

# **EU and US Antitrust Arbitration**

# **EU and US Antitrust Arbitration**

A Handbook for Practitioners

Volume 1

Edited by

Gordon Blanke  
Phillip Landolt



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## Chapter 17

# Remedies in Arbitration for EU Competition Law Violations

by Phillip Landolt

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### I. INTRODUCTION

As certain as it is that the EU legal order wishes for its competition law to be applied in international arbitration, one looks in vain within EU law for a statement directing how arbitral tribunals must or even should deal with remedies for violations of EU competition **17-001**

law. Arbitrators will seek to ascertain the expectations which the EU legal order has of them in relation to giving effect to EU competition law remedies, since the EU legal order's expectations of them are relevant to both of the bases upon which these arbitrators may be giving effect to EU competition law.

This chapter only covers final remedies in relation to EU competition law violations awarded in arbitrations. Interim remedies in respect of such violations are examined in Chapters 17, 18 and 37.

**17-002 Structure of this chapter.** The initial section of this chapter (section II) presents the two bases upon which arbitrators may decide to give effect to EU competition law and identifies the relevance of the EU legal order's requirements in each case. The next section (section III) identifies the requirements of the EU legal order on EU Member State courts in relation to remedies for violations of EU competition law. There then follows a section (section IV) attempting to translate these requirements of the EU legal order on EU Member State courts into the arbitration context. In the final section (section V), issues relating to the law on remedies for violations of EU competition law will be summarized.

## II. THE BASES UPON WHICH ARBITRATORS MAY GIVE EFFECT TO EU COMPETITION LAW

**17-003 The law applying to the right applies to the remedy.** As a general proposition of conflicts of laws, the law applying to the right applies also to the remedy. Article 12 of the Rome I Regulation (applying to contractual obligations),<sup>1</sup> for example, operates upon this principle:<sup>2</sup>

1. The law applicable to a contract by virtue of this Regulation shall govern in particular:
  - [...]
  - (c) within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law;
  - [...]
  - (e) the consequences of nullity of the contract.

Article 15 of the Rome II Regulation also prescribes that remedies for breach of non-contractual obligations are governed by the law of the obligation:

The law applicable to non-contractual obligations under this Regulation shall govern in particular:

- (a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;
- (b) the grounds for exemption from liability, any limitation of liability and any division of liability;
- (c) the existence, the nature and the assessment of damage or the remedy claimed;

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1. Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17 Jun. 2008 on the law applicable to contractual obligations (Rome I) OJ L177/6 of 4 Jul. 2008.

2. Article 12(2) does, however, create a narrow exception to the principle, namely that regard to the law of the place of performance shall be had in determining the steps to be taken in the event of defective performance.

- (d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation;  
[...]

**Law of the forum.** While this treatment under Rome I and Rome II is expressive of general private international law rules, it is true that certain limited aspects of remedies are in some legal systems treated as matters of the *lex fori*. English law, for instance, treats the calculation of damages in tort<sup>3</sup> (but not the determination of the heads of damage) and the calculation of pre-judgment interest (but not its availability) as matters for the *lex fori*.<sup>4</sup> **17-004**

**Two bases for the law applying to remedies.** As was seen in Chapter 13, arbitrators may decide to give effect to competition law as an element of the *lex causae*. On the other hand, as seen in Chapter 15 arbitrators may decide to give effect to competition law as mandatory norms. **17-005**

**EU law generally refers to Member State law to govern remedies.** As will be seen in section III, EU competition law does not itself govern much of matters relating to remedies, but refers to the law of the Member States to supply the treatment of remedies. There is a question whether in this situation the law of the Member State can be treated as the *lex causae*, if the *lex causae* is not that of an EU Member State. This matter is dealt with in section IV below. **17-006**

**The *lex causae* as the legal basis of remedies.** If the arbitrator is applying EU competition law as part of the *lex causae* then the law determining the remedies is simply the *lex causae*, both its competition element, and other relevant aspects of remedies which EU competition law leaves to be determined by the *lex causae*. **17-007**

**Mandatory norms as the legal basis of remedies.** If, however, the arbitrator is applying competition law upon the second basis, as mandatory norms, the law determining remedies for competition law violations is the particular competition law in question, which of course governs the question of rights and therefore may validly prescribe remedies. But the *lex causae* will also be applicable, if referred to by EU competition law to determine the matter of remedies. **17-008**

**Potential differences in result between the two legal bases for the application of remedies.** One might think initially that the result is the same as between the two bases upon which arbitrators may apply EU competition law, although the route is slightly different. But because the mechanism of the application of mandatory norms can result in some attenuation in their application, especially in arbitration, results may in fact differ as between the two bases. This potential attenuation of mandatory norms was described at paragraph 15-013. **17-009**

3. *Harding v. Wealands* [2007] 2 AC 1 and s. 14(3)(b) of the *Private International Law (Miscellaneous Provisions) Act* 1995.

4. See s. 35A *Supreme Court Act* 1981 which treats the calculation of pre-judgment interest as discretionary and therefore a matter of procedural law, which of course is governed by the *lex fori*.

III. THE REQUIREMENTS OF EU LAW IN RELATION TO  
REMEDIES FOR VIOLATIONS OF EU COMPETITION LAW

**17-010 Automatic nullity.** The very text of Article 101(2) TFEU declares that agreements in violation of Article 101 TFEU are ‘automatically void’. The EU courts have determined that the decisions of courts recognizing a violation of Article 101 TFEU are merely declarative and not constitutive of the violation, with the result that the agreement is void retroactively to the time of the infringement.<sup>5</sup> Moreover, the EU courts have determined that the voidness is absolute, and not merely relative to the parties to the agreement.<sup>6</sup> On the other hand, the EU courts have read down the language of Article 101(2) TFEU to determine that EU law does not require that the whole agreement is void, but merely the offending clause or clauses of the agreement.<sup>7</sup> There is no EU authority on the question of whether the voidness subsists only for as long as the violation of EU competition law does. A decision of the English courts has, however, determined this to be the position.<sup>8</sup> The EU courts have also determined that, despite the absence of equivalent wording in the text of Article 102 TFEU, practices in violation of Article 102 TFEU are also automatically void, and subject to the same treatment as agreements in violation of EU competition law are under Article 101 TFEU.<sup>9</sup> This is an expression of the direct effect of Article 102 TFEU under EU law.

Logically, a clause which is void cannot be enforced. This is in fact the only ‘remedy’ specifically and directly required by EU law for infringements of its competition law. As will now be seen, however, EU law in effect requires a good deal more, in a more diffuse and indirect way.

**17-011 EU Member State courts enforce rights under EU law.** The EU legal order has not created a system of EU courts for the enforcement of rights arising from violations of EU law. As EU law has no such ‘legions’, it borrows those of the Member States. Rights arising for persons under EU law are enforced by the Member State courts. EU Member State courts are under an obligation proceeding from Article 4(3) TEU loyally to ensure the application of EU law.

**17-012 Member State duty of sincere cooperation in the application of EU law.** Article 4(3) TEU, which entered into force on 1 December 2009 with the Treaty of Lisbon, provides as follows:

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.

5. Case 48/72, *Haecht II* [1973] ECR 77.

6. Case 22/71, *Béguelin Import v. GL Import Export* [1971] ECR 949 and more recently Joined Cases C-295/04 and C-298/04, *Manfredi v. Lloyd Adriatico Assicurazioni SpA*.

7. Joined Cases 56/64 and 58/64, *Consten and Grundig v. Commission* [1966] ECR 299 and Case 319/82 *Société de vente de ciments et betons v. Kerpen & Kerpen* [1983] ECR 4173.

8. *Passmore v. Morland plc* [1999] 3 All ER 1005.

9. Case 127/73, *BRT v. SABAM* [1974] ECR 51 and Case 66/86, *Ahmed Saeed Flugreisen v. Zentrale zur Bekämpfung unlauteren Wettbewerbs* [1989] ECR 803.

This provision is the functional replacement of Article 10 EC which provided as follows:

Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

The second and third paragraphs of Article 4(3) of the TFEU would appear to be substantially equivalent to Article 10 EC. The other paragraph of Article 4(3) TFEU, its first, does not centrally relate to how the EU Member States apply EU competition law.<sup>10</sup> Therefore, it is to be expected that the law requiring EU Member States, and in particular their courts, loyally to ensure the application of EU competition law, will be unchanged.

**Autonomy of EU Member State law in relation to procedure.** EU law leaves Member State court procedure untouched in principle. Since remedies are a matter considered for these purposes to be within the scope of Member State procedure, EU law generally leaves Member States to apply remedies available under EU Member State law by way of the enforcement of rights arising under EU law. **17-013**

**EU requirements of equivalence and effectiveness.** Nonetheless, EU law imposes two cumulative standards that EU Member States must adhere to in awarding remedies for breaches of EU law. First, the Member State legal system must observe the principle of equivalence, that is, remedial protection equivalent to that available in respect of equivalent Member State law rights must be available. Secondly, Member States must ensure compliance with the principle of effectiveness. In brief, Member State remedies must be effective in remedying violations of EU law but the conventional formulation of the notion under EU law is that remedies available under Member State law must not render practically impossible or excessively difficult the vindication of rights under EU law. **17-014**

**Principle of effectiveness under EU law requires availability of action for compensation for violations of rights under EU law.** In practice, it is the principle of effectiveness which imposes the greatest remedial requirements. For instance, it has been held by the European Union courts, which authoritatively interpret EU law, that there must in principle be a remedy in damages for breaches of EU law and for infringements of EU competition law in particular.<sup>11</sup> It is only if such a remedy exists in principle that Member State law can be said to have made rights under EU competition law effectively enforceable. Moreover, it is only if such damages are at a level such as to cover loss of profit that the EU principle of effectiveness is satisfied.<sup>12</sup> The principle of effectiveness requires that compensation contain a component of interest.<sup>13</sup> **17-015**

10. As seen from the text of the first paragraph of Art. 4(3) of the TFEU, this paragraph requires the Member States and the EU institutions to cooperate with each other in carrying out EU law tasks. In enforcing EU competition law rights, EU Member State courts act upon their own obligations, and not pursuant to an obligation to assist EU institutions in doing so.

11. Case 453/99, *Courage v. Crehan*, [2001] ECR I at para. 26: 'The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) 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.'

12. *Brasserie du pêcheur and Factortame* [1996] ECR I-1029 at para. 87, as well as Joined Cases C-397/98 and C-410/98, *Metallgesellschaft and Others* [2001] ECR I-1727 at para. 91.

13. Case C-271/91, *Marshall* [1993] ECR I-4367.

In European Union case law there is also consideration of whether various restrictions on the availability of actions, notably those sounding in damages, might fall afoul of the principles of equivalence and effectiveness. For instance, it was held by the European Court that Member State law bars on actions relating to competition law injury on the basis of shared involvement in an illegality (*nemo auditur propriam turpitudinem allegans* or *in pari delicto*) infringe the principle of effectiveness unless the party relying on the violation of competition law shared ‘significant responsibility’ for the violation.<sup>14</sup>

**17-016 Further consequences of automatic nullity.** Quite apart from the EU law requirements of equivalence and effectiveness, the automatic nullity under EU law of agreements sets the stage for Member State law to draw consequences: ‘[T]he invalidity referred to in [Article 101(2) TFEU . . .] is capable of having a bearing on all the effects, either past or future, of the agreement or decision concerned [ . . . ].’<sup>15</sup> By consequence, a weaker party to a contract which is ‘illegal’ for its non-compliance with EU competition law is not by the fact of that party status alone precluded from founding its action or defence upon the illegal contract. It must have had enough power to participate in the fashioning of the violation in the contract, and, one expects, it must obtain that that violation served that party’s own interests.

**17-017 Damages open to any individual.** There are dicta in this same case of *Courage v. Crehan* to the effect that an action in damages must be open to ‘any individual’, in principle.<sup>16</sup> This would seem to presage that standing requirements under Member State law to bring actions for a violation of EU competition law will not withstand the principle of effectiveness. Examples include the requirement under French law that the claimant’s interest must be ‘personal, existing, real and legitimate’,<sup>17</sup> and perhaps any limitation proceeding upon the requirements of English tort law that a duty of care be owed to the victim of competition injury.<sup>18</sup>

**17-018 Tension between a Member State law requirement to show fault and the principle of effectiveness.** Again, there are dicta of the European court that a fault requirement for recovery in respect of violations of EU competition law will be repugnant to the principle of effectiveness. This is seen in references in the *Manfredi* case focusing alone upon violation, harm, and a causal relationship between the two:

[ . . . ] it should be recalled that the full effectiveness of [Article 101 TFEU] and, in particular, the practical effect of the prohibition laid down in [Article 101 TFEU] 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 [ . . . ].

14. Case 453/99, *Courage v. Crehan*, [2001] ECR I.

15. Case 48/72, *Brasserie de Haecht II*, [1973] ECR 77, para. 26 and repeated in Case 453/99. *Courage v. Crehan*, [2001] ECR I at para. 22 and in Joined Cases C-295/04 and C-298/04, *Manfredi v. Lloyd Adriatico Assicurazioni SpA* at para. 57.

16. Case 453/99, *Courage v. Crehan*, [2001] ECR I at para. 26.

17. See Art. 31 of the *Nouveau code de procédure civile* as well as TGI Le Mans 4 Mar. 1984 and Cas. Soc. 19 Jun. 1995.

18. In *South Australia Asset Management Corporation v. York Montague Ltd* [1997] AC 191 the House of Lords held that the requirement of English tort law that the defendant owes the particular claimant a duty of care in regard to the type of loss suffered did not apply in relation to EU competition law damage claims.

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 101 TFEU].<sup>19</sup>

**Limitation periods and the principle of effectiveness.** Similarly, *Manfredi* contains the suggestion that certain limitation periods to actions in damages might violate the effectiveness principle. 17-019

A national rule under which the limitation period begins to run from the day on which the agreement or concerted practice was adopted could make it practically impossible to exercise the right to seek compensation for the harm caused by that prohibited agreement or practice, particularly if that national rule also imposes a short limitation period that is not capable of being suspended.<sup>20</sup>

The issue concretely which is likely to arise is whether Member State law must cause periods of limitation to arise only at the point that a competition authority has declared that there is a violation. The EU legal order might make such a requirement in light of the reality that effective actions seeking compensation for competition injury in the EU have in the past usually piggy-backed upon such authoritative declarations of violation, and can be expected to continue to do so, whatever facilitation of damages actions lies in the future.

**Full compensation.** Lastly, in *Manfredi*, the European Court of Justice laid down a full compensation requirement in relation to damages actions for competition law wrongs, including the recovery of loss profit: 17-020

95. [...] it follows from the principle of effectiveness and the right of any individual 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.

96. Total exclusion of loss of profit as a head of damage for which compensation may be awarded cannot be accepted in the case of a breach of Community law since, especially in the context of economic or commercial litigation, such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible (see *Brasserie du pêcheur* and *Factortame*, [...] paragraph 87, and Joined Cases C-397/98 and C-410/98 *Metallgesellschaft* and Others [2001] ECR I-1727, paragraph 91).

97. As to the payment of interest, the Court pointed out in paragraph 31 of Case C-271/91 *Marshall* [1993] ECR I-4367 that an award made in accordance with the applicable national rules constitutes an essential component of compensation.

The *Manfredi* requirement that loss of profit be included in the compensation is significant in that many legal systems treat actions for damages for competition law harm as akin to tort actions.<sup>21</sup> The principle generally found in assessing tort damages is that the claimant is placed in the position he would have been if the tortious conduct had not occurred or the value of actual loss alone is granted.

19. *Manfredi v. Lloyd Adriatico Assicurazioni SpA* at paras 60 and 61.

20. *Manfredi v. Lloyd Adriatico Assicurazioni SpA* at para. 78.

21. See for example *Garden Cottage Foods v. Milk Marketing Board* [1984] AC 130, where the Lords categorised a claim for damages flowing from a breach of Art. 102 TFEU as functionally equivalent to an action for breach of statutory duty, which, if successful, would therefore deliver tort-level damages.

IV. THE APPLICATION OF EU COMPETITION LAW  
BY INTERNATIONAL ARBITRATORS

**17-021 Application as *lex causae*.** If international arbitrators are applying EU competition law as part of the *lex causae* then the *lex causae* will always be the law of an EU Member State. EU law is part and parcel of Member State law.

Will international arbitrators therefore be in exactly the same position as judges of EU Member State courts as regards the application of EU competition law as a component of Member State law? It is true that international arbitrators are not subject to the same duty to apply EU competition law faithfully as judges of EU Member States are under, by operation of Article 3(4) TFEU. Nonetheless, when international arbitrators apply the law of a legal system, they apply all of it, subject to special circumstances. They do not distinguish among legal rules within the legal system as a function of their provenance. So for example, they will apply legal rules under that legal system which originated in an international convention, such as the Vienna Convention on Contracts for the International Sale of Goods. EU law is part of the constitutional order of Member States. International arbitrators will therefore properly apply EU law in accordance with the requirements of EU law.

**17-022 Application as mandatory norms.** The position is potentially different if international arbitrators are applying EU competition law as a set of mandatory norms. A first issue is whether the EU legal order actually seeks the application of its competition law as mandatory norms. This is because a mandatory norm is only a mandatory norm where the legal order from which it emanates requires it to apply, generally in relation to a spatial criterion, and not as a consequence of its being part of the *lex causae*.<sup>22</sup>

There is some lack of clarity as to the EU legal order's requirements in this relation. This lack of clarity arises in that a sufficient basis for the application of EU competition law by Member State courts is the latter's Article 3(4) TFEU duties to apply EU law faithfully. By consequence, in virtually the entirety of the case law, EU law is not treated as a set of mandatory norms applicable in accordance with a spatial criterion, but rather applicable as part of EU Member State law.

**17-023 EU competition law is mandatory law.** Nonetheless, it would appear to be the case that the EU legal order treats EU competition law as mandatory law. First, it does provide a spatial test for the application of EU competition law,<sup>23</sup> and the purposes of EU competition law are only achievable if it is applied in accordance with this spatial test. In other words, it would defeat the achievement of the purposes of EU competition law if its application is made subject to Member State law being the *lex causae*. Secondly, there are statements in EU law to the effect that EU competition law is 'public policy' and must be raised by EU Member State courts on their own initiative.<sup>24</sup> The term 'public policy' is often used, some might say

22. See paras 15-009 and 15-010 *supra*.

23. See para. 15-043 *supra*.

24. *Eco Swiss v. China Tea Time*; see also para. 3 of the Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Arts 81 and 82 EC; OJ C101 27 Apr. 2004, 54–64: '[...] it should be remembered that Arts 81 and 82 EC are a matter of public policy and are essential to the accomplishment of the tasks entrusted to the Community, and, in particular, for the functioning of the internal market(6). According to the Court of Justice, where, by virtue of domestic law, national courts must raise of their own motion points of law based on binding domestic rules which have not been raised by the parties, such an obligation also exists where binding Community rules, such as the EC competition rules, are concerned.'

abusively, to refer to mandatory norms, and the fact that the norms in question must be raised upon the adjudicator's own motion is a central feature of mandatory norms. Thirdly, competition policy is treated as sufficiently important to the EU legal order for it to be a set of mandatory norms, notwithstanding that it has now been removed from the list of fundamental objectives of the EU in Article 3 TEU and placed in a protocol.<sup>25</sup>

**Does all of EU competition law comprise mandatory norms?** If EU competition law is a system of mandatory norms, is it the case that the EU legal order considers all of EU competition law as uniformly mandatory, or are their gradients of this quality? The automatic nullity of agreements and conduct contrary to EU competition law is at the centre of the European Union's requirements. The importance of this automatic nullity has constantly been emphasized by the European courts. As has been seen above, the same is true of actions in damages to compensate for competition injury. **17-024**

On the other hand, the fact that the European Union legal order leaves other consequences of violations of EU competition law to the Member States, subject to the observance of the principles of equivalence and effectiveness, may suggest that such other consequences are less mandatory. Certainly the EU legal order goes no further than to indicate that it does not interfere with EU Member State rules to avoid unjust enrichment.<sup>26</sup> EU law does not require the prevention of unjust enrichment.

**Inapplicability of equivalence requirement where the *lex causae* is not Member State law.** Lastly, it may be contended that where the *lex causae* is not Member State law, the EU principle of equivalence does not apply. The principle of equivalence is an effect of EU law being part and parcel of EU Member State law. It is a violation of the legal requirement that like cases be treated alike for a distinction to be taken between Member State law originating in EU law, and Member State law originating elsewhere, insofar as the two norms in question are materially identical. It is a violation of Member States' duty of loyalty not to afford equivalent remedies. The position is different with *leges causae* other than Member State law. EU law is no part and parcel of these legal systems and this reasoning therefore does not obtain. One is no longer comparing like with like. **17-025**

**Full applicability of the principle of equivalence where the *lex causae* is not Member State law.** On the other hand, the principle of effectiveness would appear to apply undiminished in respect of non-Member State *leges causae*. The impetus behind the principle is the European Union's will to have the policies behind its law given expression. This impetus is not specific to Member State law, but applies with any *lex causae*. **17-026**

Since, as was noted above, the more important of the European Union's two requirements of Member State law in relation to remedies for European Union law is the principle of effectiveness, it may be that any inapplicability of the principle of equality in relation to non-Member State *leges causae* is without practical effect.

**The authority of European Commission decisions on arbitrators.** As seen in Chapter 5 concerning the burden and standard of proof, Article 16(1) of the Modernisation Regulation<sup>27</sup> makes Commission decisions on violations of EU competition law binding **17-027**

25. Protocol (No. 27) on the Internal Market and Competition.

26. Case 238/78, *Ireks-Arkady v. Council and Commission*, [1979] ECR 2955, para. 14, Joined Cases C-441/98 and C-442/98, *Michailidis*, [2000] ECR I-7145, para. 31, and *Courage and Crehan*, *supra* n. 11, para. 30.

27. Council Regulation (EC) no. 1/2003 of 16 Dec. 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty, OJ L1/1 of 4 Jan. 2003.

upon EU Member State courts. Does this, for instance, apply to arbitrators as well? The answer to this question may be found in identifying the basis upon which the obligation upon EU Member State courts exists, and determining whether this basis, or any other applies to arbitration tribunals.

**17-028 The position of EU Member State courts.** In the *Masterfoods*<sup>28</sup> case the European Court of Justice held that Member State courts are bound by the Commission's decisions in competition cases, even where there is an appeal against the Commission decision to the European General Court and its president has ordered a suspension of the Commission's decision. The European Court of Justice reasoned that by Article 105 TFEU the Commission is empowered to determine competition policy and apply competition law. It is part of the Member State courts' duties of sincere cooperation to act in conformity with the distribution of powers under the European treaties. Moreover it would imperil the European Union general legal principle of legal certainty for Member State courts to act contrary to Commission decisions.

**17-029 Arbitral tribunals will properly defer to Commission decisions.** Arbitration tribunals are not subject to the duty of sincere cooperation which EU law subjects Member State courts to. Nonetheless, arbitration tribunals should accord significant deference to EU competition law decisions of the Commission in view of the latter's great experience in dealing with EU competition law, and also in view of its potent effectiveness in gathering the relevant facts. The European Commission has powers to require information of persons and undertakings,<sup>29</sup> to take statements from persons,<sup>30</sup> and to inspect business and other premises.<sup>31</sup> All of this is backed up by the threat of significant penalties for failure of compliance.<sup>32</sup> On the other hand, as a matter of EU law, authoritative interpretative power is given to the European Courts and not to the European Commission.<sup>33</sup> By consequence, arbitral tribunals will be inclined to accord virtually mechanical deference to decisions of the Commission on facts, and significant deference to decisions of the Commission on interpretations of EU law.

Arbitral tribunals will for the same reason accord a high degree of deference to EU Member State competition authorities' factual determinations, and, depending on the particular circumstances, some degree of deference in relation to the interpretation of EU law. Relevant factors in the latter sort of determinations include whether or not the national law of that authority prescribes that its decisions in relation to EU competition law are binding on its own courts, and the depth of experience which the particular authority has achieved in relation to EU competition law even indirectly if Member State competition law is modelled upon EU competition law.

**17-030 Actions to set aside and refusals to enforce arbitration awards before courts of an EU Member State.** It may also be significant that where the arbitrators are sitting in an EU Member State or where their award will or may need to be enforced in an EU Member State, the arbitrators' failure to issue an award consistent with EU competition law may be treated as a violation of public policy justifying annulment or a refusal to enforce. These matters

28. C-344/98, *Masterfoods Ltd v. HB Ice Cream Ltd*, [2000] ECR I-11369.

29. Article 18 of the Modernisation Regulation.

30. Article 19 of the Modernisation Regulation.

31. Articles 20 and 21 of the Modernisation Regulation.

32. Article 23 of the Modernisation Regulation.

33. Article 19 TEU.

are dealt with in Chapter 22. For the present purposes, such a prospect may render arbitrators more anxious to ensure the compatibility of their awards with EU competition law.

**Arbitrable remedies.** In relation to both bases upon which arbitrators may apply EU competition law, a question arises as to whether the arbitral context and the situation facing arbitrators may somehow affect the remedies which arbitrators award, and how they award them. It has been said that competition law remedies seeking the public interest are not arbitrable. This statement is certainly overbroad, at all events, since there are a variety of tests for arbitrability in arbitration law systems around the world. In Switzerland, for instance, by Article 177(1) of the Swiss *Private International Law Act*, any question with a monetary value is arbitrable. By consequence, there is nothing in public interest remedies which from a Swiss point of view is in principle unarbitrable. A second test for arbitrability frequently found around the world is that matters not capable of agreement between private parties are not arbitrable. Under this test too, public interest seeking remedies are arbitrable, insofar as with competition law the private interests of the parties will overlap to a great degree with the public interest. This is, incidentally, the reason why competition law systems, paradigmatically US Federal law, provide incentives for private enforcement of competition law.<sup>34</sup> On the other hand, it cannot be said that an arbitrator's decision seeking the public interest or otherwise can in any way bind or preclude a competition authority from acting to remedy a competition violation in its view of the public interest. Indeed, it may be that an arbitral award pronouncing remedies for competition injury which is contrary to the public authority's determination of the public interest in competition matters will be unenforceable as against public policy. But that does not make the public interest remedies unarbitrable. A third test for arbitrability is to enquire whether any questions are reserved to particular courts or other adjudicators. If so, it is not available to arbitrators to decide them, and they are unarbitrable. Again, public interest seeking competition remedies are not generally the preserve of competition law authorities or state courts. It is simply the case that the latter maintain compulsory powers to make determinations on the public interest relating to competition law, unimpeded by what private adjudicators such as arbitrators may determine in relation to remedies for competition law injury. Thus there is nothing inhering in public interest seeking remedies which is unarbitrable. 17-031

**The general impropriety of arbitral concern for the public interest.** On the other hand, it may be enquired whether concern for the public interest can in any way be appropriate in international arbitration. It must first be observed that in relation to competition law, the private interest tends to map the public interest. As was mentioned, this is why sophisticated systems of competition law enforcement harness private interest in ensuring the enforcement of the public concern to ensure undistorted competition. It may be stated generally, however, that where the private interest departs from the public interest it is generally the case that it is because the latter requires a greater degree of intervention, and more wide-ranging enforcement. 17-032

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34. See also the European Commission's *Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM (2005) 672 of 19 Dec. 2005, at 3: 'The antitrust rules in Articles 81 and 82 of the Treaty are enforced both by public and private enforcement. Both forms are part of a common enforcement system and serve the same aims: to deter anti-competitive practices forbidden by antitrust law and to protect firms and consumers from these practices and any damages caused by them.'

While it is true that, strictly speaking, remedies in the public interest will not generally encounter problems of arbitrability, where, however, they go beyond the strictly private interests of the parties to an arbitration they will be inappropriate. Theoretically speaking, for example, arbitral tribunals will generally have powers in principle to order such drastic measures as structural remedies, that is, disposals of business divisions or even the break up of a company. This, however, will usually go beyond what is necessary to remedy the prejudice suffered by the individual litigant. But, again generally speaking, remedies occasioning a lesser incursion into the rights and interests of the subject of the remedy will very often be available. It is true that EU law requires of Member State law, and by consequence probably of any *lex causae*, that it provide for ‘proportionate’ consequences for the violation of EU law.<sup>35</sup> Of course it would, however, appear unlikely for a violation of the principle of proportionality to be contrary to public policy, or to satisfy any other of the usual bases for refusing to enforce an international arbitration award.

**17-033 Fines.** The imposition of fines may well have the effect of ensuring future compliance with competition law in favour of a private party to an arbitration. Since, however, the monetary value of fines does not usually go to an injured private party, but rather to the treasury of the legal order imposing the fine as representative of the wounded public interest, it will always be inappropriate for an arbitral tribunal to impose a fine as a remedy. On the other hand, it may be appropriate for an arbitral tribunal to impose super-compensatory damages. This latter matter is examined in section IV.D.2 below.

**17-034 Limitations on remedies by virtue of the end of the arbitrators’ jurisdiction.** A second feature of international arbitration bears on the sorts of remedies which international arbitrators will be willing and indeed able to award to correct competition law problems. When an arbitral tribunal issues its award it is in principle *functus officio*, that is, its mission has been accomplished and it is disseised of its jurisdiction. There are various exceptions to this principle, for example a limited extended period during which the arbitral tribunal may correct or interpret its award. Its jurisdiction may, moreover, spring back to life upon judicial order, for example nullifying an award in whole or in part, and requiring the original arbitration tribunal to reconsider the matters affected.

**17-035 Behavioural remedies.** Since arbitral tribunals have no powers to monitor their awards, there is a tendency in arbitration for awards to confine themselves to ordering discrete relief, such as one-time payments. Behavioural remedies to competition law problems are fundamentally problematic for arbitration. Unlike courts, arbitral tribunals cannot in principle continue to exist to monitor compliance with behavioural remedies. Thus any required licensing arrangement or order to supply or Chinese walls arrangement is for practical reasons not generally available in arbitration. Nor is any remedy practically available requiring the observance of a pricing formula the factors for which will fluctuate over time. Indeed, because arbitral tribunals cannot in principle monitor post-award developments, any remedy depending on future market phenomena and the position of the party subject to the remedy within that market except for damages will not practically be available. Only damages can be fashioned to take into account the vagaries of future developments, for example reducing the damages award as a function of the probability that the future condition justifying damages will obtain, and to what degree.

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35. Case 68/88, *Commission v. Greece*, [1989] ECR 2965, paras 23–25.

V. ISSUES RELATING TO THE LAW ON REMEDIES FOR VIOLATIONS OF EU COMPETITION LAW

A. GENERAL

This section is intended to outline the issues which arise in relation to the usual private law remedies arising upon violations of EU competition law – the invalidity of the contract, injunctive relief, damages, and restitution. Since, for the most part, these remedies are governed by the *lex causae* and not by EU law directly, the specific issues arising in relation to these remedies will depend on the *lex causae*. By consequence, in what follows a certain degree of abstraction is necessary. The issues which tend to arise, across legal systems, will be identified. The purpose of this will be to provide a degree of orientation to the arbitration practitioner grappling with remedies in an arbitration. But he or she will need to refer to the specifics of the particular *lex causae* in contending with the case there at hand. **17-036**

B. NULLITY AND SEVERABILITY

It was seen above that the European Union legal order only requires the invalidity of the clauses of an agreement in violation of EU competition law. The question for the *lex causae*<sup>36</sup> therefore becomes whether the offending element of the agreement can be severed and the remnant saved. **17-037**

**A variety of approaches to severability.** There are varying approaches to this. English law is among the most restrictive prohibiting, as it does, the court or arbitral tribunal from supplying contractual language to replace the offending language, and limiting the adjudicator's powers to merely striking out the latter.<sup>37</sup> In addition, to save a severed contract, English law requires that what remains does not constitute a different contract from that the parties sought to enter into or fail for lack of consideration.<sup>38</sup> **17-038**

Other contractual systems go to greater lengths to save contracts sheared of their repugnant elements. Article 20(2) of the Swiss *Code of Obligations*, for instance, provides that:

If the contract is only vitiated in respect of certain of its clauses then these clauses alone are invalid, unless there is reason to accept that the contract would not have been entered into without these vitiated clauses.

This rule of Swiss contract law permitting contracts to survive the severance of their offending clauses unless the adjudicator concludes that the contract would not have been entered into without these clauses applies even where they relate to essential elements of the contract.<sup>39</sup> Thus under Swiss law, unless it is proved that the remaining part of the contract would not have been entered into without the invalid part, the remainder survives.

German law treats severance similarly to Swiss law, except that under German law the entirety of the contract is void unless it can be shown that the parties would have entered

36. Case 319/82, *Kerpen & Kerpen*, [1983] ECR 4173.

37. *Goldsoll v. Goldman* [1915] 1 Ch 292 (CA).

38. *Chemidus Wavin v. TERI* [1978] 3 CMLR 614 (CA).

39. ATF 107 II 216 JT 1982 I 66.

into it without the offending elements. Article 139 of the *Bürgerliches Gesetzbuch* provides that ‘if a part of a legal operation is invalid, then the entirety of the legal operation is invalid if it appears that the legal operation would not have been undertaken without the invalid part’.

**17-039 Drafting to enhance severability.** A party wishing to uphold the remainder of a contract relieved of its clauses contrary to EU competition law would be well advised to choose a *lex contractus* with a more permissive regime concerning the survival of contracts. Moreover, certain contractual stipulations can favour the survival of non-offending aspects of the contract. Where the *lex contractus* is English law, for instance, an express contractual severance clause may assist. Clear words to the effect that the parties intend for the remainder of the contract to survive will usually be given effect by a judge or arbitral tribunal, providing that the result is not a markedly different contract from that originally entered into.<sup>40</sup>

A Swiss or German contract is more likely to survive severance of offending clauses if it is organized into a concatenation of discreet obligations and counter-obligations and if in fact performance thereunder can be separated into distinct elements.

### C. INJUNCTIVE RELIEF

**17-040** Interim injunctions in relation to competition law matters were dealt with in Chapters 18, 19 and 37. Since even interim injunctions are probably a matter not governed by EU law but by the *lex contractus*, for the greater reason the law governing final injunctions is the *lex contractus*.

**17-041 Reluctance to grant final injunctive relief.** As was mentioned in paragraph 17-034 above, since in principle arbitral tribunals are *functus officio* upon rendering their final award, there is a general reluctance among arbitrators to order final injunctive relief. The arbitral tribunal will not be around to police compliance with the injunction, and this will be a matter for the courts. If, after the short period generally available for interpretation and correction of an arbitral award, any questions arise as to the obligations under the arbitration award the matter will generally need to be decided by a newly constituted arbitral tribunal and not by the courts. This is because it will usually obtain that any such questions are within the scope of the original arbitration clause.

### D. DAMAGES CLAIMS

#### 1. Commission Policy

**17-042 Damages as the classic remedy in private EU competition law actions.** Claims for damages are the quintessential remedy in private competition law cases. This is because all other relief can be obtained, often more effectively, from competition authorities pursuing the public interest in undistorted competition.

**17-043 Standing requirements potentially contrary to EU law.** As was seen in section III above, European Union law requires that actions for damages to repair competition law injury be

40. Bellamy & Child, *European Community Law of Competition*, ed. P. Roth QC & V. Rose, 6th edn, (Oxford: Oxford University Press, 2008) at 1437.

available to any person. By consequence, it is likely that standing requirements under Member State law or other *leges causae* will infringe EU law. By parity of reasoning, any requirements under Member State law that claimants be direct victims of competition law infringements are likely to fall afoul of EU law. Additionally, as also seen in section 17-018 above, EU law would also appear to set its shoulder against fault requirements in the test applying to such damages actions.

**Other requirements of the EU legal order in relation to damages claims.** As seen in section III above, the EU legal order requires that limitation periods in damages actions not be such as to render the bringing of damages actions following on from a competition law authority's finding of infringement practically impossible. In addition, the EU legal order would appear to take a restrictive view of the permissibility of fault requirements as a component of an action to recover damages for violations of EU competition law. Moreover, the EU legal order requires that the amount of damages represent 'full compensation', including loss of profit and interest on the capital sum due. **17-044**

**Rarity of damages claims.** Whereas damages claims in competition law cases are ubiquitous in the United States, there are decidedly few such claims before the courts of the EU Member States, even in today's age of modernized EU competition law. A 2008 Commission White Paper<sup>41</sup> on damages claims in competition matters summarized the situation as follows: **17-045**

Despite the requirement to establish an effective legal framework turning exercising the right to damages into a realistic possibility, and although there have recently been some signs of improvement in certain Member States, to date in practice victims of EC antitrust infringements only rarely obtain reparation of the harm suffered. The amount of compensation that these victims are forgoing is in the range of several billion euros a year.<sup>42</sup>

**The reasons for the rarity of damages actions.** A 2005 Commission Green Paper on the subject ascribed the rarity of private actions seeking and succeeding in obtaining damages for competition law injury to the great variety of legal and procedural hurdles in Member State legal systems as well as to the fact that Member State legal systems very often lack mechanisms specifically suited to antitrust damage suits.<sup>43</sup> **17-046**

**Commission Damages White Paper.** The Commission outlined its policy reforms in its 2008 White Paper. First, it indicated its intention to initiate the creation of representative actions and opt-in class actions for competition law damages actions under European Union law. Secondly, it proposed specific European Union standards for disclosure of evidence in competition law damages actions, which would represent in a number of Member State systems a significant broadening of disclosure requirements. Thirdly, the Commission announced its intention to initiate the creation at European Union level a **17-047**

41. The term 'White Paper', taken from the British parliamentary tradition, means a specific legislative proposal published to elicit public comment. The White Paper on damages, for instance, states that '[t]his White Paper considers and puts forward proposals for policy choices and specific measures [...]'. The term 'Green Paper' in the British parliamentary tradition denotes a more general policy discussion without generally suggesting a particular legislative response although a preference or preferences may be expressed.

42. *White Paper for damages actions for breach of the EC antitrust rules*, COM (2008) 165 of 2 Apr. 2008.

43. See the Commission Green Paper referred to in *supra* n. 34.

requirement that competition law infringement final decisions of any Member State competition authority or appeal court be binding on all other Member State courts. Fourthly, the White Paper espoused a maximum standard for any fault requirement in Member State law relating to EU competition law infringement, namely that only a demonstration of ‘excusable error’ would suffice. According to the White Paper, ‘an error would be excusable if a reasonable person applying a high standard of care could not have been aware that the conduct restricted competition’. Fifthly, the Commission stated it would require Member State law to apply rules to facilitate the calculation of damages for competition injury by means of Commission ‘pragmatic, non-binding guidance for quantification of damages in antitrust cases, for example, by means of approximate methods of calculation or simplified rules on estimating the loss’. Sixthly, the Commission proposed the facilitation of damages calculations for indirect victims of competition violations, namely a presumption that the direct victim ‘passed on’ the entirety of the extra costs to them. Seventhly, the Commission proposed that European law intervene in relation to Member State law on limitation periods. The Commission suggested that limitation periods begin only once repeated violations cease, and only once the victim has knowledge of the offence and the harm. Moreover, the Commission proposed that a two-year limitation period be applied, beginning once a final decision on infringement had been reached by a competition law authority or final court.

In the White Paper the Commission also encouraged Member States to revise their laws in relation to costs in damages actions for compensation harm to remove disincentives to the bringing of such actions. It announced moreover (eighthly), certain measures to prevent leniency disclosures from use in private actions.

**17-048 European Parliament resolution on competition law damages actions.** In a resolution of 26 March 2009,<sup>44</sup> the European Parliament took issue with various aspects of the White Paper, such as super-compensation claims, harmonized limitation periods, and broad representative actions raising, the Parliament feared, the spectre of US-style litigiousness. Moreover, the Parliament’s resolution suggested that certain of the policies being advanced by the Commission in relation to competition law ought to be coordinated with similar policies relating to other areas which were also under consideration at the European Union level.

**17-049 Draft damages directive.** The Commission began preparing a directive to implement various aspects of its White Paper. No text of the draft directive was ever released publicly. Nonetheless, it was widely reported that the draft directive contained requirements upon Member States to accept national competition law authorities’ competition law determinations as binding, uniform limitation periods, wide disclosure of documents, and representative actions. Doubtless the marked incursion into Member State legal systems, in particular in matters related to procedure, which these proposals entailed, created resistance among certain Member States. Moreover, in its resolution of 26 March 2009,<sup>45</sup> the European Parliament had taken issue with various aspects of the White Paper.

44. P6\_TA(2009)0187 White Paper on damages actions for breach of the EC antitrust rules European Parliament resolution of 26 Mar. 2009 on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI)).

45. P6\_TA(2009)0187 White Paper on damages actions for breach of the EC antitrust rules European Parliament resolution of 26 Mar. 2009 on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI)).

**Withdrawal of the directive.** In face of this adversity, and the concern that the time was not yet ripe to introduce legislative changes facilitating competition law claims for damages, in the autumn of 2009 the Commission withdrew its draft directive. **17-050**

**Deference to Commission policy?** The great deference which Member State courts must show to Commission decisions was seen in the *Masterfoods* case, discussed in section IV above. It is recalled that this deference extends from the leading role which the European Union legal order confers upon the Commission by virtue of Article 105 TFEU: '[...] the Commission shall ensure the application of the principles laid down in Articles 101 and 102.' It is submitted that this deference applies not just in relation to decisions of the Commission, but also in regard to clear policies expressed by the Commission, in regard to the future direction and development of European Union law. Certainly, the reference to '*principles*' laid down by Articles 101 and 102 TFEU would tend to suggest a wide-ranging role for the Commission in giving specific definition to broad principles. **17-051**

The essential point is that in the White Paper a Commission intention to facilitate damages actions for competition law wrongs is readily apparent. The ordinary career of the White Paper, emerging into European Union legislation, was, however, not to be, or at least, not yet. This situation would tend to blur the distinction between *lex lata* and *lex feranda*.

**Lack of legislation.** It remains the case that no European Union legislation yet exists translating the Commission's programme into concrete law. Yet, when a claim for damages for competition injury arises in an arbitration the arbitral tribunal may wish to bear in mind and be guided by the Commission's concern to remove artificial obstacles to claims in damages to compensate for competition injury, and to adopt a pragmatic, contextual approach to the general legal principles in applicable law. **17-052**

**Facilitation of procedural matters.** This is especially indicated, it is suggested, in matters of procedure, of which the arbitral tribunal has, in principle, broader decision-making power. Given the fact that the alleged infringer will generally be in a distinctly better position to furnish evidence on competition law matters, the arbitral tribunal may wish to ensure broad rights of discovery, and be more anxious than usual to draw adverse inferences for failure to provide evidence. In light of the difficulty in making out various elements of competition law offences and damages suffered, the arbitral tribunal may wish to attenuate standard of proof requirements. **17-053**

**Facilitation of substantive matters where no specific competition law treatment exists.** In respect to matters of substantive law, arbitral tribunals may wish to bear in mind and be guided by the Commission's criticism of Member State law which does not contain specific provisions relating to damages for competition injury, but rather where the general law will apply.<sup>46</sup> Arbitral tribunals may wish to consider that such undifferentiated substantive law will generally be in the process of adapting to the new realities of the private competition law enforcement both with a view to becoming more just, more suited to the purpose, more **17-054**

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46. The *Ashurst Report* identified only three EU Member States (Finland, Lithuania and Sweden) as containing a particular regime for competition damages, four EU Member States as relying exclusively on their general law relating to civil liability (Belgium, Czech Republic, France, the Netherlands). The remaining Member States feature a combination of general civil liability and

*Sachgerecht*, and in conformity with the requirements loyally to apply EU law, including, the *Masterfood* requirements of deference to the European Commission. German law and English law have both evolved to provide for specific treatment sensitive to the competition law context. Other legal systems will follow. Where this is the case, the arbitral tribunal may wish to bear in mind the Commission's concern to remove artificial obstacles to claims in damages to compensate for competition injury, and to adopt a pragmatic, contextual approach to the general legal principles in applicable law.

## 2. The Extent of Damages

**17-055 Full compensation.** As was seen in section 2 above, *Manfredi* is authority for the proposition that EU law requires full compensation for injury suffered by reason of violations of EU competition law. This includes recovery for a profit element, and interest.

**17-056 Passing on and the level of damages.** An issue that frequently arise in relation to damages for competition law violations is whether a defendant can be heard to claim that the damages suffered should be reduced inasmuch as the claimant passed on the price increase due to the distortion of competition to its own purchaser or licensee. Various legal systems take different approaches to this matter. Moreover, the question arises whether indirect victims of competition law wrongs have been passed on the increase in price due to a distortion in competition, and if so, to what extent. As was seen in paragraph 17-047 above, the Commission advocates a rebuttable presumption that such indirect victims have been passed on the entirety of the price increase incurred by direct victims of the infringement.

**17-057 Calculation of damages.** The essential enquiry when calculating damages for competition law injury proceeds in two steps. First, one ascertains what the position would have been had the competition law violation not occurred. Then one assesses the difference. The devil is in the detail. Indeed, as the Commission recognized in its White Paper, the particular calculation of damages may be so burdensome and difficult an exercise that worthy claimants may be discouraged from asserting their rights:

This calculation, implying a comparison with the economic situation of the victim in the hypothetical scenario of a competitive market, is often a very cumbersome exercise. It can become excessively difficult or even practically impossible, if the idea that the exact amount of the harm suffered must always be precisely calculated is strictly applied. Moreover, far-reaching calculation requirements can be disproportionate to the amount of damage suffered.<sup>47</sup>

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competition context-specific principles to govern damages claims for violations of competition law. See D. Waelbroeck, D. Slater & G. Even-Shoshan, *Ashurst Report, Study on Conditions of Claims for Damages in Case of Infringement of EC Competition Law*, 31 Aug. 2004. Since the Ashurst Report German law has been amended to provide a specific statutory basis for damages claims for breaches of EU competition law. See Art. 33 III of the *Gesetz gegen Wettbewerbsbeschränkungen*. In fact, German law was amended to treat damages claims for breach of EU competition law on the same footing as such claims for breach of German national competition law. Given the disadvantages inherent in the former route under German law for asserting such claims in relation to EU competition law, namely Art. 823 II of the BGB, such a situation would probably have been found in breach of the EU principle of equivalence at all events.

47. White Paper, at 7.

Calculating damages in compensation for competition law injury is a notoriously difficult exercise. It was seen in section V.D.1 above that the Commission signalled in its White Paper an intention to publish ‘pragmatic, non-binding guidance for quantification of damages in antitrust cases, e.g. by means of approximate methods of calculation or simplified rules on estimating the loss’. In December 2009 a study commissioned by the European Commission was published titled ‘Quantifying antitrust Damages – Towards non-binding guidance for courts’.<sup>48</sup> As its title intimates, this study is preparatory to the issuing of Commission guidance to courts in relation to the calculation of damages in competition cases. This study helpfully presents and explains the multiplicity of economics methods for assessing damages due to competition law infringements. The arbitration practitioner can select a method or methods from within these for use in her own case. It also comprises a wealth of case examples of particular approaches and results in the assessment and calculation of competition law damages. The arbitration practitioner can refer to these examples to identify one close to the case of concern to him, and draw guidance from it.

**Permissibility of super-compensatory damages.** There is a question as to the permissibility of super-compensatory damages such as punitive damages. In *Manfredi* the European Court clearly stated that this is entirely a matter for Member State law but, in accordance with the requirement of equivalence, if such damages are available in relation to violations of Member State municipal law they must be available in relation to violations of EU law, such as EU competition law: **17-058**

92. As to the award of damages and the possibility of an award of punitive damages, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to set the criteria for determining the extent of the damages, provided that the principles of equivalence and effectiveness are observed.

93. In that respect, first, in accordance with the principle of equivalence, it must be possible to award particular damages, such as exemplary or punitive damages, pursuant to actions founded on the Community competition rules, if such damages may be awarded pursuant to similar actions founded on domestic law (see, to that effect, *Brasserie du pêcheur* and *Factortame*, cited above, paragraph 90).<sup>49</sup>

#### E. RESTITUTION

The most obvious consequence of the automatic nullity of a contract under Articles 101 and/or 102 TFEU is that actions taken and performance made on the basis of the contract will need to be considered, and treated in accordance with the true position, namely that there was no basis for such actions and such performance. **17-059**

**EU law imposes virtually no requirements in relation to restitution.** Despite such obviousness, European Union law has not yet much concerned itself with matters of restitution except, indirectly, insofar as restitution-level compensation may qualify as full compensation within the meaning of *Manfredi*. As seen above, restitution is not a requirement of EU law, which rather merely proclaims that it will not stand in the way of **17-060**

48. Oxera and a multi-jurisdictional team of lawyers led by Dr Assimakis Komninos, *Quantifying Antitrust Damages – Towards Non-binding Guidance for Courts*, 2009.

49. *Manfredi*, *supra* n. 6, at paras 93 and 94.

Member States legal systems' endeavours to prevent unjust enrichment.<sup>50</sup> By consequence, various defences to actions in restitution under the *lex causae* would be unobjectionable from the point of view of EU law – change of position, absence of required mental state (such as belief of obligation), policy-based excuses, and even the *in pari delicto* defence largely invalidated for other purposes in *Courage v. Crehan*.

**17-061 Restitution should be consistent with the nature of the nullity imposed by EU competition law.** Nonetheless, restitution under Member State law, and other *leges causae*, will need to be consistent with the nature and extent of the nullity of a contract under EU competition law. As seen in section III above,<sup>51</sup> it is probably the case under EU law that the nullity only subsists insofar as the violation of EU competition law subsists. By consequence, any restitution would be solely in respect of that limited period of invalidity, and indeed, may be negated by the fact that the contract may have sprung back into validity. Similarly, restitution may also be barred if under the *lex causae* the contract can be saved, minus those of its parts in violation of EU competition law.

## VI. CONCLUSION

**17-062** There are two bases upon which arbitrators may apply EU competition law remedies, either as the *lex causae* or as mandatory norms. If they apply remedies as part of mandatory norms, EU law directs them to the *lex causae* for most matters at all events. Nonetheless, because the mechanism of applying mandatory norms may result in some attenuation of the mandatory norm vis-à-vis its application as domestic mandatory norms by courts, there may be a difference in result as between the application of remedies under these two legal bases.

EU law lays down an assortment of requirements upon EU Member State courts in dealing with remedies for breaches of EU competition law. These requirements emanate from the EU principles of equivalence and effectiveness. EU Member State courts must observe these principles as part of their duty of sincere cooperation in enforcing EU law.

Arbitral tribunals, whether sitting within or outside of the EU, are not subject to this EU law duty of sincere cooperation. Nonetheless, they will apply EU competition law as part and parcel of the *lex causae* and as mandatory norms. They will also accord deference to decisions of the Commission, in view of its institutional authority and expertise in EU competition law matters. It may even be said that arbitrators will be guided by the clear policy intention of the Commission to facilitate actions seeking compensation for EU competition law injury. Moreover, if the arbitrators are sitting within an EU Member State or expect enforcement of their award to be sought in one, they will be conscious that an incompatibility between the award and EU competition

50. See *Manfredi*, *supra* n. 6 above, at para. 94: '[...] it is settled case-law 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' (see, in particular, Case 238/78, *Ireks-Arkady v. Council and Commission*, [1979] ECR 2955, para. 14, Joined Cases C-441/98 and C-442/98, *Michailidis*, [2000] ECR I-7145, para. 31, and *Courage and Crehan*, [...] para. 30).

51. See in particular the English case of *Passmore v. Morland*, referred to in *supra* n. 8.

law may amount to a violation of public policy justifying the annulment of the award or a refusal to enforce it.

Although EU law refers many if not most matters concerning remedies for violations of EU competition law to the law of the Member States, and therefore to the *lex causae*, certain issues which tend to arise in relation to the application of this law have been identified.

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