

## The *Manfredi* judgment of the ECJ and how it relates to the Commission's initiative on EC antitrust damages actions <sup>(1)</sup>

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### The reactions to the Green Paper

On 20th December 2005, the Commission published a Green Paper on damages actions for breach of the EC antitrust rules <sup>(3)</sup>. The Green Paper has been met with broad interest in the antitrust community: it has been discussed at a number of conferences both in Europe and abroad, and has also stimulated debate at the OECD, the European Parliament, the European Economic and Social Committee, and in the parliaments of various EU Member States. This high level of interest is also reflected in the substantial number of responses to the Green Paper. At the time of writing, the Commission has received 147 submissions, of which 49 are from industry, 44 from law firms, 18 from academics, 15 from Member States' governments, 7 from consumers' groups, 6 from national competition authorities, 5 from judicial organisations and 3 from individual citizens. The non-confidential submissions are published on the website of the Directorate-General for Competition <sup>(4)</sup>.

Practically all the responses to the Green Paper acknowledge the complementary role of private actions in the overall enforcement scheme of the EC competition rules. More particularly, there is widespread agreement that victims of competition law infringements are entitled to damages, and that national procedural rules should be such that this right can be exercised effectively. This expression of interest in an effective right to compensation has been followed, in timely fashion, by an important judgment of the European Court of Justice in a case concerning antitrust damages.

### The Judgment in *Manfredi*

On 13th July 2006, the Court of Justice rendered its preliminary ruling under Article 234 EC in four references from the Giudice di Pace di Bitonto (Italy): Joined Cases C-295/04 to C-298/04, *Manfredi*

*et al* <sup>(5)</sup>. The ruling considers directly a number of the issues raised in the Green Paper on antitrust damages actions, and unequivocally confirms the Commission's priority that effective legal redress be available to the victims of infringements of the competition rules. The case follows-on from a finding of the Italian competition authority that an agreement between automotive insurers infringed the competition rules. As a result of an unlawful exchange of information, the premiums charged to consumers were inflated twenty per cent on average. Mr Manfredi and the other applicants, who alleged they had suffered an overcharge, brought actions against their respective insurers to recover damages.

In confirming its jurisdiction to issue a preliminary ruling in the case, the Court of Justice emphasised the importance of the competition rules, and their justiciability in private actions before national courts: "it should be recalled that Articles 81 EC and 82 EC are a matter of public policy which must be automatically applied by national courts". [Para. 31] The Court also indicated that, depending on the particular circumstances of the case in question, an anticompetitive practice may simultaneously infringe both national and Community competition law rules. [Paras. 33-52]

Concerning the right to claim damages for harm suffered through a breach of the competition rules, the Court of Justice in *Manfredi* reiterated a statement of principle which it had already given in *Courage v Crehan* (Case C-453/99), and to which the Commission referred in the Green Paper. In *Manfredi*, the Court said:

"... as regards the possibility of seeking compensation for loss caused by a contract or by conduct liable to restrict or distort competition, it should be recalled that the full effectiveness of Article 81 EC and, in particular, 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 (*Courage and Crehan*, paragraph 26).

<sup>(1)</sup> The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.

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<sup>(3)</sup> COM(2005) 672 final: <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html#greenpaper>.

<sup>(4)</sup> <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html#greenpaper>

<sup>(5)</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:C2006/224/05:EN:NOT>.

... It follows that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC.” [Paras. 60-61]

One can expect that this reasoning would also apply to damages claims for breaches of Article 82. It is interesting to note that the Court of Justice does not refer to any requirement of fault over and above the proof of the infringement, but instead states — for the first time in such clear wording — that a causal nexus between an infringement of the competition rules and the harm thereby caused is sufficient to ground a claim in damages. This corresponds closely to the situation envisaged in Option 11 of the Commission’s Green Paper <sup>(6)</sup>.

In *Manfredi*, the Court of Justice also considered whether Italian procedural rules which require litigants claiming damages under the competition rules to commence proceedings before a particular court — thereby incurring increased costs and delays, as compared with proceedings before an inferior tribunal — are compatible with Article 81 EC. The Court held that, so long as procedural rules are not harmonised at European level, the respective Member States’ rules must safeguard the rights guaranteed by the Treaty in a manner not less favourable than those governing similar domestic actions (principle of equivalence), and that the procedural rules must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness). [Para. 71]

The Court of Justice also referred to the principles of equivalence and effectiveness when considering procedural rules as to the limitation periods for antitrust damages actions. In the absence of Community rules it is, said the Court, for the Member States to prescribe limitation periods in actions for antitrust damages, subject to the principles of equivalence and effectiveness. Thus, limitation periods may not be so short or so inflexible as to render practically impossible or excessively difficult the exercise of the right to seek compensation for the harm suffered. [Paras. 81-82] Here again, the Court’s insistence on providing for *effective*

redress directly reflects the Commission’s position on limitation periods, as expressed in the Green Paper: “Suspension of or longer limitation periods play an important role in guaranteeing that damages claims can effectively be brought, especially in the case of follow-on actions”. [Green Paper, text introducing Option 36.]

The Court re-emphasised the criterion of effective redress in considering how damages should be defined and quantified:

“... it follows from the principle of effectiveness and the right of individuals to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest.” [Para. 100; compare Para. 149 of the Staff Working Paper annexed to the Green Paper]

Interestingly, the judgment in *Manfredi* does not preclude procedural rules which provide for “particular damages, such as exemplary or punitive damages” in antitrust cases, although national courts may take the steps necessary to ensure that claims under competition law do not give rise to unjust enrichment. [Para. 99]

## Effective redress for antitrust damages

The judgment in *Manfredi* has now crystallised — and effectively harmonised — the law on a number of salient points. Most importantly, the Court of Justice has clearly confirmed the Commission’s guiding principle that the procedures for redressing harm caused by antitrust infringements must be effective. However, the judgment still leaves open a number of other issues discussed in the Green Paper.

### Access to evidence

Some respondents to the Green Paper indicate that special rules concerning access to evidence in competition-law litigation are not warranted, as antitrust cases do not present evidentiary difficulties greater than other commercial litigation. However, several potential antitrust plaintiffs indicate that enhanced access to evidence is essential to ensuring that the right to seek compensation for antitrust damages can be exercised effectively. Responses from the legal profession have emphasised that antitrust practitioners regard effective access to documents as the single most important issue in facilitating actions for damages; although there remains a degree of divergence as to the technical instruments appropriate to achieve effective access while preventing unwelcome externalities,

<sup>(6)</sup> On the question of whether there should be a fault requirement for antitrust-related damages, the Green Paper envisaged 3 options, namely 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”) and 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).

such as “fishing expeditions”, “discovery blackmail”, procedural abuses and excessive costs for potential defendants. Similarly, the need for protection of business secrets and other confidential information is recalled.

One can discern a need to provide for some minimum effective level of disclosure of evidence between the parties to antitrust damages cases. Given the legal-cultural differences between the Member States, and in order to avoid disclosure leading to abuses, it can be argued that a practicable system of court-supervised pre-trial disclosure based on reasonable standards of fact-pleading may be required. As an additional matter, it might also be appropriate to consider the fact-pleading requirement to be fulfilled in cases following-on from an infringement decision of the Commission or of a national competition authority.

### *Fault requirement*

There is considerable support for a system under which proof of an infringement of the competition rules would fulfil the fault requirement in tort litigation. Following the judgment in *Manfredi*, this would also now seem to be the appropriate legal standard. Respondents’ opinions diverge concerning exculpation in cases of genuine factual or legal error. Some consider that a possibility of exculpation is a normal feature of tort litigation, while others find it a complete novelty.

### *Damages*

The majority of respondents to the Green Paper would not like to see a system which provides for multiple, punitive or exemplary damages. These respondents argue that damages should be regarded as properly a compensatory instrument. Nevertheless, most respondents are at pains to indicate that the concept of damages should be broadly understood, in order to ensure that victims of antitrust infringements be compensated fully for their loss, including, where appropriate; compensation for loss of profits; pre-judgment interest from the time of the infringement; and, post-judgment interest until the damages awarded are paid out. These comments largely presage the judgment in *Manfredi*, although the ECJ explicitly did not rule out so-called “particular” damages.

### *The passing-on defence and standing for indirect purchasers*

Respondents to the Green Paper are substantially divided on the question of the passing-on defence. At the one extreme, there are those who recommend allowing the passing-on defence, and limiting standing to direct purchasers. This approach is, however, rejected by other respondents, who

argue that it leads to unjust enrichment of defendants. At the other extreme, there are those who would prefer disallowing the passing-on defence, while allowing both direct and indirect purchasers’ claims. In-between those two groups, there is a small minority of respondents which advocates both disallowing the passing-on defence and denying standing to indirect purchasers. The single aspect on which there seems to be a consensus — and *Manfredi* provides backing for this — is the need to avoid unjust enrichment of both claimants and defendants.

### *Collective and representative actions*

The majority of respondents to the Green Paper who commented on the issue of consumers’ interests opposed any initiative which would facilitate collective actions. The objections focus principally on the costs of collective actions, and on the risk of multiple recovery from infringers. Of those not opposed, most respondents preferred allowing collective actions be brought only through recognised consumers’ organisations. Collective follow-on actions by consumers’ organisations may indeed serve the purpose of rendering rights under competition law effective and accessible to citizens, while clearly moderating the excesses and external costs associated with more general types of “class actions”. As a number of Member States already allow various types of collective actions, and others are actively considering introducing such measures, a certain natural development in this regard is already taking place.

### *Costs of actions*

Respondents’ opinions are mixed as to the options raised in the Green Paper which could alleviate the financial risks for claimants who have a meritorious claim. While most submissions acknowledge that such financial risk constitutes an obstacle to potential claimants, some consider the current national rules are necessary to avoid unmeritorious litigation. Other respondents would allow the judge to decide at the end of the trial whether there are sufficient reasons to deviate from the general cost rules. A final group of submissions supports permitting the judge, by way of pre-trial pleadings, to shield the meritorious claimant against cost recovery. These respondents argue that this could be the case for follow-on actions and for claims brought by (representatives of) consumers. Since the judgment in *Manfredi* requires the Member States to make effective redress procedures available to any person injured by an antitrust infringement, it could be argued that national judges should be empowered to modulate the rules as to claimants’ costs where necessary to assure effective exercise of the right to compensation.

### *Coordination of public and private enforcement*

Apart from a very few exceptions, there is general support among respondents to the Green Paper for precluding disclosure of leniency applications. Other respondents argue that leniency applicants do not need to be additionally “rewarded”, because the incidence of requests for leniency will not be influenced substantially by follow-on actions for damages. It is thus generally accepted that it is important to preserve the high level of effectiveness of the leniency programmes in Europe, while not affecting the right of injured parties to effective redress, and that these goals are not mutually incompatible.

### **Conclusions**

In its *Manfredi* judgment, the Court of Justice underlined yet again the need for an effective redress for the victims of competition law infringements. In doing so, the Court confirms the overall objective of the Commission’s Green Paper on anti-

trust damages actions. Effective redress can only be achieved through rules and procedures allowing for it. In the absence of Community rules governing the matter, it is accepted that those rules and procedures are national, provided that the principles of equivalence and effectiveness are observed. The *Manfredi* judgment shows the willingness of the Court of Justice to interpret these principles, in particular the principle of effectiveness, in order to achieve piecemeal minimum harmonisation of national rules and procedures. There are still national rules and procedures in force which make it practically impossible or excessively difficult to succeed in an action for antitrust damages in certain jurisdictions. Alternatively, effective actions for antitrust damages are excluded simply because there are *no* national rules in place. Both situations are characterised by an absence of national rules allowing for effective redress. The question remains whether those situations are best remedied at the pace of the case law of the Court of Justice, or whether there is a need for Community legislation on the matter.