, not be adopted.

Question E: How should damages be defined?

Option 14: Definition of damages to be awarded with reference to the loss suffered by the claimant as a result of the infringing behaviour of the defendant (compensatory damages).

Option 15: Definition of damages to be awarded with reference to the illegal gain made by the infringer (recovery of illegal gain).

Option 16: Double damages for horizontal cartels. Such awards could be automatic, conditional or at the discretion of the court.

Option 17: Prejudgment interest from the date of the infringement or date of the injury.

Option 14 corresponds to the traditional notion of damages, whereas at least in some national tort laws, an increasing tendency to take illegal gains into consideration can be observed.[34] In the latter cases, the claimant is seen (and rewarded) as the agent of respect for the law (against defamation, say, or against manipulations of the financial markets), thus serving the public good, in addition to seeking to protect his individual interests. *Options 14* and *15* are, therefore, not exclusive of each other.

Articles 81 and 82 of the Treaty (2004/C 101/07), [2004] OJ C 101/81; Communication from the Commission – Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), [2004] OJ C 101/97, and a number of sector-specific guidelines.

[33] See, *e.g.,* the early condemnation of absolute territorial protection in Joined Cases 56 and 58/64 *Consten and Grundig* v. *Commission* [1966] ECR 299, or of price fixing in Case 48/69 *ICI* v. *Commission* [1972] ECR 619, in both of which the ECJ upheld the Commission's decision.

[34] *Monopolkommission,* Das allgemeine Wettbewerbsrecht in der Siebten GWB-Novelle, Sondergutachten der Monopolkommission gemäß § 44 Abs. 1 Satz 4 GWB, available under http://www.monopolkommission.de/sg_41/text_s41.pdf, para. 80 (p. 43). More specifically on private actions for damages in Germany, see *Bundeskartellamt* [Federal Cartel Office], Private Kartellrechtsdurchsetzung – Stand, Probleme, Perspektiven (Sept. 2005), available at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Diskussionsbeitraege/05_Proftag.pdf

The damage suffered by the plaintiff should be the *minimum* of damages, or else he would, despite litigation, be left with an overall loss. The illegal gain cannot serve this function as the perpetrators might not have reaped any.[35] Nevertheless, if the gains of the defendant, for whatever reason, exceeded the damage suffered by the claimant, there is no reason to allow the defendant to keep the surplus. Natural justice as much as the aim of fostering respect for competition law and of enhancing the effectiveness of its enforcement demand that the perpetrator be stripped of such surplus.

A different matter is whether it should be the plaintiff to take and to keep the surplus. Alternatively, the competition authority could receive it, either to keep in its own budget or to pay into the state's coffers. If the authority had not initiated proceedings it would, however, receive an unwarranted windfall, while the claimant's incentives to bring an action would be diminished as others got to enjoy the fruits of his endeavour. There is, conversely, no reason why the surplus should go to plaintiff if it was the competition authority which recovered it: the surplus is only the bonus for those who foster competition law in general; the plaintiff's damage compensated, justice is restored with regard to him. To put the point differently: the claimant's forgoing the surplus (which the authority gets to keep) is the price for the procedural advantages[36] which the claimant derives from the authority's uncovering the cartel or abuse. The surplus should, therefore, stay with whoever recovers it first. Also, the surplus would be deemed to have been skimmed off by the fines imposed by the competition authority. This is because the illegal gain will normally be a factor in the calculation of the fine. The Commission already sets fines so as to claw back any illegal profits reaped by the infringers, and this has been endorsed by the Court of First Instance.[37] If individual authorities do not yet take the illegal gain into consideration, they should in future follow the example of the Commission. To leave the recovering of the illegal gains to private plaintiffs would have the advantage of a clear and simple division of labour. It would be safer, however, for the authority to collect these gains, as its proceedings might, for whatever reason, not be followed by private action.

Option 16 presumably takes *Option 14* as the point of reference for the term "damages". Also, "horizontal" should be read as "hard core". Not all horizontal cartels are equally danger-ous, and not all vertical cartels are less dangerous than horizontal ones. This reading would also be in line with *Option 12*. *Option 16* takes *Option 14* into the direction of *Option 15* with its emphasis on rewarding those who benefit the general interest as an incident to protecting their own. As long as the entire sur-

[35] Similarly, the Court of First Instance denied a reduction of the fines where the cartelists had not made any gains because otherwise, the fines would lose their deterrent effect: Case T-241/01 *Scandinavian Airlines System* v. *Commission* [2005] ECR II-0000, paras. 144–147.
[36] See above **Questions A and B**.
[37] Joined Cases T-67 et al./00 *JFE* v. *Commission* [2004] ECR II-0000, para. 536.

plus is clawed back from the infringer, *Option 16* is as readily acceptable as is the combination of *Options 14* and *15* advocated above.

To the extent that the surplus were exceeded, however, *Option 16* would lend the judgment on the claimant's action a punitive character. There is nothing wrong with this as far as hard core cartels are concerned:[38] it is always open to the competition authority to prosecute the infringement. The defendant, in turn, has no legitimate expectation that any punishment would be meted out by an administrative body acting in the general interest, rather than by a civil court upholding the private interests of an individual. The distinction becomes even more blurred if the authority's decision is confirmed on judicial review by a court (administrative, or indeed civil). In this case, it would also be obvious that the level of legal protection for the defendant would not vary to any substantial degree.[39]
The only problem remaining from the point of view of the defendant's fundamental rights seems to be the prohibition of double jeopardy (*ne bis in idem*).[40] This could, however, be accommodated by a mandatory rebate in subsequent proceedings by a competition authority. No rigid formula seems possible here. The authority's sanctions, though also pecuniary in nature, are not primarily linked to the notion of damages, but at least as much to those of reproach and deterrence.

If the administrative sanctions, however, preceded the private action, a mandatory doubling of damages, however calculated, in the subsequent judgment might well fall foul of the pro-hibition of double punishment. In this case, doubling should be conditional (not discre-tionary, as the defendant's fundamental rights should be upheld with every certainty). Because it is for the competition authority to determine the overall level of fines, with private actions in this respect only acting as an additional enforcement mechanism, no doubling would take place once the authority had imposed any fines. This would be so even if damages plus fine would not equal twice the damages, or if the court considered the fines too low.
Doubling of damages, be it mandatory, conditional, or discretionary, might also cause a related policy problem. The Commission has, since the early 1980s, continually raised the level of fines, and the Court of Justice has consistently held that undertakings infringing Com-munity competition law have no legitimate expectation that this increase will not continue in the future.[41] An immutable factor of two would introduce just such an element of foresee-ability. This point can, however, be neglected in practice: competition authorities are unlikely to cease enforcement ac-

[38] Non-hard-core cartels (see our comments on *Option 12*) should be treated more leniently, at least by granting national courts discretion regarding the doubling of damages.
[39] This would be true at least as long as only pecuniary sanctions are in issue. Imprisonment as provided for in the United Kingdom Enterprise Act 2002 is not, at this stage, being suggested as a punishment to be adopted by all Member States anyway.
[40] Other concerns are addressed and rejected by the *Monopolkommission* (fn. 34), para. 75–84.
[41] Starting with Joined Cases 100–103/80 *Musique Diffusion* v. *Commission* ("Pioneer") [1983] ECR 1825; see, most recently, Joined Cases C-189 *et al.*/02 P *Dansk Rørindustri* et al. v. *Commission* [2005] ECR I-0000, para. 169–173, 209–232, and in connection with leniency programmes, para. 453–457.

tivities altogether. As long as the threat of their intervention exists, it will have a deterrent effect.
In all, therefore, *Options 14–16* could be combined in the interest of maximum efficiency and deterrence: the higher amount of either the damage caused, or the surplus reaped, would be doubled at the discretion of the court. Where this would infringe the principle *ne bis in idem,* the private plaintiff would be compensated for the damage sustained. He would, in this case, not be awarded any surplus of the gains over the damages. These would already have been stripped away by the fine imposed by the competition authority acting before any private claim was brought.

The two sub-options of *Option 17* again go to the heart of the question: what is the purpose of private enforcement? Prejudgment interest from the date of the infringement, when no damage might yet have occurred, would highlight private litigants' role as enforcers of com-petition law in the general interest; to grant such interest from the time of the injury would correspond with the traditional, purely remedial understanding of private competition law litigation.[42] As regards the preceding options, equity seems to demand a distinction: interest should be due from the date of infringement if the private action precedes any action taken by the competition authority (which, in fixing their fine, would take into consideration the extended interest already paid). If the competition authority had acted first, there would be no need to offer this added incentive to private litigants. In this case, they should be allowed to calculate interest only from the time they actually suffered damage.

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

Option 18: What is the added value for damages actions of use of complex economic models for the quan-tification of damages over simpler methods? Should the court have the power to assess quantum on the basis of an equitable approach?

Option 19: Should the Commission publish guidelines on the quantification of damages?

Option 20: Introduction of split proceedings - between the liability of the infringer and the quantum of damages to be awarded - to simplify litigation.

As far as the use of "complex economic models" is concerned, the evidence so far is little encouraging. Some German courts, including one higher court, appeared not even on top of simple economic models.[43] Nevertheless, the *Ashurst*-study submit-

[42] It should, however, be noticed that interest on fines imposed by the Commission is only due once the deadline for payment has expired which the Commission sets together with the imposition of fines. The undertakings can escape execution by applying to the ECJ for suspension under Article 256, fourth subparagraph EC. Although interest is not mentioned in Regulation 1/2003, the Court has repeatedly endorsed this practice: see, e.g., Joined Cases T-236 *et al.*/01 (fn. 5), para. 476–479; Joined Cases T-71 *et al.*/03 *Tokai Carbon (No. 2)* [2005] ECR II-0000, para. 411; Case T-23/99 *LR AF 1998* v. *Commission* [2002] ECR II-1705, para. 395–398.
[43] LG [regional court] Mannheim, [2004] GRUR 182; LG Mainz, [2004] NJW-RR 478; OLG [higher

ted in 2004 to the Commission does not hold out much hope that complex models might ever be of use in practice.[44] The number of factors to be considered, their interdependence, and the problem of attaching specific figures to each in a given case, all strongly point towards an equitable approach as the more realistic of the two sub-options of *Option 18*. Such an approach is not necessarily little more than a rough rule of thumb – it is up to the parties to plead models however complex they like. The court would, however, be free to make among these a choice informed by common sense rather than by textbook economics. The Commission might still try to issue guidelines, as suggested in *Option 19* and preferably couched in non-technical language, drawing (if possible) on specific examples of the application in practice of more sophisticated models of calculating the quantum of damages.

The solution recommended in *Option 20* has proven its workability in German procedural law.[45] This two-step procedure is currently only admissible in cases where the amount of the claim is not as yet ascertainable; otherwise, the plaintiff has to take the most direct way to his objective of obtaining damages. There is, however, no reason in principle why this procedure should not be extended (limited to competition law litigation if need be) to cases where the quantum is ascertainable but difficult to establish with any precision. This would also increase the chances that following a successful action as to the ground of liability, the parties reach agreement on the damages without troubling the court with the question of quantification.

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

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

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regional court] Karlsruhe, [2004] NJW 2243; on these, see *von Wiese,* Private actions, vitamins and the passing-on defence – turnaround in the German courts?, [2004] Comp Law 247; *Bulst,* Private Kartellrechtsdurchsetzung durch die Marktgegenseite – deutsche Gerichte auf Kollisionskurs zum EuGH, [2004] NJW 2201; but see, for a different approach, LG Dortmund, [2004] EWS 403, with an annotation by *Bulst,* Internationale Zuständigkeit, anwendbares Recht und Schadensberechnung im Kartelldeliktsrecht, [2004] EWS 403.

[44] *Clark/Hughes/Wirth,* Study on the condition of claims for damages in case of infringement of EC competition rules – Analysis of economic models for the calculation of damages, Ashurst, Brussels 2004, available at http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/economic_clean_en.pdf ; see also *Waelbroek/Slater/Even-Shoshan,* Study on the conditions of claims for damages in case of infringement of EC competition rules – Comparative report, Ashurst, Brussels 2004, available under http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/comparative_report_clean_en.pdf.

[45] See sec. 256 *ZPO* (fn. 21).

Option 22: The passing-on defence is excluded and only direct purchasers can sue the infringer. Under this option direct purchasers will be in a better position as the difficulties associated with the passing-on defence will not burden the proceedings.

Option 23: The passing-on defence is excluded and both direct and indirect purchasers can sue the infringer. While the exclusion of the passing-on defence renders these actions less burdensome for the claimants, this option entails the possibility of the defendant being ordered to pay multiple damages as both the indirect and direct purchasers can claim.

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

The passing on-defence has been the subject of a long-running controversy, both in the European Community and, starting earlier, in the USA.[46] It is fair to say that today, it is the most vexed question of European private competition law litigation. *Options 21–23* highlight the issues involved: allowing the defence tends to remove direct purchasers as potential litigants, and draw in customers further downstream instead. While it is most likely that they have ultimately suffered damage through the infringement, they will also find it harder to prove that the breach of competition law was causal for their loss. In other words, substantive justice and procedural convenience are in conflict.

Option 24 comes close to reconciling these two concerns, but can still be improved on. Allowing "any" victim to sue would unnecessarily swell the ranks of claimants and thus be procedurally cumbersome. Also, it would not make the problems of proof go away. We therefore advocate a solution where primarily the direct purchasers would be allowed to bring an action. These are most likely to succeed anyway. In order to forestall any conflicts of interest, certain companies would not be counted as "direct customers", namely those companies connected to infringers in the same way as the "block exemption" regulations for the application of Art. 81(3) define "connected undertakings".[47] Their customers would (subsidiarily) also be allowed standing. The reasons why they were excluded to begin with are purely pragmatic. What is more, those direct customer who would, in the interest of good business relations with the infringers, rather not bring an action against them would also be leapfrogged by *their* customers.

An alternative could be to allow one or several direct customers willing to bring an action to claim damages on behalf of even those unwilling (or those excluded for their connections with the infringers). The drawback of this solution is, however, that an unsuccessful action might preclude actions by the customers of the unwilling direct customers. This depends on how narrowly national procedural law defines the

[46] *Olsen,* Enhancing private antitrust litigation in the EU, [2005] Antitrust 73; *Rudden/Bishop,* Gritz and Quellmehl – Pass it on, [1981] E.L.Rev. 243; *Monopolkommission* (fn. 34), para. 66–74.

[47] The wording is identical in all block exemption regulations; see, e.g., Article 1(2) of Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, [2004] OJ L 123/11.

subject-matter of proceedings. New evidence on essentially the same infringement might not allow these second-in-line customers to raise claims again whose dismissal were considered *res iudicata.* It might, therefore, be easier right away to allow standing to customers of direct customers unwilling to bring an action against the infringers.

Furthermore, damages should be calculated in accordance with our reply to **Question E**. This should remove any incentives for infringers and (unconnected, see above) direct purchasers to collude: the direct purchaser(s) would have too much of an incentive to cheat on the infringer(s). These, in turn, would stand more to lose than to gain from any such arrangement and would, at any rate, have to live with a troubling uncertainty. This would render the temptation all the greater to seek refuge in a leniency application, not least because too many parties would have to be involved in this two-tier cartel (between the original cartelists, and their victims who thus form their own cartel) for nothing to leak out. In short, any deal between infringers and direct customers would foreseeably be too instable even to be contemplated.

On a successful action, however, the plaintiff(s) would not be allowed to keep the damages, at least not initially. For it is as unlikely that they have borne all loss (i.e. that the conditions of their market downstream did not allow them to pass on any price rises) as it is that they have suffered none of it (i.e. that their purchasers' demand was completely price-inelastic). This would depend on the market conditions in each case. The wholesale denial or admission of the passing on-defence is too crude to mirror this adequately (but see above *Option 18* on the complex economic modelling that would be required for a more nuanced assessment).
Instead, the successful claimant should be placed in a position similar to that of a trustee in bankruptcy. The task of such a trustee is to distribute the bankrupt's estate among all those who compete in bankruptcy for their alleged claims. The requirement to register claims would not be overly burdensome on victims further down the supply chain, yet sufficient to keep those away do not care to make a point and to recover small sums. The difference would be that ultimately, the claimant(s) would get to keep the leftover spoils of their litigation. If this were seen to be too much of an incentive for the claimant to cling on to the damages unjustifiedly, the court might also consider appointing a neutral trustee. For maximum deterrence of infringement and in order not to detract from the incentives of claimants, the entire costs of the distribution would be borne by the infringer. In this context, any amount of "complex economic models" could determine, if the trustee so chose, the distribution of the damages among the victims at the various levels of trade.

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

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

Option 26: A special provision for collective action by groups of purchasers other than final consumers.

In light of the above answer to **Question G,** *Option 25* would appear only second best. Consumers are farthest removed from the cartel, with typically several layers of production, refining, and distribution, between them and the infringers. This circumstance compounds problems of proof, both regarding the damage sustained (see **Question E**), and regarding causality (see **Question N**). Consumer associations are certainly better organised than individual consumers and can gather or procure more legal expertise, yet this circumstance would not make the problem go away. Nevertheless, to grant consumer associations standing might at least overcome the obstacle that the individual's damage is normally so small that pursuing the matter would hardly ever be worth their while, even if the other hurdles did not exist.
As far as the issue of standing is concerned, an authorisation system does not appear to be called for. It would be required if without it, frivolous or incompetent actions might be brought. This would not be the case merely because a consumers' association were formed in order to go after a specific cartel ("gold digging"). This, too, would enhance the effective enforcement of Community competition law; the claimants' motivation is neither here nor there. Also, as facts are the prime issue in competition cases, spurious arguments as in some past consumer protection cases before the German courts would be beside the point.[48] Accordingly, no filter (as in the Directive on injunctions for the protection of consumers' interests)[49] would be required to ensure that associations are not fronts for one group of competitors out to make life harder for another group. The rules on civil procedure in the Member States are sufficient to filter out any procedurally deficient claims. All other questions, including the distribution of damages, can be left to competition in the market for this type of services. This is especially true of the issue of distributing damages. Consumers will not assign their claims gratuitously, nor will they mandate somebody to pursue these claims in the courts for a fee but without the obligation to account for any damages obtained.

For the same reason, one might well argue that lawyers already offer the expertise, and the ethics, that are required. Arguably, the perceived excesses of the American system are ultimately due to the involvement of juries in first instance civil trials. In fairness, it should be noted that on appeal, the most spectacular awards are routinely reduced – which, however, goes mostly unreported. No-one argues for their intro-

[48] See, e.g., Case C-315/92 *Verband Sozialer Wettbewerb* v, *Clinique Laboratories and Estée Lauder* [1994] ECR I-317; Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln* v. *Mars* [1995] ECR I-1923.
[49] Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, [1998] OJ L 166/51, Article 3.

duction in the Member States of the European Community.[50] It is hard to see what consumer associations would offer over and above the services of the existing national bars. It is also not entirely clear how in the absence of substantial Member State subsidies (which would be in themselves problematic from a competition point of view) they would attract able personnel and acquire legal expertise that would be more suitable to consumers' needs. Nevertheless, they might still work as a kind of insurance scheme for legal costs. In this capacity, they could, ideally after a competitive tender, contract out legal work to existing law firms. Even this function might, however, become at least partially redundant if special rules were introduced to reduce the cost risk for claimants (see **Question I**).

In this context, it would also be necessary that individual consumers continue to enjoy standing. Admittedly, there would be drawbacks to this. It would be tantamount to allowing some consumers to sit on the fence and watch the association's action progress, ready to take a "free ride" if it succeeded. This could also weaken associations' clout in bargaining for extra-judicial settlements.[51] Competition in consumer representation would, however, be slower to get off the ground if the associations as service providers had a guaranteed, captive clientele. Not many consumers will go it alone, anyway, but at least the possibility should remain as a spur for associations to offer "value added".

As associations would, in this view, essentially be private plaintiffs who had been assigned, or authorised to enforce, other private parties' claims, damages should be awarded to them as in our reply to **Question E**. As they have no power of coercion (see **Question A**), consumer associations cannot, and should not, supplant public competition authorities anyway.

Special provisions for collective action by groups of purchasers other than final consumers, as contemplated in *Option 26,* would be particularly desirable if only direct customers would be allowed to bring an action, as advocated in our reply to **Question G**. Collective action on their part should aim at taking away the entire surplus from the infringer(s), or at least at compensating the whole of the damage caused. These provisions should hence aim at drawing as many direct customers as possible into the action. The same moral hazard as described above in relation to individual consumers would arise at this point: each direct purchaser would be tempted to wait and see whether the action brought by the others succeeded. If it did, he would be spared proving much of the facts. If it did not, and he did not have any means of proving the infringement superior to the others' evidence, it would be established at no cost to him that his claim was worthless from the outset.

[50] To avoid misunderstandings, it should be pointed out that civil juries are now so much of a rarity (*Andrews,* Civil Procedure, ch. 19 of *Birks,* English Private Law, vol. II – Law of Obligations; Litigation, Oxford 2000, para. 19.288–19.290) that they have said to be "virtually extinct" (*Baker,* An Introduction to English Legal History, 4th ed. London 2002, p. 92).

[51] For a similar argument in the context of producer cooperatives, see Case T-61/89 *Dansk Pelsdyraflervorening* v. *Commission* [1992] ECR II-1931, para. 98.

Two solutions to this problem are conceivable. First, unless defendants made a *prima facie* case which direct customers of the infringers had not been subjected to the cartel's practices, there would be a presumption that all had been affected, and the damages increased accordingly. In their own action, the latecomers would have to prove that they had suffered damage exceeding the assumptions of the court, and only the excess could be sued for. For the main part of their damage, they would receive only a considerably reduced share in the distribution, as they had saved the time and expense of the joint suit. Secondly, there could be forced assignment to the plaintiffs of the claims of those who would rather not join an action, again with a reduction in their share of the damages.

Two problems common to all collective actions by direct customers or other purchasers have already been touched on above (see *Option 21–23*). One is that some victims might be reluctant to sue the infringers, either in the perceived interest of continued business relations, or for fear of outright reprisals. This, however, is a question for substantive competition law to deal with. It is also a task for economic policy in general to open markets throughout the Community to as much competition as possible, and thus to undermine the potential for abuses of concerted, oligopolistic, or individual market power. Competition law alone would be overwhelmed by this task, not least because currently, there is little it can do about market power (that is, situations of economic dependence) below the threshold of dominance. The other problem is that the collective action should, like anything competitors do jointly, not lead to the claimants exchanging business secrets, nor to the disclosure of such information to the defendant(s), who might use it in future infringements. Deletion of sensitive information from any documents exchanged with the other side (or disclosure of such information to their lawyers only, if need be under the supervision of the court) could prevent the latter. To allow communication of such information among the plaintiffs' lawyers only might go some way towards avoiding the first problem.

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

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

Option 27 would have most of its merit in actions brought by individual consumers or other claimants who are "small" in their ability to meet the costs of the action, compared to the "big" infringers. If in accordance with our reply to **Question G**, standing would be confined to direct customers, concerns that the costs of an unsuccessful action might overwhelm the claimant(s) might be less pressing. If not, it would appear preferable to place any rebate at the discretion of the court. Other-

wise, one poor claimant could sue as an assignee (with an obligation to account for any damages received). He could, hence, act as a front for others who would not qualify for a rebate, had they brought the action in their own name.[52]

Similar considerations apply to consumer associations (see **Question H**). One single action for several claims combined (i.e. for a higher sum) normally costs less than the sum of the costs for individual actions on each of the claims (i.e. for many small sums).[53] Consumer associations thus enjoy an "inbuilt" rebate already.[54] The court might, however, consider a further rebate if the action raises novel questions, and if only a "few" of the potential claimants had brought it. In this case, the few would have taken a high risk and enjoyed only a small cost allowance for combining their claims. The novelty of the question might, admittedly, not be much easier to establish than the "manifest unreasonableness" of the action. This aspect, however, militates in favour of leaving it up to the court to grant further rebates.

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

Option 28: Exclusion of discoverability of the leniency application, thus protecting the confidentiality of sub-missions made to the competition authority as part of leniency applications.

Option 29: Conditional rebate on any damages claim against the leniency applicant; the claims against other infringers – who are jointly and severally liable for the entire damage - remain unchanged

Option 30: Removal of joint liability from the leniency applicant, thus limiting the applicant's exposure to damages. One possible solution would be to limit the liability of the leniency applicant to the share of the damages corresponding to the applicant's share in the cartelised market.

Option 28 appears to be limited in its application to proceedings pending before a compe-tition authority: even if its leniency application qualifies the undertaking for a rebate on the fine, the ensuing decision will, by definition, reveal at least some of the information sub-mitted. There is as yet no jurisprudence under Regulation 1/2003 on the question whether this information (as all findings of fact) binds national courts. According to Art. 16(1) Regulation 1/2003, "[w]hen national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the

[52] Both German (see, e.g., OLG Brandenburg [2002] NJW-RR 1703 with numerous references) and English law would disallow this as champertous (the modern leading case is *Trendtex* v. *Crédit Suisse* [1982] AC 679 (House of Lords); see, more recently, *Offer-Hoar and others* v. *Larkstore Ltd and another* [2005] EWHC 2742, 2 December 2005 (Queen's Bench Division – Technology and Construction Court)), and if it were discovered later, it might render the sponsors of the action liable to costs as if they had themselves brought the suit (*Arkin* v. *Borchard Lines Ltd* [2005] EWCA Civ 655, [2005] 1 WLR 3055 (Court of Appeal)).

[53] That is, the cost curve looks like the upper half of a parabola lying on its right hand side: it flattens out as it rises.

[54] This is why, conversely, they act as a sort of "insurance scheme" for their members (see our reply to **Question H**): each participant carries less of a cost burden if the collective action fails than they would have had to shoulder in case of an individual failure.

Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the *decision* adopted by the Commission" (emphasis added). The "decision" technically means only the operative part, as is apparent from Art. 253 EC. Nevertheless, each act of Community law has to be understood and interpreted in its entirety, that is in the light of the reasons given by the adopting institution, be they factual or legal reasons.[55] The national court would, hence, not be allowed to deviate in its judgment from the Commission's findings if the claim were based exclusively on facts established in the Com-mission's decision.[56] The situation in those countries which accord a binding effect on their courts to decisions of other Member States' authorities[57] is equally as yet unclear. The principle should arguably apply there as well.

Options 29 and *30* address a potential conflict between two means to facilitate the enforce-ment competition law, that is, leniency applications and private competition law claims. They propose two different ways of, ultimately, favouring the contribution of whistleblowers over that of private litigants. In recent Commission practice (as mirrored in the jurisprudence of the Community courts), the facts of each case are much less disputed (if at all) than their legal assessment, procedural questions (rights of the defence in particular), and the factors that ought to go into the calculation of fines.[58] The leniency programme can, in this respect, be de-scribed as a great success. The Commission is therefore right to accord it precedence (which may be reconsidered in the light of future experience). This (and *Option 28*) also highlight again that national leniency programmes should urgently be aligned with the one at Commu-nity level, or some new common standards be found for both Community

[55] Case T-125/97 *Coca-Cola* v. *Commission* [2000] ECR II-1733, para. 77–79; Joined Cases T-346, 347/02 *Cableuropa* v. *Commission* [2003] ECR II-4251, para. 211. On the limits of this mode of interpretation, see Case C-68/94 *France and SCPA* v. *Commission* [1998] ECR I-1375, para. 168–177

[56] A different assessment is, however, permissible if it were argued that circumstances had changed in the meantime, and the claim were at least partially based on facts not established in the Commission's decision, see Case 99/79 *Lancôme* v. *Etos* [1980] ECR 2511, para. 10, 11; Case C-279/95 P *Langnese Iglo* v. *Commission* [1998] ECR I-5609, para. 30 for a similar question regarding negative clearances and comfort letters under Reg. 17 of 1962.

[57] See sec. 33(4) *GWB* (Act against restraints of trade), as amended 2005: „Where damages are claimed for an infringement of a provision of this Act or of Article 81 or 82 of the EC Treaty, the court shall be bound by a finding that an infringement has occurred, to the extent such a finding was made in a final decision by the cartel authority, the Commission of the European Community, or the competition authority - or court acting as such - in another Member State of the European Community. The same applies to such findings in final judgments resulting from appeals against decisions pursuant to sentence 1. Pursuant to Article 16(1), sentence 4 of Regulation (EC) No. 1/2003 this obligation applies without prejudice to the rights and obligations under Article 234 of the EC Treaty." (Unofficial translation by the Federal Cartel Office, available at http://www.bundeskartellamt.de/wEnglisch/index.shtml.

[58] See, e.g., Case T-241/01 *Scandinavian Airlines System* v. *Commission* [2005] ECR II-0000; Joined Cases T-49–51/02 *Brasserie nationale* v *Commission* [2005] ECR II-0000; Case T-112/98 *Mannesmannröhren-Werke* v. *Commission* [2001] ECR II-729; Joined Cases T-236 *et al.*/01 *Tokai Carbon* v. *Commission* [2004] ECR II-1181; Joined Cases C-189 *et al.*/02 P *Dansk Rørindustri* et al. v. *Commission* [2005] ECR I-0000.

and Member States. Otherwise, conflicts will be unavoidable if a private action is brought in one Member State while the defendant has applied for leniency in another.

Option 29 proposes to grant the leniency applicant a rebate on the damages which, in principle, he remains liable to pay jointly and severally with the other infringers; he would, thus, bear a (reduced) part of their responsibility, should one of them become insolvent. *Option 30* would go one step further and altogether remove joint and several liability between the infringers and the leniency applicant and replace this kind of liability, in the latter's case, with one *pro rata*. *Option 29* slightly favours private applicants in that after a successful action, their judgment debtors would be more numerous. *Option 30* might in practice turn out more attractive to leniency applicants. They do not tend to be the ringleaders of infringements (who are not eligible for a reduction anyway)[59] nor, which is often the same, to be the big players on the market affected by the infringement. Release from joint and several liability with the more prominent infringers would thus doubly favour leniency applicants. This is ultimately in the interest of private claimants, too, as the applicant's whistle blowing factually alleviates their burden of proof, and the overall sum of damages awarded will not be reduced by much. For this reason, *Option 30* appears preferable.

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

Option 31: The applicable law should be determined by the general rule in Article 5 of the proposed Rome II Regulation, that is to say with reference to the place where the damage occurs.

Option 32: There should be a specific rule for damages claims based on an infringement of antitrust law. This rule should clarify that for this type of claims, the general rule of Article 5 shall mean that the laws of the states on whose market the victim is affected by the anti-competitive practice could govern the claim.

Option 33: The specific rule could be that the applicable law is always the law of the forum.

Option 34: In cases in which the territory of more than one state is affected by the anticompetitive behaviour on which the claim is based and where the court has jurisdiction to rule on the entirety of the loss suffered by the claimant, it could be considered whether the claimant should be given the choice to determine the law applicable to the dispute. This choice could be limited to choose one single applicable law from those laws designated by the application of the principle of affected market. The choice could also be widened so as to allow for the choice of one single law, or of the law applicable to each loss separately or of the law of the forum.

Option 31 has the advantage of regulatory simplicity. It deviates, however, from the familiar parameters of competition law analysis. What is decisive there is the demarcation of the market on which competition is distorted; the place where any damage has occurred is, at best, a secondary consideration. To use different sets of criteria would only create unnecessary complication, even confusion: what, for in-

[59] Commission notice on immunity from fines and reduction of fines in cartel cases (2002/C 45/03), [2002] OJ C 45/3, para. 11

stance, if the damage caused by a distortion of the financial services market in the Community occurred only in some off-shore tax haven which is neither a Member State nor a signatory to any international convention on private international law? *Option 31* should, therefore, not be pursued.

Option 32 appears to envisage that an action based on damage occurring in several Member States would always be governed by the several laws of these Member States, each portion of the overall claim according to where it is territorially rooted, without any choice for the plaintiff. This would still allow, in accordance with the provisions of Regulation 44/2001,[60] a concentration of the proceedings in the courts of one Member State only. The mandatory application of a multitude of national tort laws would, however, not be helpful.

Option 34 proposes one way of bringing about substantive concentration as well, namely by allowing the plaintiff a choice among all applicable laws. The application of any foreign law, however, is fraught with difficulty for most national courts. This unease will be shared by most potential plaintiffs, particularly if victims other than direct customers were allowed to sue. It might be easier when it comes to private competition law actions because the under-lying provisions breached, Articles 81 and 82 EC, are common to all Member States. This is, however, where the commonalities end. The remaining differences cover the whole range of substantive and procedural law. Any solution via the conflict of laws would do nothing to overcome these differences, leaving private enforcement as fragmented as before.

Similar objections apply to *Option 33* although of those offered, this option has the appeal of utmost simplicity. Its problems become particularly obvious in cases involving disputes arising from "vertical" relationships (between supplier and distributor, as in *Courage* v. *Crehan*)[61] rather than from classic horizontal price fixing. In such vertical contracts, the stronger party will invariably stipulate which courts are to have jurisdiction. If one did not want to prohibit such clauses altogether, because they make good commercial sense, *Option 33* could easily be sidelined: the choice of law would be an indirect one (through the choice of jurisdiction), but a uniform regime would still be elusive. Apart from this, a whole new range of problems would arise if the courts of a non-Member State were given jurisdiction. Again, this problem could be avoided if substantive harmonisation rather than harmonisation of the conflicts regime(s) were sought.

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

Option 35: Require the parties to agree on an expert to be appointed by the court rather than by themselves.

[60] See fn. 13.
[61] Case C-453/99 *Courage* v. *Crehan* [2001] ECR I-6297.

This question is one of mere procedural expedience which should be left to the Member States.

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

Option 36: Suspension of the limitation period for damages claims from the date proceedings are instituted by the Commission or any of the national competition authorities. Alternatively, the limitation period could start running after a court of last instance has decided on the issue of infringement.

The first alternative of *Option 36* has a lot to commend it. One may wonder, however, whether the termination of proceedings would not be the more appropriate date from which the limitation period would run. To bind the limitation period to any proceedings at all is pre-sumably meant to be the price private claimants have to pay for the advantages they enjoy in a "follow on-action", that is the authoritative establishment of the facts (as the case may be, see **Question J**). Depending on how one defines the "institution of proceedings",[62] some years might pass during which proceedings are conducted while plaintiffs would not enjoy the abovementioned advantages. *Option 36* also begs the question what ought to happen if no administrative proceedings were initiated at all. This "independent" limitation period could either be gleaned from national tort law or, preferably, from Art. 25(1)(b) Regulation 1/2003, i.e. five years from the substantive infringement. This should be adapted to run from the inci-dence of the damage, as damage is the condition which specifically allows private claimants to bring a competition law claim at all.

These two periods could be combined: as long as no administrative proceedings have been instituted (however defined), the five year period runs; it is suspended when proceedings are initiated. Once proceedings are concluded,[63] the five year limitation period is terminated and a new period commences within which claims must be brought. This period could be rather short (a year, say) as plaintiffs would enjoy, depending again on the binding effect attributed to such findings, considerable advantages regarding the burden of proving the infringement. The action would thus be time-barred after five years or one year after the finding of an infringement by a competition authority, whichever is the earlier.

In order to create transparency regarding the suspension of the five year period, a mechanism for informing the public should be devised. This could be modelled on the regular notices by the Commission under Directive 98/34.[64] This Directive

[62] It should be noted that according to Art. 2 Regulation 773/2004 (see fn. 7), the Commission can formally open proceedings at a fairly advanced stage of its activities, when the in particular the information-gathering has already been conducted, Art. 7(3).

[63] This conclusion would have to be an infringement being found otherwise, depending on the binding effect of such findings (see **Question J**), it would simultaneously be established that the action is unfounded.

[64] Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a

obliges Member States to notify planned legislation to the Commission (which, in turn, communicates it to the other Member States for them to submit their comments) if such legislation would result in technical standards or regulations liable to impede the free movement of goods or services between Member States. Notification by the Member State triggers a standstill periods during which bills must not be enacted; the Commission's notices in the Official Journal bring to the attention of the public the date on which this period expires.

The second alternative of *Option 36* does not provide a solution for the case that no pro-ceedings are initiated, although this case could be accommodated as above. More proble-matic, however, is the substantial extension of time that might ensue if it were adopted. Con-sidering, however, that until final judgment the undertakings concerned know that they must still expect consequences from their infringements, one might as well allow private claimants to benefit from the absence of any legitimate expectations on the part of the defendants that they would no longer have to face the consequences of their competition law infringements. The complete formula would then read: the action is time-barred after five years, or one year after the finding of an infringement by a competition authority can no longer be challenged, whichever is the earlier.

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

Clarification of the legal requirement of causation is not necessary seeing that the practical results converge across jurisdictions.[65]

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

The Commission does not, at least not in the Green Paper, raise the question of the form that any Community action on damages actions in the Member States should take, and what its legal basis would be.

As the legal basis can determine the forms of acts available, this question should be addres-sed first. Articles 65, 83, and 308 EC are potential legal bases, the last-mentioned, however, only in so far as any gaps appear in the former two. The question of damages actions touches only incidentally on problems of co-operation be-

procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, [1998] OJ L 204/37, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, [1998] OJ L 217/18, (non-binding) consolidated version under http://europa.eu.int/eur-lex/en/consleg/pdf/1998/en_1998L0034_do_001.pdf. See, most recently, the notice in [2006] OJ C 90/40.

[65] Para. 275 of the Commission staff working paper (fn. 4).

tween courts in different Member States. To the extent that it does, the appropriate instruments are mostly already in existence, namely Regulation 44/2001[66] and Regulation 1206/2001.[67] The creation of rules to promote private actions as a complement to the Commission's and the national authorities' enforcement of Articles 81 and 82 EC can best be described as "[giving] effect to the principles set out in Articles 81 and 82". This points to Article 83 as the appropriate legal basis.

Our general reservations against harmonising the Member States' provisions on conflict of laws notwithstanding, it is true that **Question K** addresses that subject-matter. At first sight, it appears more specifically governed by Article 65 lit. (b). Nevertheless, the conflict of laws regarding cartel infringements is also a question regarding "the relationship between national laws and the provisions [of Articles 81 and 82]" (Article 83(2)(e)). This is because said national laws govern the consequences in private law of the Community provisions as inter-preted by the ECJ in *Courage* v. *Crehan*. The determination of the applicable national law is, hence, at the same time a determination of the application of Articles 81 and 82. The conflict of laws specifically regarding cartel infringements is, therefore, within the compass of Article 83. If one thought that both Article 65 and Article 83 were a suitable legal basis, the "centre of gravity"[68] would still lie with the cartel aspects rather than the conflict of laws aspect. This specific form of tort is already governed by the Treaty in Articles 81 and 82, whereas Article 65 covers any (other) tort.

If one endorsed our reservations against the conflict of laws-approach (see our comments on *Options 31–34*), Article 83 would be the only suitable legal basis for substantive harmoni-sation in order "to give effect to the principles set out in Articles 81 and 82". As there is a suf-ficient legal basis in Article 83, recourse to Article 308 is not required.

As to the legal form, Article 83 offers the choice of directives or regulations. Additionally, the Commission may always issue non-binding guidelines. Guidelines would not seem appro-priate. They would be incapable of bringing about the many substantial and procedural innovations required for the creation of a culture of private competition enforcement. A Directive would have to leave Member States choices, particularly regarding the applicable substantive law, that would do little to overcome the present fragmentation. A Regulation, by contrast, is best suited when a uniform regime is sought. It was in the past employed in order to create, e.g., the Community trade mark.[69]

[66] See fn. 13.
[67] See fn. 12.
[68] This is the test the Court applies in Case C-376/98 *Germany* v. *EP & Council* ("Tobacco Advertising Directive") [2000] ECR I-8419, and in Case C-491/01, *R* v. *Secretary of State for Health,* ex parte *British American Tobacco* et al. [2002] ECR I-11453.
[69] Council Regulation (EC) No. 40/94 of 20 December 1993 on the Community trade mark, [1994] OJ L 11/1.

One last question that can only be raised here but not answered pertains to Article 82. The presence of one singly or several jointly dominant competitors might require an adaptation of the calculation of the damage caused by any abuses; the outcome of the Commission's current review of the application of Article 82 will have to be taken into account. The absence of a formalised leniency programme, both at Community level and in the Member States, might also necessitate a reconsideration of some of the procedural issues discussed above.