

# The White Paper on damages actions for breach of the EC antitrust rules

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## 1. Introduction

On 2 April 2008, the European Commission adopted a White Paper on damages actions for breach of the EC antitrust rules (hereinafter ‘the White Paper’) <sup>(2)</sup>. It presents a set of recommendations to ensure that victims of competition law infringements have access to genuinely effective mechanisms for obtaining full compensation for the harm they have suffered.

The White Paper is the latest stage of a policy initiative, the premises of which were already laid down in Regulation 1/2003 that stressed the essential role of national courts in the application of the EC competition rules, for example by awarding damages to the victims of infringements <sup>(3)</sup>. Given the importance of the right to damages in order to guarantee the effectiveness of the EC competition rules, as acknowledged by the European Court of Justice (ECJ) <sup>(4)</sup>, and in view of the considerable hurdles faced by the victims wishing to exercise their rights in Europe <sup>(5)</sup>, the Commission adopted in December 2005 a Green Paper <sup>(6)</sup> that identified potential ways forward.

### a. From the 2005 Green Paper to the White Paper

The purpose of the Green Paper was to identify the main obstacles to a more effective system of damages claims, and to set out different options for further reflection to improve both follow-on and stand-alone actions. The Green Paper was met with broad interest in the antitrust community, and achieved its objective of **raising awareness on the right to compensation of victims of competition law infringements, and on the obstacles they face when attempting to enforce their rights.**

Encouraged by the comments on the Green Paper received from stakeholders, from the European Parliament, the European Economic and Social Committee and the Member States, and taking into account the recent case law of the ECJ, the Commission decided to publish a White Paper in order to encourage and further focus the ongoing discussions on actions for damages by setting out concrete measures aimed at creating an effective private enforcement system in Europe.

The Commission also made great efforts to assess the likely benefits and costs of various policy options that could address the current ineffectiveness of antitrust damages actions in the EU. In particular, it commissioned an extensive impact study by independent experts, who used existing scientific knowledge and data to conduct their own economic analysis of the likely effects of various measures to facilitate antitrust damages actions. Building on the findings of the study, the Commission analysed and compared the likely implications of the major policy options available <sup>(7)</sup>. In its White Paper, the Commission further develops the specific policy recommendations which offer a balanced solution to the current, often inefficient and ineffective, compensation systems in place, while avoiding over-incentives that could lead to excessive or abusive litigation of the kind seen in some countries outside Europe.

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<sup>(2)</sup> White Paper on damages actions for breach of the EC antitrust rules COM(2008) 165, 2.4.2008. The White Paper and the accompanying Staff Working Paper (SWP) are available at <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html>.

<sup>(3)</sup> Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty, OJ L 1, 4.1.2003. See in particular recital 7.

<sup>(4)</sup> Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, confirmed in joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619.

<sup>(5)</sup> See the 2004 Comparative Study commissioned by the European Commission on the conditions of claims for damages in case of infringement of EC antitrust rules, at [http://ec.europa.eu/comm/competition/antitrust/others/actions\\_for\\_damages/study.html](http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/study.html).

<sup>(6)</sup> Green Paper on damages actions for breach of the EC antitrust rules (the ‘Green Paper’) COM(2005) 672 final. The Green Paper and the accompanying Staff Working Paper are available at: <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html>.

<sup>(7)</sup> The external study and the impact assessment report are available at: <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/index.html>.

## b. The key objectives and underlying principles

Despite some recent signs of improvement in certain Member States, **the victims of EC antitrust infringements only rarely obtain reparation of the harm suffered**. In that regard, the impact study notes that successful damages actions are still rare, and that the majority of Member States have had no real experience of private antitrust damages actions to date. The ineffectiveness of the right to damages is largely due to various legal and procedural hurdles in the Member States' rules governing actions for damages. Indeed, traditional rules of civil liability and procedure are often inadequate for actions for damages in the field of competition law, due to the specificities of the actions in this field, namely: **complex factual and economic analysis, unavailability of crucial evidence and the often unfavourable risk/reward balance for claimants**.

The general objective of the White Paper is therefore to ensure that all victims of infringements of EC competition law have **access to truly effective mechanisms for obtaining full compensation** for the harm they have suffered. In designing the specific measures aimed at addressing the obstacles identified, the Commission followed three main guiding principles:

- **full compensation** is to be achieved for all victims. This necessarily entails consequences in terms of deterrence of future infringements and greater compliance with EC antitrust rules, particularly when the number of infringements detected increases;
- the legal framework for more effective antitrust damages actions is to be based on a **genuinely European approach**, with balanced measures rooted in European legal culture and traditions;
- the effective system of **private enforcement** by means of damages actions is meant to **complete, and not to replace** or jeopardise **public enforcement** of Articles 81 and 82 of the EC Treaty by the Commission and the national competition authorities (NCAs) of the Member States.

## 2. Compensating the victims of competition law infringements

The focus of the White Paper on compensating victims becomes clearest when considering the scope of the damages and the passing-on of overcharges.

## a. The scope of the damages

### (i) Full compensation

The ECJ confirmed in its *Manfredi* ruling that the principle of effectiveness requires Member States to **ensure that victims of competition law infringements are compensated for the actual loss** (which results from the illegal overcharge) **and the loss of profit** (which results from the reduced sales) caused to them <sup>(8)</sup>. Moreover, in order to guarantee that this harm is compensated at real (rather than nominal) value, the ECJ requires that **(pre-judgment) interest shall also be paid**.

In its White Paper, the Commission fully endorses this broad definition of the harm caused by competition law infringements and the resulting obligation for the Member States (which is addressed both to the national legislator and to the national judge) to enable the victim to receive such full compensation. In its Staff Working Paper, the Commission expresses the hope that this clear instruction from the ECJ will suffice to have all the obstacles to full compensation that still exist in (some of) the Member States removed. However, if it were to appear that such is not the case, the Commission may want to re-examine what further measures are necessary to achieve that objective.

### (ii) The calculation of damages

Even if it is clear under what heads of damage the victim of a competition law infringement may seek damages, the latter may still face difficulties in court because he cannot show (to the required standard) the extent of the harm suffered. For instance, under some circumstances it may be totally impossible for the victim to show the exact amount of the loss. In its White Paper and in the accompanying Staff Working Paper, the Commission formulates two suggestions to overcome these difficulties.

It first recalls that **the principle of effectiveness excludes calculation requirements**, as imposed by law or by the courts, **that make it excessively difficult for victims to obtain the damages to which they are entitled under Community law**. Legislators and, in the absence of their action, judges are thus obliged to mitigate these requirements to a more appropriate level. Naturally, the argument that such mitigation cannot be allowed because it risks deviating from the objective to compensate (the victim may obtain somewhat more, or less, than the actual damage suffered), cannot be accepted. Since compensation remains the objec-

<sup>(8)</sup> See *Manfredi*, *supra* n. 4, paragraphs 60 and 95.

tive, judges must do their utmost to ensure that the damages awarded correspond as far as possible to the harm suffered. This approach is clearly reflected more by an approximation of that harm than by a refusal to award damages.

Secondly, the Commission is committed to produce **non-binding guidance on the calculation of damages**, in order to provide judges and parties with pragmatic solutions to these often complicated exercises. The challenge is to produce easily accessible economic calculation models and suitable approximate methods of calculation. In order to assist the Commission in the drafting of the guidance, a study has been tendered, the results of which should be ready in Spring 2009 <sup>(9)</sup>.

### *b. The passing-on of overcharges*

The compensation objective also determined the solution that was put forward in the White Paper for dealing with the passing-on of overcharges. That thorny issue, on which there is little clarity in the Member States' legislation and case-law, covers both the question (i) whether or not the infringer can invoke the passing-on defence and (ii) whether or not the one to which the overcharge has been passed on can claim damages for the resulting harm.

#### *(i) The passing-on defence (shield)*

Since the objective of the White Paper is to ensure that victims of competition law infringements receive compensation for the damage they have suffered, it goes without saying that, if ultimately there is no harm suffered, there should also be no compensation <sup>(10)</sup>. **Purchasers of an overcharged product or service who have been able** (meaning that they have actually done so) **to pass on that overcharge to their own customers should therefore not be entitled to compensation** of that overcharge. However, the passing-on of the overcharge may well have led to a reduction in sales. Such loss of profits should obviously be compensated by the one who is responsible for the initial overcharge.

In order to avoid the infringer having to pay damages for an overcharge that has been passed on, the Commission feels that he should be able to invoke the passing-on as a defence. That defence, of course, needs to be proven according to the required standards. In order not to negate the right to compensation, those standards should not be

too low. For instance, the fact that a press release states that consumers are harmed by an infringement of competition law cannot constitute sufficient proof of the passing-on of the overcharges to the consumers.

#### *(ii) The 'passing-on' claim (sword)*

**The compensation objective implies, as a corollary of the acceptance of the passing-on defence, that the one to whom the overcharge has been passed on, i.e. the ultimate victim, can claim compensation for the resulting harm.** However, that ultimate victim, unlike those higher up in the distribution chain, may be less inclined to start an antitrust damages action. The reasons for that reluctance may be manifold, but issues of a low-value claim, an unattractive cost/reward balance, the difficulty of establishing causality with the initial infringement, remoteness, etc will certainly be among them.

To the extent that those ultimate victims have standing to claim damages <sup>(11)</sup>, the Commission makes **two types of suggestions** to enable these victims to bring their damages claims. First, it is suggested that they can **aggregate their claims via collective actions**. Secondly, their claims can be facilitated by a **presumption that the overcharge has been passed on in its entirety to their level**. That presumption can be rebutted by the infringer, for instance by referring to the fact that he has already paid compensation for that same overcharge to someone higher up in the distribution chain than the claimant. The latter example is evident when a joint action is brought by claimants from different levels in the distribution chain, but efforts should also be made to have it apply in the case of parallel or consecutive actions. Finally it should be noted that the said rebuttable presumption does not exempt the claimant from its duty to prove the initial infringement and the scope of the damage; the latter aspect is particularly relevant when the overcharge relates to an intermediate product.

<sup>(9)</sup> The tender is published under COMP/2008/A5/10, and is available at: <http://ec.europa.eu/dgs/competition/proposals2/>.

<sup>(10)</sup> Arguments of enforcement efficiency and deterrence are thus not accepted as autonomous arguments. They can only be accepted as secondary arguments to complement the compensation principle.

<sup>(11)</sup> Since the ECJ confirmed 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 [EC competition law]" (see *Courage and Crehan*, *supra* n. 4, paragraph 26, and *Manfredi*, *supra* n. 4, paragraph 61, *our italics*), standing could be refused under national law due to the absence of sufficient causality, e.g. in cases of remoteness (see also *Manfredi*, paragraph 64: "in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to prescribe the detailed rules governing the exercise of that right, including those on the application of the concept of 'causal relationship', provided that the principles of equivalence and effectiveness are observed").



### 3. Access to justice

#### a. Collective redress mechanisms

It is clear that victims will rarely, if ever, bring a damages action individually when they have suffered scattered and relatively low-value damage. **In order to avoid these victims remaining uncompensated, it is necessary to provide for some form of collective redress.**

The issue of collective redress is a sensitive one and has attracted attention in the Member States and at EC level because of its importance for access to justice. This increased attention is also partly due to certain excesses that have been reported from other jurisdictions. This is therefore an area where the Commission has been careful to comply with its second guiding principle of adopting a balanced and genuine European approach, and has designed appropriate safeguards so as to avoid excesses.

The Commission suggests two types of collective redress mechanism. They offer alternative means of court action for the victims, such as final consumers or SMEs, that would otherwise be unable or unwilling to seek compensation given the costs, uncertainties, risks and burdens involved.

##### (i) *The first mechanism: opt-in collective actions*

An opt-in collective action combines in one single action the claims from those individuals or businesses who have expressed their intention to be included in the action. Such a system improves the situation of the claimants by making the cost/benefit analysis of the litigation more attractive, since it allows them *inter alia* to reduce the costs and share the evidence.

There has been much debate on whether the Commission should suggest an opt-in mechanism, which is closer to the Member States' legal traditions, or rather an opt-out mechanism, whereby the victims represented are all those who do not expressly opt out from the action. Opt-in collective actions are said to make the litigation more complex by requiring the identification of the claimants and the specification of the harm allegedly suffered, whereas an opt-out mechanism allows a wider representation of the victims and can therefore be seen as being more efficient in terms of corrective justice and deterrence. However, combined with other features, opt-out actions in other jurisdictions have been perceived to lead to excesses. On balance, the Commission considered it more appropriate to suggest opt-in collective actions.

##### (ii) *The second mechanism: representative actions brought by qualified entities*

A representative action for damages is an action brought on behalf of two or more individuals or businesses who are not themselves parties to the action. It is aimed at obtaining damages for the harm caused to the interests of all those represented. **The Commission suggests that a representative action can be brought by two different types of qualified entities.**

The first type of qualified entities covers entities **such as consumer organisations, trade associations or state bodies representing legitimate and defined interests, which are officially designated in advance by their Member State to bring representative actions for damages.** In order to be designated, i.e. 'endorsed' by their Member State, these qualified entities need to meet specific criteria set in the law. These criteria, together with the risk that the designation is withdrawn in case of excesses, will help prevent abusive litigation.

Given the nature of these qualified entities as well as the designation safeguard, the range of victims they can represent is not defined restrictively. Indeed, they are entitled to represent victims, not necessarily their members, which are identified or, in rather restricted cases, identifiable. While victims shall normally be identified either from the outset or at a later stage, the requirement of strict identification may sometimes be unnecessary, overly costly and burdensome. The possibility to represent 'identifiable' victims can be relevant particularly in a case where, in view of the minimal amount of damages to be awarded and the high costs of direct distribution, the court decides that distribution should be indirect, e.g. pursuant to the *cy-près* doctrine <sup>(12)</sup>.

The second type of qualified entities covers **entities which are certified on an *ad hoc* basis by a Member State**, as regards a particular antitrust infringement, to bring an action on behalf of (all or some of) their members only. Eligibility is limited to entities whose primary task is to protect the defined interests of their members other than by pursuing damages claims (e.g. a trade association in a given industry). The various restrictions on standing (i.e. the ability to bring an action) are designed so as to avoid abusive actions, for

<sup>(12)</sup> *Cy-près* distribution means that the damages awarded are not distributed directly to those injured to compensate for the harm they suffered but are rather used to achieve a result which is as near as may be (e.g. damages attributed to a fund protecting the interests of victims of antitrust infringements in general).

instance, when led by litigation vehicles specially constituted for the sole purpose of bringing damages actions.

One could assume that opt-in collective actions are likely to be used primarily by businesses or victims having suffered a non-insignificant individual harm, as they require at the outset a positive action from the victims. In contrast, the representative action mechanism is directly targeting the victims' traditional inertia when the harm suffered individually is very low. These two complementary collective redress mechanisms, together with the possibility for the victims to bring individual actions, constitute a set of solutions that will significantly improve the victims' ability to effectively enforce their right to damages.

### *b. Limitation periods*

While acknowledging the importance of limitation periods for establishing 'legal peace', the Commission feels that these limitation periods should not be such that they bar claimants from bringing a damages claim when that is still legitimate. To achieve that balance, the White Paper contains suggestions both for stand-alone and for follow-on damages cases.

With regard to stand-alone cases, the main issue relates to the commencement of the limitation period, particularly in the event of a continuous or repeated infringement or when the victim cannot reasonably have been aware of the infringement, for instance because it remained covert for a long period of time. It would clearly be odd if a limitation period were to expire while the infringement is still ongoing or where the victim is simply not aware of the infringement. **The Commission has therefore suggested that the limitation period should not start to run before a continuous or repeated infringement ceases, or before the victim of the infringement can reasonably be expected to have knowledge of the infringement and of the harm it caused him.**

To keep open the possibility of follow-on actions, the Commission considered a number of measures aimed at avoiding the limitation period expiring while public enforcement is still ongoing. One of those options was to suspend the limitation period during the public proceedings. The main drawback of that option, however, is that it may be impossible for parties to calculate the remaining period precisely, given that the opening and closure of proceedings by competition authorities are not always public knowledge. Moreover, if a suspension were to commence at a very late stage of the limitation period, there may not be enough time left to prepare a claim. **The Commission therefore suggests that a new limitation**

**period of at least two years should start once the infringement decision on which a follow-on claimant relies has become final.** The Commission believes that such a rule would not unduly prolong the uncertainty for the infringer, while it would enable the claimant to bring a damages claim once the illegality of the behaviour has been finally established <sup>(13)</sup>.

### *c. Costs of damages actions*

Taking into account the predominant views expressed during the consultation on the Green Paper, as well as the beneficial effects of the 'loser pays' principle as the main costs allocation rule in terms of preventing abusive claims, the Commission decided not to suggest any specific changes to national cost regimes. However, **costs of damages actions represent a major disincentive for victims to exercise their right to damages**, particularly for claimants whose financial situation is significantly weaker than that of the defendant, and/or in situations where cost prevents meritorious claims being brought due to the uncertainty of the outcome. The Commission therefore felt it important to encourage Member States to reflect on their cost regimes, including the level of the court fees, the cost allocation rule and the ways of funding.

In its White Paper the Commission also highlights the **necessity for Member States to give due consideration to mechanisms fostering early resolution of cases**. It notes that the effectiveness of settlement mechanisms is directly related to the effectiveness of the mechanisms for seeking redress through court actions. Indeed, settlement mechanisms alone cannot guarantee the exercise of the victims' right to damages without there being an effective and credible judicial alternative. However, where the court alternative becomes credible — and this is the Commission's objective — early settlements are to be encouraged as they can significantly reduce or eliminate litigation costs for the parties and the costs to the judicial system.

## **4. Proving the case**

Different sections in the White Paper address the specific difficulties that victims of antitrust infringements frequently encounter in proving their case, both in actions following a decision by a competition authority (follow-on actions) and in stand-alone actions <sup>(14)</sup>. The measures proposed

<sup>(13)</sup> This suggestion should thus be read in combination with the one on the probative value of NCA decisions (see point 4b below).

<sup>(14)</sup> In the White Paper (see section 1.2 *in fine*), the Commis-

in this context concern, in particular, the disclosure *inter partes*, the effect of decisions of competition authorities and the issue of fault. The sections dealing with the passing-on issue, discussed above, contain a further proposal to facilitate proof for victims.

#### *a. Access to evidence: disclosure inter partes*

Victims of antitrust infringements find themselves in a dilemma: antitrust damages cases are very fact-intensive, as the finding of an infringement, the quantum of damage and the relevant causal links all require the often unusually complex assessment of economic interrelations and effects. Much of the corresponding evidence, however, often lies inaccessibly in the hands of the infringers, who sometimes go to considerable lengths to conceal this information. **The current systems of civil procedure in many Member States offer, in practice, no effective means to overcome the information asymmetry that is typical of anti-trust cases.** As a result, infringers are able to keep crucial evidence to themselves, which means that victims are discouraged from bringing a claim for compensation and, where they do, judges are not able to decide the case based on a full picture of the facts.

In the sections on disclosure of evidence, **the Commission's** desire to suggest balanced measures becomes particularly apparent. It **proposes a minimum standard** for more effective access to evidence across all EU Member States so as to avoid excesses in both directions. It is committed to avoid, on the one hand, overly wide-ranging, time-consuming and costly disclosure obligations that are prone to abuses (e.g. so-called 'discovery blackmail') and, on the other hand, major obstacles to revealing the truth simply because the relevant evidence happens to be under the control of the infringer. Moreover, the White Paper puts forward a solution that is capable of integration even in those systems of civil procedure of the continental legal tradition where obligations to disclose evidence to the court and the other party are less developed <sup>(15)</sup>. To this end, the White Paper fur-

ther develops a mechanism that is already part of the Member States' legal orders, namely that underlying the Intellectual Property Directive 2004/48/EC. Under this approach, **obligations to disclose arise only once a court has adopted a disclosure order and they are subject to a strict control by this court.** This central role of the judge corresponds to the systems of civil procedure that applies in the vast majority of Member States. However, for a range of continental European countries, the proposal in the White Paper would mean a significant step forward towards more effective access to evidence.

Judges could order disclosure of information, documents or other means of evidence relevant to the claim once they are satisfied that a range of conditions are met. The first condition is that **the claimant (or the defendant <sup>(16)</sup>) has asserted all the facts and offered all those means of evidence that are reasonably available to him**, provided that these are sufficient to make his claim a plausible one, i.e. he must show plausible grounds for suspecting that he suffered harm as a result of the antitrust infringement by the defendant. Member States which currently apply very strict requirements in terms of specification of facts and means of evidence would have to allow for an initial alleviation of these strict requirements in antitrust damages cases. The general standard of proof for ultimately winning a case would, however, remain unaffected <sup>(17)</sup>.

The second condition is that **the claimant is unable, applying all reasonable efforts, to produce the means of evidence for which disclosure is envisaged.** The third and fourth conditions require that the claimant has specified sufficiently **precise categories of evidence to be disclosed**, and that the envisaged disclosure measure is **relevant to the case, as well as necessary and proportional in scope.** Specification of circumscribed categories of evidence is needed to allow the court to tailor the disclosure order to what is truly necessary in order to reveal the essential facts and proportionate in view of the nature and value of the claim, the seriousness of the alleged infringement and the addressee of the order. Courts must have some discretion to appreciate the specific circumstances of each individual case, and the Staff Working Paper mentions examples of how categories of

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sion pursues the explicit policy choice to improve the effectiveness of damages actions regardless of whether or not they follow an infringement decision by a competition authority. Even where victims can rely on such an infringement decision, they still face particular difficulties in gathering the evidence required to demonstrate the quantum and the causation of the harm.

<sup>(15)</sup> The reference to jurisdictions of the continental legal tradition is not meant to suggest homogeneity between these jurisdictions; indeed, particularly in relation to the rules on evidence, significant differences exist on the continent.

<sup>(16)</sup> For reasons of equality of arms, this disclosure in antitrust damages cases should be available not only to support claims of claimants but also defences by defendants (where in the text above reference is made to 'the claimant', the same shall apply *mutatis mutandis* to defendants).

<sup>(17)</sup> See SWP, paragraph 91.



evidence can be specified in a sufficiently precise manner while being comprehensive enough not to jeopardise effective access to evidence.

Further important issues addressed include the delicate question of how and to what extent **confidential information**, such as business secrets, can be protected in the proceedings before national courts without *de facto* precluding the exercise of the right to compensation, given the fact that much of the crucial evidence is likely to be commercially sensitive <sup>(18)</sup>. Another important issue addressed is that **effective sanctions must be available in order to avoid a refusal to hand over evidence and the destruction of evidence** <sup>(19)</sup>.

Among a number of measures aimed at **preserving the effectiveness of public enforcement** and, in particular, at maintaining the effectiveness of leniency programmes <sup>(20)</sup>, the White Paper contains an important exception to the disclosure obligations. ‘Corporate statements’, i.e. the voluntary presentations by a company of its knowledge of a cartel and role therein which are drawn up specially for submission under the leniency programme <sup>(21)</sup>, should be protected against disclosure. This protection applies to all applications (successful or not) submitted under EC and national leniency programmes when the enforcement of Article 81 EC is at issue. A similar form of protection may be appropriate in the context of voluntary presentations as part of settlement submissions.

### *b. Probative value of NCA decisions*

Where a breach of EC antitrust rules has been found in a decision by the European Commission, victims can rely on this decision as binding proof in civil proceedings for damages (see Article 16(1) of Regulation 1/2003). There is a range of compelling reasons for a similar rule in relation to decisions by national competition authorities when they find a breach of Article 81 or 82. At present, such a rule exists in the national law of only some Member States <sup>(22)</sup>. The Commission suggests that **a final decision by an NCA and a final judgment by a review court upholding the NCA decision or itself finding an infringement should be**

**accepted in every Member State as irrebuttable proof of the infringement in subsequent civil antitrust damages cases.**

Such a rule would not only increase legal certainty <sup>(23)</sup>, especially for victims of infringements, and enhance the consistency in the application of Articles 81 and 82 by different national bodies. It would also — and this is very important in terms of the effectiveness of antitrust damages actions — significantly increase the procedural efficiency of actions for antitrust damages and reduce the difficulties that the victims encounter when they have to prove their case. Without such a rule, infringers would be allowed to call into question their own breach of the law that has already been established in a binding decision by an NCA and, possibly, confirmed by a review court. Victims would have to formally prove, and courts in the civil proceedings would have to re-examine, all the facts and legal issues already investigated and assessed by a specialised public authority and often by a review court, the latter being the best placed body to ensure the legal and factual accuracy of NCA decisions. Such ‘re-litigation’ would usually entail lengthy disputes between the parties and their legal and economic experts. This would not only add to the already considerable costs and duration of antitrust damages actions, but it would also be a factor which further increases the uncertainty of the victim’s action for damages.

The rule suggested in the White Paper is (to some extent) modelled on Article 16(1) of Regulation 1/2003, i.e. based on a legal mechanism that is already part of the Member States’ legal order and that is not, as further explained in the Staff Working Paper <sup>(24)</sup>, at odds with the principles of an independent judiciary and separation of powers.

The Commission does not limit the binding effect of an NCA decision to the domestic courts of the same Member State. This is not surprising given the cooperation and mutual consultation provided for in Regulation 1/2003, and given the objectives of legal certainty, consistency in the application of Articles 81 and 82 and enhancing the effectiveness of antitrust damages claims across the EU. Indeed, limiting the binding effect of NCA decisions to only one Member State would create a serious disincentive for victims of multi-state infringements (found by NCAs of several Member States) to concentrate their claims for compensation in one court. Such concentration of proceedings has

<sup>(18)</sup> See SWP, paragraphs 112 *et seq.* On the need of balancing the right to judicial protection of victims of infringements of EC law and the right to privacy of the infringer see, in a different context, Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* (not yet reported).

<sup>(19)</sup> See in more detail SWP, paragraphs 128 *et seq.*

<sup>(20)</sup> See in more detail SWP, chapter 10.

<sup>(21)</sup> See points 6 and 31 of the EC Leniency Notice.

<sup>(22)</sup> See the references in footnote 65 of the SWP to the rules, for instance, in Germany, Hungary and the UK.

<sup>(23)</sup> See on this aspect in relation to civil proceedings following a Commission decision Case C-234/89 *Stergios Delimitis v Henninger-Bräu AG* ECR [1991] I-935 paragraph 47.

<sup>(24)</sup> See paragraphs 148 *et seq.*, see also footnote 64 of the SWP.

obvious advantages in terms of consistency and procedural efficiency for claimants, defendants and the judicial system alike. In the context of multi-jurisdictional cases, Article 6(1) of Regulation 44/2001 explicitly provides for tort victims to be able to cumulate their damages actions against all co-defendants before one court of the country where at least one of them is domiciled.

The Commission sees no need for an exception to the binding effect of NCA decisions from another Member State. All Member States are legally bound to fully respect the rights of defence and fair trial pursuant the European Convention on Human Rights and the EU Charter on Fundamental Rights <sup>(25)</sup>, and the corresponding possibilities of judicial review exist <sup>(26)</sup>.

### c. *The fault requirement*

A final topic that is covered by the White Paper and which is relevant in the context of proving a case relates to the fault requirement. In some Member States it is sufficient to prove the infringement of the EC competition rules (and of course also the damage it has caused) in order to be awarded damages. Other Member States, however, require the claimant also to show that the infringer committed a fault, meaning that he acted intentionally or negligently. The idea behind this additional requirement is that infringers who did not know that they were breaking the law should not be held liable for the negative consequences of their behaviour. The Commission feels that the full application of this requirement to breaches of directly applicable EC public policy rules, such as the EC competition rules, cannot be reconciled with the principle of effectiveness of those rules <sup>(27)</sup>. That is not only the case because the burden of proving the fault lies with the claimant, who is often unlikely to have information that allows him to show intent or negligence. **The fault requirement in itself also introduces a difficulty to the acquisition of damages which can be disproportionate to the objective it seeks to achieve.**

The Commission understands, however, that **in some exceptional cases, it should be possible for the infringer to escape liability.** Such is the case when the infringer has taken every precaution that can be reasonably expected from him and nevertheless is found to have infringed the competition rules. That kind of **excusable error** on which the infringer can rely by way of defence may occur in novel and complex situations. Mere ignorance of the law, however, clearly cannot render an error excusable; one is bound by the law even if one has no knowledge of it. It will thus normally be irrelevant whether or not the undertaking actually realised that it was infringing Articles 81 or 82. Equally, reliance on wrong legal or other professional advice, as such, cannot exonerate an undertaking. Errors based on incorrect official statements by competent public entities, such as competition authorities and courts, should only be excusable where undertakings applying a high standard of care could reasonably rely on such statements.

## 5. Outlook

The analysis in the White Paper and its accompanying documents has shown that measures such as those discussed above are indispensable in order to address the obstacles faced by victims and to make the right to damages a realistic possibility for citizens and businesses across the EU. The Staff Working Paper concludes by recalling the Commission's view that some aspects of the issues listed in the White Paper may require EC legislative action to ensure the effectiveness of antitrust damages actions. In addition, it recommends the codification of the key aspects of the *acquis communautaire* and drawing up of non-binding guidance on the calculation of damages.

All of this will, of course, be reflected upon further in the light of the results of the consultation process. The period of public consultation ran until 15 July and more than 170 stakeholders submitted their comments on the White Paper and the accompanying documents, in particular the Staff Working Paper.

<sup>(25)</sup> See Article 6 of the Convention and Articles 47(2) and 48 of the Charter.

<sup>(26)</sup> The Commission, nonetheless, would not object if a Member State were to apply, as a further safeguard, an exception to the binding effect analogous to that contained in Article 34(1) of Regulation 44/2001 with respect to fair legal process; see SWP, paragraph 162.

<sup>(27)</sup> See, in this context, also the case law of the ECJ which only names the infringement and the damage caused as conditions for a right to damages (cf., the quote of *Manfredi* in footnote 11).