

Damages Actions for Breach of the EC Antitrust Rules

- Introduction from the Romanian Law Perspective -

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In 2001, after more than ten years of litigation, Mister Crehan, an innkeeper tied by an anticompetitive agreement,² obtains a favourable decision from the European Court of Justice regarding the possibility of damages for losses suffered as a result of breach of Art. 81 EC-Treaty. Two years later, the national judgement of the English High Court, denied any recovery damages.³ The national Court did not even mention the ECJ judgement.

This situation was a strong signal for the Commission to outline its policy in the private enforcement area.

Claims to recover damages caused by infringements of EC competition law have been a possibility since the inauguration of the EC antitrust enforcement system in 1962. In the Case *AG Van Gerven* from 1992,⁴ it was confirmed that:

“The national court is obliged in principle, under Community law, to award damages for loss sustained as a result of breach of a directly applicable competition rule.”

A study ordered by the Commission (furthermore mentioned as the Ashurst Report)⁵ concluded that in the 40 years in which the antitrust enforcement system has been functioning, only twelve successful damages cases have been awarded for damages for breach of EC competition law. A similarly limited number was registered in the national competition law.

As underlined by the European Court of Justice in the *Crehan* Case, in order to have “full effectiveness of the competition law rules, it is essential to open to any individual the possibility to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.”

Based on the US Model but trying to avoid its deficiencies, the Commission published in December 2005 a Green Paper for damages actions for breach of the EC antitrust rules. The staff working paper notes that “the US system of antitrust litigation offers strong incentives to bring”

¹ Traducerea și adaptarea Daniela Mădălina Stănică, MA.

² ECJ, Case C-453/99 *Courage v Crehan* [2001] ECR I-6297. In an action for the recovery for unpaid deliveries of beer, Mr Crehan argued that the requirement to buy beer exclusively (beer tie) from Courage infringed Article 81 of the EC Treaty. He also counterclaimed for damages arguing that Courage sold its beer to pubs which were not subject to the beer tie at substantially lower prices than those in the price list and that this price difference reduced its profitability driving him out of business.

³ The judge settled that there had been no infringement of Article 81 by the brewer companies. *Crehan v Intreprenur Pub Co* [2004] EWCA Civ 637.

⁴ *AG Van Gerven*, Case C 128/92, *Banks v. British Coal*, 1994 E.C.R. I-1209. Though, the case related only to Articles 65 and 66 of the European Coal and Steel Community Treaty (“ECSC Treaty”) and the Commission, and not national courts, was competent to determine an infringement of those articles.

⁵ COMPARATIVE REPORT, Study on the conditions of claims for damages in case of infringement of EC competition rules, (known as Ashurst Report), 2004, available at:
http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/study.html.

antitrust suits, including treble damages, costshifting, and class action procedures. On the other hand, the “US system is often perceived as encouraging unmeritorious or vexatious litigation,” so it “should be examined carefully and lessons drawn from it” in order “to keep excessive litigation in check and to try to achieve some form of moderation in the enforcement system.”⁶

I. Background

Through the Regulation 1/2003⁷ the Commission abolished its monopoly to grant exemptions under Art. 81 (3) EC. As a result, a major obstacle to an extensive application of the competition rules by the national judges (and national competition authorities) was removed.⁸

The actions before national Courts were blocked as long as the Commission was considering an exemption decision. The Commission had a wide margin of discretion in the consideration of the case⁹ which was highly time consuming and which often transformed the national Court case into a superfluous one.¹⁰

Now, the national Courts must fully apply Articles 81 and 82 EC in addition to the national law when an agreement or practice affects trade between Member States.¹¹ As in the old system, they are further entitled to analyse the allegation of one party of violations of competition law under Art. 81(1) EC. The news is that they must also analyse the other party’s defence based on Art. 81(3) EC without the intervention of the Commission being necessary. As stated in the Recital 7 of the Regulation 1/2003, “the national courts have an essential role to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements.”

The Rec. 7 underlines the privatisation (beside the decentralisation) aim of the new Regulation and it was meant to strengthen the possibilities for private parties to seek and obtain relief before national Courts. Private enforcement of the competition rules has direct benefits for the functioning of the internal market, it has a strong deterrent effect and it promotes a culture of competition.¹² It brings direct compensations for those who have suffered losses due to breaches of the competition rules and increases the level of access to justice; the courts are obliged to hear the cases while an administrative authority has discretion to pursue other priorities.

The question formulated by Neelie Kroes “why there are so few cases started in Europe alleging infringements of the competition rules?” still remains. The answer “sadly, I don’t think it’s because there are so few infringements around”¹³ was confirmed by the Ashurst Report: “the damages actions for breach of competition law in the enlarged EU are one of astonishing diversity and total underdevelopment”.

⁶ COMMISSION STAFF WORKING PAPER Annex to the GREEN PAPER on Damages actions for breach of the EC antitrust rules, Brussels, 19.12.2005 SEC(2005) 1732.

⁷ COUNCIL REGULATION (EC) No 1/2003 of 16th December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

⁸ Deselaers/ Obst, EWS 2000, S. 41, 41.

⁹ CFI, Case T-39/92 and T-40/92 [1994] ECR II-49, para. 109 – Groupement des cartes bancaires (CB) and Europay International S.A. v. Commission.

¹⁰ SPEECH/04/403, Mario MONTI. Private litigation as a key complement to public enforcement of competition rules and the first conclusions on the implementation of the new Merger Regulation IBA – 8th Annual Competition Conference Fiesole, 17th September 2004.

¹¹ Art. 6, Regulation 1/2003.

¹² SPEECH/05/613, Neelie Kroes Member of the European Commission in charge of Competition Policy Damages Actions for Breaches of EU Competition Rules: Realities and Potentials Opening speech at the conference ‘La réparation du prejudice cause par une pratique anti-concurrentielle en France et à l’étranger: bilan et perspectives’, Cour de Cassation Paris, 17th October 2005.

¹³ SPEECH/06/158, Neelie Kroes. More private antitrust enforcement through better access to damages: an invitation for an open debate.

The evidence, generally under the control of the defendant, lowers the ability to prove the infringement. The calculation of damage (which has to be proved as direct and certain) as well as the causation between the tort and the damage is difficult to settle. The uncertainty concerning the result of the action in the court, the risk of bearing the related costs and the reality that the legal costs of the claimant are never fully compensated¹⁴ are further elements which justify the high degree of unreported cases.

II. Initiatives by Member States

A number of solutions have already been given by the Member States in the field of the private enforcement. They adapted their national rules in order to facilitate the antitrust damages claims:

- In the UK a **specialised Court** was created, the Competition Appeal Tribunal (“CAT”), which can hear actions for damages where a prior decision of the Office of Fair Trading (“OFT”) or the European Commission exists.
- Most of the Member States provide rules for designation of competent Courts which derogate from the normal competence, for example by using **higher jurisdictions**.¹⁵ Romania is another example for this. According to Art. 7 from the Romanian Competition Law 21/1996 (in the followings RCL), the ordinary instance in solving the competition law cases is the Court of Appeal which judge in the first instance. The decision can only be contested in final instance by the High Court of Cassation and Justice.
- In Sweden, “opt in” class actions were introduced in 2003. Recently a number of measures were recommended to further support private enforcement, including the extension of **class actions** to consumer groups and other private individuals affected by an infringement of competition law.
- The new German competition law (GWB¹⁶) includes **facilitations** of the private enforcement of Articles 81 and 82 EC through :
 1. the relaxation of the “protective purpose”, which were limiting the circle of potential claimants to those directly targeted by the infringer;
 2. the permit to take into account the infringer’s profit when assessing the amount of damage;
 3. the idea of according interest from the moment of occurrence of the damage;
 4. the binding effect on civil courts of the Final Decisions of the German Federal Cartel Office, of the EC Commission and of the competition authorities of other EU Member States, of final decisions issued by Courts of other EU Member States having the function of a competition authority as well as of Court decisions on appeals against the abovementioned decisions insofar as they find an infringement of competition law;
 5. the reduction of the Court and lawyers’ fees when a party is not in a financial position to bear those costs.¹⁷

¹⁴ In French Law for example, pursuant to art. 700 of the Code of Civil Procedure, the courts may order the unsuccessful party to bear all legal costs ; in practice, the prevailing party is never fully reimbursed, e.g. in Case Eco-System/ Peugeot, (Commercial Court of Paris, 22th October 1996) only € 240,000 were reimbursed from € 15 M which have been claimed.

¹⁵ Austria, Belgium, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovenia, Spain, Sweden, UK.

¹⁶ The 7th amendment to the German Act against Restraints of Competition (Gesetz gegen Wettbewerbsbechränkungen).

¹⁷ Ashurst Report, above, note 4.

III. Proposals

The Green Paper set out a number of alternatives to modify the current framework for antitrust damages claims where that framework is considered to hinder litigation.

These alternatives regard:

1. Access to Evidence for claimant. The difficulty for private parties in proving the applicability of Art. 81 EC is highlighted in the Case “*Delimitis v. Henninger Bräu*”¹⁸ and confirmed in the Ashurst Report and it is linked with the accessibility to the relevant evidence: “Several national reporters identified the difficulty of obtaining evidence as one of the major obstacles due to the limited scope for ordering disclosure of documents that exists in most Member States.”

The Green Paper makes the distinction between:

- a) The **follow-on actions**, when a competition authority has already taken a decision, finding an infringement of the European competition rules, and the claimant subsequently starts proceedings before a national Court in order to be compensated for the damage. The national Courts are bound by a Commission’s decision on EC law.¹⁹ The question is if the claimant can also rely on the decision of the national competition authority as evidence of the infringement, on matters of national law but also of EC law.²⁰
- b) The **stand alone actions**, when there is no decision of a competition authority and the plaintiff has to prove alone an infringement of the European competition rules. In this case solutions should be found so that the evidence, which is usually in the hands of the defendant, can be disclosed without imposing a disproportional burden on the defendant.

Bearing in mind this distinction, the Commission asks:

- about the special rules governing disclosure of documentary evidence²¹
- whether there should be special measures to prevent the destruction of evidence and
- whether the burden of proof should be alleviated, e.g. by lowering the standard of burden of proof in cases of information asymmetry between claimant and defendant.

The article 172 Romanian Civil Procedure Code (in the following RCPC) stipulates the following: “*when the party acknowledges that the offender holds relevant documents, the Court can order its disclosure*”. By the moment that the plaintiff explicitly presents the relevant facts of the case as well as the relevant evidence in its possession, the interest for disclosing the required documents is considered demonstrated.

According to Art. 169 RCPC, the evidence has to be administrated in front of the Court, if the law does not stipulate otherwise. As an arbitrator between the two parties, in virtue of its active role and in order to avoid other consequences of a disposal that could go beyond the limits of a damages action, the Court is the instance that has to establish, for each invoked document, if it is relevant (to create premises leading to the solving of the case) and reasonable (to be related to the object of the process) in the procedure: “*the evidence can be approved only if the Court considers that it can create premises for solving the case, except for the case when evidence could be lost by delay of the procedure*”.²²

¹⁸ *Delimitis v. Henninger Bräu*, C-234/89 [1991] ECR I-935, para 26 (3).

¹⁹ Regulation 1/2003, Article 16.

²⁰ As for example the case in UK where the national courts already applies OFT decisions.

²¹ Less relevant to common law countries where these obligations are already.

²² Art. 167 of the Romanian Civil Procedure Code.

For the case that the Court orders the disclosure of documents, it should consider the confidential character of certain documents in conformity with Art. 173, point 2 RCPC: “The Court will partially or entirely deny the request for a document disclosure when: (...) such a disclosure would breach the obligation to keep the secrecy”

If the party refuses to present a document or an asset within the deadline fixed by the Court²³, as well when the **competition authority** or other person refuses or omits to communicate at the request of the Court the data resulting from the acts and its records²⁴ there can be fines imposed on the owner. Besides, the unjustified refusal to disclose evidence could lead to a relative or absolute presumption of a proved request: „If the party refuses to respond to the interrogation proposed (...), the Court shall consider as proved the requests on the content of the document of the party asking the hearings”²⁵.

Further, the provisions concerning the insurance of relevant evidence are mandatory. In Romania, the preservation of evidence is settled through the Civil Procedure Code, under article 235 and the following ones. The article 272 of the Penal Code incriminates as well the act of **withholding** or damaging a document required for solving a pending case.

Assuming that the private action does not follow a public action the information asymmetry case between the parties based on the fact that the presumptive author of the anticompetitive practice possesses the information that are inaccessible for the claimant and which according to the common law would be necessary to solve the case could justify the favouring of burden of proof for the claimant.²⁶

2. Fault. Several EU countries require proof of “fault” (negligence orientated) in addition to prove a violation of antitrust law. The Commission asks:

- whether proof of an infringement alone should suffice (strict liability), or
- whether there should be a defence of excusable error.

The Analyse of this proposal should be divided for the two situations – for the follow up and stand alone actions.

In Romania, the decision of the competition authority is an administrative act having binding character. This constitutes in the actual system a simple presumption of the fault. The Competition Council, in its Position regarding the Green Paper²⁷ propose that for this case, the infringement alone should suffice; the simple presumption should be given an absolute character irrespective of the infringement’s severity.

For the case of a stand alone action and when there is still no decision of the Competition Authority, the ordinary national law should conduct the procedure of fault according to which the lack of fault represents an exemption from liability. A positive discrimination between parties injured by competition law infringements and those injured by the infringements of other rules would not be justifiable of the character of the competition law infringements.

3. Computation of Damages. The Member States pursue a variety of approaches to the calculation and proof of damages, especially based on the idea of compensation or recovery of illegal gain.

²³ Art. 108 paragraph 1, point 2, letter e of the Civil Procedure Code.

²⁴ Art. 108 paragraph 1, point 2, letter f of the Civil Procedure Code.

²⁵ Art. 174 of the Civil Procedure Code.

²⁶ Position of the Romanian Competition Council regarding the The European Commission Green Paper in case of damages actions for breach of the EC antitrust rules, April 2006, p. 7.

²⁷ Position of the Romanian Competition Council regarding the The European Commission Green Paper in case of damages actions for breach of the EC antitrust rules, April 2006, p. 8.

The Commission addresses the questions regarding the best modality to define and award the damages:

- on the basis of the loss suffered by the claimant or the illegal gain made by the infringer and
- whether double damages should be awarded for cartels between competitors. In United States the plaintiff may recover treble damages,²⁸
- whether interest should be calculated from the date of the violation or the date of the injury.

In Romanian Law the civil liability has a reparatory not a sanctioning role. Therefore, the compensation should fully and equitably compensate both the effective loss and the gain that the victim could have obtained²⁹ but not exceeding it with the difference up to the illegal gain achieved by the defendant (if the case); this solution should be maintain as well for the case in which the cartelist has not obtained (yet) any gain or the obtained gain is inferior to the caused damage.

Further, regarding the calculation of damages, it was held by the Romanian Competition Authority³⁰ that the Commission should only define the principles on quantifying the damages; the details of the implementing procedure should be conduct according to the national legislation of the Member States.

The Green Paper also asks whether “complex economic models” or “simpler methods” should be used for providing evidence of the damages. The ECJ, in *Crehan* Case seemed to have decided, as the English national Courts,³¹ in favour of the “common sense approach” rather than any sophisticated econometric analysis. In *Crehan*, the evidence provided by the witness, the claimant’s accountant was worth more than a study econometric nature.³²

The complex econometric methods of damage quantification can complicate and therefore discourage private actions. On the other hand, the methods of calculating damages available in normal civil proceedings might generate delays or provoke confusions due the complex nature of the competition cases. The differences between national proceedings might also lead to completely different results regarding the quantum of the damages.

A major challenge for any party relying on economic evidence will be to provide clear, understandable, convincing and relevant evidence to the judge.

4. Costs of Actions. The Green Paper asks whether there should be rules to reduce the cost risk for claimants, e.g. that unsuccessful claimants should only have to pay costs where they acted in a manifestly unreasonable manner in bringing their case. In the United States the costs of the defendant do not have to be reimbursed by the plaintiff even if the plaintiff loses his case. In most EU Countries and in Romania’s jurisdictions, the costs of the successful party are paid, at least in part, by the losing party.

5. Passing-On Defence and Indirect Purchaser Standing. The “passing-on defence” refers to the legal treatment of the fact that a claimant who purchases from a supplier engaged in anti-competitive behaviour passed on all or a substantial part of the overcharge to companies further down the supply chain. Thereby his loss is avoided or substantially reduced.

The main questions are:

²⁸ Am. Soc’y of Mech. Eng’rs v. Hydrolevel Corp., 456 U.S. 556 (1982).

²⁹ Calculated by the moment that the obligation has become certain and outstanding so to the losses according to Art. 1084 of the Romanian Civil Code.

³⁰ Position of the Romanian Competition Council regarding the The European Commission Green Paper in case of damages actions for breach of the EC antitrust rules, April 2006, p. 10.

³¹ In *Arkin v. Borchard Lines Ltd. et al.*, [2003] All E.R. (D) 173, [2003] E.W.H.C. 687 (Comm. 10th Apr. 2003).

³² There was no sign of any detailed analysis.

- whether this defence should be allowed to the infringer and
- whether indirect purchasers should be allowed to claim the suffered loss.

Regarding the first issue, the Romanian law system contains any provisions; the legislation of the Member State offers different solutions. In **Italy**, in the Case *Indaba Incentive Company/Juventus*,³³ the defence of the infringer was successfully admitted on the basis that the claimant, a provider of ticket distribution services, had passed on the effects of the infringer's anticompetitive conducts to the final consumers. The case showed that the Italian law allows defendants (infringers) to argue that a claimant has not suffered any loss due to his anticompetitive conducts having passed on the effects to its downstream purchaser.

The situation is different in **German law**, where, the Sec. 33 GWB settles that the upstream producers are explicitly forbidden to use the passing on defence.³⁴

Regarding the second issue, to the possibility for the indirect purchaser of claiming the suffered loss, the ECJ has decided in *Crehan* Case :³⁵ "The Court has held that Community law does not prevent national Courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them." So, sustained by the principle of forbidding *unjust enrichment*, the ultimate consumer, "every individual"³⁶ may pursue a private action for breaching of the competition laws. This consumer-welfare orientated decision implies the allowance of the indirect purchaser suits.

The Romanian Law³⁷ provides that "[...] individuals and/or legal entities reserve the right to sue for the complete remedy of the damage caused by the anticompetitive practices [...]."

In the Member State, in **Ireland** for example, the Competition Act held that "any person who is aggrieved in consequence of an agreement, decision, or concerted practice which is prohibited under [Articles 81 and 82] shall have a right of action."³⁸ As expressed in *The State (Lynch) v Cooney*, an "aggrieved person" is "a term to be generously interpreted – which is generally understood to include any reasonable grounds to bring the proceedings."³⁹

In **Germany**, according to the Sec. 33(1) "anybody, be it a competitor or be it another participant in the market, who has been affected by an infringement against German or EC competition rules has a claim for injunctive relief and damages".

Nevertheless, the problematic of the indirect purchasers is strongly correlated to that of the passing on defence; if the indirect (downstream) purchasers have a right of action on the base of the effects of the breaches of competition law that they suffered, there should be a model which precisely identifies the overcharge that has been passed on to them.

As suggested in the Ashurst Report and experienced in the US law, to measure the overcharge passed on can be extremely complex and costly, and may cause difficulties to private action claims:

*"Permitting the use of pass-on theories ... essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge – from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness."*⁴⁰

³³ Judgment of the Italian Court of Appeal, Corte d'Appello di Torino, in *Danno e Responsabilità*, p. 46 (6th July 2000).

³⁴ Sec. 33 (3) GWB; the judge might consider this when assessing the reasonable level of damages.

³⁵ Paragraph 30 of the *Crehan* judgment.

³⁶ As held by the ECJ in *Crehan*, Paragraph 26.

³⁷ Art. 64 RCL.

³⁸ Ireland Competition Act (2002), Sec. 14(1).

³⁹ *The State (Lynch) v Cooney* [1982] IR 337.

⁴⁰ *Illinois Brick v Illinois*, 431 US 720 (1977).

In the **United States**, due to the jurisprudence from the Case *Illinois Brick v. Illinois and Hanover Shoe v. United Shoe Machinery Corp*⁴¹, the indirect purchasers are in principle prevented from bringing federal private antitrust damage actions. The use of the passing on defence is also, in principle prohibited.

These solutions are being contested also in the US. Having in mind the *Crehan* decision, where it was stressed that “every individual “, including the party to the restrictive contract should have the right to claim for damages is to be expected that the European solution will be different.

6. Defending Consumer Interests. The Ashurst Report attested that no Member State provides a remedy like the American class action.⁴² This type of action which consists in organising a large number of small individual claims under one lawsuit, presents important advantages e.g. the compensation for a large number of antitrust victims, saving time and money and the important deterrent effect.

The Commission asks:

- whether collective actions brought on behalf of groups of customers or final consumers, e.g. consumer associations, should be permissible and
- if so in which procedural frame.

In the **Romanian** Law exists the possibility of constituting “ad-hoc association” for bringing private damages actions against the same defendant(s).⁴³ According to the Art. 47 RCPC “more persons can be together claimants if the object of the trial is a common right or obligation or if their right or obligations have the same cause. Further, everybody who proves an interest can interfere in a trial which have been started by other persons⁴⁴ and every party can as well ask the interference of another person who could pretend the same rights as the claimant.⁴⁵”

In a **U.S.** class action, an individual, including a lawyer, can bring a claim on behalf of a group of plaintiffs. In EU jurisdictions the representative actions brought in the field of antitrust actions, are those of the representative associations.

In **Germany**, according to Sec. 33(2) GWB an action is allowed for an injunction to be brought before the courts by “representative Organisations of competitors if their members are affected by the infringement. The consumer organisations don’t beneficiate a right to claim.”

7. Coordination of Public and Private Enforcement. Delicate issues are identified in the Green Paper, especially regarding the leniency programs in public enforcement which has the same aim as civil liability: to contribute to a more effective deterrence from entering into cartels. A balance between public and private enforcement has to be created. The questions posed by the Commission for the case of the leniency application are:

- whether and if yes,
- to what extent, there should be a relief from damages claims, without affecting constitutional rights of free access to justice.

⁴¹ *Hanover Shoe Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). Hanover Shoe recognized, however, that the difficulties of proof may not always be sufficiently great to preclude use of the pass-on defence, "for instance, when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged."

⁴² William Page, J. Woodbury, European Commission Green Paper: Damages Actions for Breach of the EC Antitrust Rules, available at: [www. antitrustsource.com_January2006](http://www.antitrustsource.com_January2006).

⁴³ This is an interpretation based on the common law (the Civil Procedure Code); the special Law, Law 21/96 doesn’t offer any such indications.

⁴⁴ Art. 49 RCPC. The intervention is in his own interest when the person who interferes invokes his own right. The intervention is in the interest of one of the parties when it supports only the others’ defence.

⁴⁵ Art. 57 RCPC.

In Romanian Law, the leniency policy which may lead to exoneration of pecuniary liability is consecrated in Art. 56 RCL. On this base were released the Guidelines⁴⁶ which shall establish the terms and conditions, and the criteria to apply this policy.

Leniency programs are applicable in most of the Member States. The Department of Trade and Industry (UK) in its comments regarding the Green paper underlined that: "the main thrust of competition law must remain public enforcement and it is important not to compromise that, or divert resources from it."⁴⁷ Further the German position completed the idea: "Public and private enforcement of competition law should be coordinated in such a way that the functionality and attractiveness of leniency applications should be affected to the least extent possible".⁴⁸

8. Other Issues. The Commission also sets questions regarding: The possibility established by Regulation 44/2001⁴⁹ that the defendants can be sued where they are domiciled, where the actions giving rise to the claim occurred, or where the harm itself occurred.

- The possibility for the courts, as a way of reducing costs, to require parties to agree on a single expert witness or permit the court to appoint one.
- The possibility of suspension of the limitation period for the private actions during public enforcement proceeding
- The possibility of clarification of the standards for proof of causation to assure that they do not pose a significant obstacle for claimants

IV Instead of conclusions

In a recent case⁵⁰, Mr. Manfredi and other individuals claimed damages from a number of Italian insurance companies that had been found by the Italian competition authority to have engaged in an unlawful exchange of information, with a view to makes possible an increase in premiums for compulsory civil liability insurance. As a further step after the *Crehan* Decision, the ECJ expressly recognizes the right of private litigants to claim compensation for loss suffered as a result of a breach of the EC competition rules. The court stresses, however, that must be a causal relationship between the harm and the agreement or practice prohibited by Article 81 EC.

Actions for damages are governed by national procedural laws

The ECJ underlines that in the absence of specific Community rules on the matter the conditions for the exercise of the right to claim damages regarding, for example to the designation of the courts and tribunals, of the prescription of the detailed procedural rules or of the prescription of the limitation period for seeking compensation for the caused harm are to be determined by national laws. However following the *Grundig Italiana*⁵¹ jurisprudence with two condition have to be respected: first,

⁴⁶ Guidelines regarding the conditions and application criteria of a leniency policy pursuant to the provisions of the art. 56(2) of the Competition Law no. 121/1996 with subsequent amendments and completions.

⁴⁷ Paragraph 4 of the Position regarding the Green Paper of the Department of Trade and Industry (UK) http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/085.pdf.

⁴⁸ Comments of the Federal Ministry of Economics and Technology and the Federal Cartel Office on the Green Paper of the EU Commission "Damages actions for breach of the EC antitrust rules"; http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/140_en.pdf.

⁴⁹ COUNCIL REGULATION (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001, L 12, p.1. In Denmark, jurisdiction is governed by the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [OJ 1990, C 189, p. 2] as amended, which is substantially equal to Regulation 44/2001.

⁵⁰ Judgment of 13th July 2006, *Vincenzo Manfredi and Others v. Lloyd Adriatico Assicurazioni SpA and Others*, joined Cases C-295/04 to C-298/04 (not published yet).

⁵¹ *Grundig Italiana*, C-255/00, ECR 2002, I- 8003.

the national rules on EC antitrust actions must not be less favourable than those governing similar actions under national law (principle of equivalence) and, second, those rules must not make the exercise of rights conferred by Community law practically impossible or even excessively difficult (principle of effectiveness). National laws not complying with these principles must be interpreted in accordance with Community law or may even be deemed inapplicable in specific cases.

Guidance on the definition of “damages”

The ECJ discussed as well whether Article 81 EC requires national courts to award punitive damages and how damages for the breach of EC antitrust rules should be measured. The ECJ stated that the criteria for determining **the extent of the damages** for harm caused by an agreement or practice prohibited under Article 81 EC are subject to national procedural law provided that the principles of equivalence and effectiveness are observed. Therefore, in accordance with the principle of equivalence, a national court may award punitive damages for breach of EC competition law where it has the power to award punitive damages for breach of national competition law. However, Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them.

The ECJ also stresses that the principle of effectiveness requires antitrust claimants to be able to seek compensation not only for actual loss but also for loss of profit, plus an award of interest, in accordance with applicable national rules.

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