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DIRECTORATE-GENERAL INTERNAL POLICIES OF THE UNION
- DIRECTORATE A -
ECONOMIC AND SCIENTIFIC POLICIES

Workshop

Damages Actions for Breach of EC Antitrust Rules

6 June 2006
European Parliament, Brussels

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Workshop on Damages Actions for Breach of EC Antitrust Rules

Programme

6 June 2006

European Parliament, Brussels, Room ASP 5E2, 4.30h – 18.00h

14.30 - 15.00 Introduction

Speakers: Pervenche Berès (MEP, ECON Chairwoman)
Antolín Sanchez-Presedo (MEP, Rapporteur)
Neelie Kroes (European Commission)

15.00 - 15.45 Panel I

Discussion of the Commission Green Paper with the authors from DG COMP

Moderation: Karin Riis-Jørgensen (MEP)
Experts: Philip Lowe (Director General, DG COMP)
Experts from DG COMP: Emil Paulis, Michael Albers, Donncadh Woods, Eddy De Smijter
- followed by debate -

15.45 - 16.30 Panel II

Reactions to the Green Paper from an academic perspective

Moderation: Antolín Sanchez-Presedo (MEP)
Experts: Fernando García Cachafeiro (Universidad de la Coruña),
Nils Wahl (Stockholm University).
- followed by debate -

16.30 - 17.50 Panel III

General Discussion of the Green Paper against the background of cases and experiences from Member States

Moderation: Jonathan Evans (MEP)
Experts: Marion Simmons (Chairman, UK Competition Appeal Tribunal)
George Peretz (Barrister, Monckton Chambers, London; Member of the Joint Working Party of the UK Bars and Law Societies on Comp. Law)

Jim Murray (Director, BEUC)
Antonio Martínez Sánchez (Attorney, Uria Menendez, Barcelona),
- followed by debate -

17.50 - 18.00 Conclusions

Antolín Sanchez-Presedo (MEP)

Curricula Vitae

Fernando Garcia Cachafeiro

Education: LL M in banking, corporate and finance lawLL.M., Fordham University, New York,. June 2000.

Awarded a grant by Barrie de la Maza Foundation.

Ph. D. La Coruna University, Spain.

Thesis entitled: “Price fixing agreements in the financial services industry”, February 2002.

Awarded a grant by Caja de Madrid Foundation.

Experience: La Coruna University School of Law, Spain: Professor of Law, July 2000 to date.

European Commission, DG Competition, Brussels: Internship, October – December 1998.

European Parliament, Luxembourg: Internship, July – September 1998.

Intellectual Property Institute of Santiago de Compostela, Spain: Member of the Advisory Committee, December 2002 to date.

Publications: Books: Competition Law and Banking Services, La Ley, Madrid, 2003.

Main articles: 1) “The Americanization of EC Competition Law”, Revista de Derecho Mercantil, no. 256, 2005; 2) “The reform of EC Competition Law”, Revista de Direito Internacional e Econômico, no. 10, 2004; “Towards a Leniency Policy in Spanish Competition Law”, Gaceta Jurídica de la Unión Europea y de la Competencia, no. 227, 2003; 4) “The American Law on Defective Products: Main Differences with the Spanish System”, Derecho de los Negocios, no. 148, 2003; 5) “Unilateral Refusal to Grant Intellectual Property Licenses (Commentary to the Intel Case)”, Actas de Derecho Industrial, vol. 20, 1999; 6) “The freedom to provide on-line services (Commentary of art. 7 of the Spanish E-comerce Act)”, Revista Aranzadi de Derecho y Nuevas Tecnologías, no. 5, 2004; 2) “No administrative approval required to provide services on the Internet (Commentary of art. 6 of the Spanish E-comerce Act), Revista de la Contratación Electrónica, no. 45, 2004.

Additional experience: Ministry of Economy, Sofia, Bulgaria: Legal advisor on the Transposition of Directive 2002/65 on the Distance Marketing of Consumer Financial Services. European Commission Twinning Project. July 2005.

Universidad Autonoma del Carmen, Ciudad del Carmen, Mexico: visiting scholar, September – October 1996.

Awarded a grant by the Spanish Foreign Affairs Ministry.

Universidad Federal do Parana, Curitiba, Brazil: visiting scholar, August – September 1995.

Awarded a grant by the Spanish Foreign Affairs Ministry.

Nils Robert Wahl

Nationality: Swedish Born: 31 January 1961

Education: Professor of European Law, Faculty of Law, Stockholm University, November 2001.

Ass. Professor, Faculty of Law, Stockholm University, May 1995.

Juris doctor (European Law), Stockholm University, January 1995.

Juris kandidat (LLM), Stockholm University, September 1987.

Working experience: Professor of European Law, Stockholm University, November 2001 --

University teacher, Faculty of Law, Stockholm University, July 1994 – October 2001, since July 1995 also holder of the Jean Monnet Chair in European Law, Faculty of Law, Stockholm University.

Managing Director for the foundation ”Stiftelsen Fakultetskurser vid Stockholms universitet”, February 1993 – November 2004.

Lawyer, Advokatfirman Cederquist, Stockholm, October 1987 - June 1989.

Trainee in the Legal Area of the Secretariat of the European Free Trade Association, March 1987 - September 1987.

Marion Simmons, QC

Marion Simmons QC is a practising barrister and also sits as an arbitrator. She was called to the Bar in 1970, and was appointed QC in 1994. She was appointed an Assistant Recorder in 1990 and has been a Recorder of the Crown Court since 1998 (sitting in criminal and civil cases). She was the Vice-Chairman of the Appeals Committee of the Institute of Chartered Accountants of England and Wales (2000-2005). She is a member of the Mental Health Review Tribunal Restricted Patients Presidents Panel, a member of the Panel of Chairmen of the Disciplinary and Appeal Tribunals of the Accountancy Investigation and Disciplinary board, the Chairman of the Disciplinary Committee of the Taxation Disciplinary Board and an Assistant Boundary Commissioner. Her main areas of practice are business, financial and commercial law, including banking, insurance, contract, partnership, financial services, professional negligence and discipline, the commercial aspects of company law, insolvency and the regulation and disciplinary functions of professional and equivalent bodies.

George Peretz

Competition and EU: George has extensive experience of both UK and EC competition law and practice during his six years at the OFT, advising on many major cartel cases, mergers, and Competition Commission references and since returning to private practice.

He has acted in several merger cases before the Competition Commission (IMS Health / PMSI; Warner Jenkinson / Pointing; Icopal / CAIK Holding; Knauf Insulation / Superglass) and under the EC Merger Regulation (Skanska / Scancem). He has also acted for parties in non-merger inquiries by the Competition Commission (extended warranties / AES license modification / Manchester Airport).

In the Community Courts, George has acted for the applicant in appeals against Commission decisions on cartels and State aids, and for the United Kingdom in Hutchison 3G v. HMRC (£3.5 billion VAT refund claim) and a number of cases involving interpretation of telecommunications directives.

In the UK Competition Appeal Tribunal, he acted for Allsports Ltd on liability and penalty in the Replica Football Kit Appeals (the first cartel case to come before the CAT); for the OFT in Claymore Dairies v. OFT, and for Ofwat in Independent Water Company v. Ofwat. He also acted in the first ever damages action brought in the CAT (BCL Old v Aventis).

He represented Lladro Comercial before the OFT in a case of alleged RPM (fine reduced to zero). He is acting for a number of parties in current OFT investigations, and acted for one of the schools in the OFT’s Private Schools investigation. George acted for the applicant in the first application to the High Court for an interim injunction under the Competition Act, Claritas v. Post Office, and in the subsequent complaint to the OFT.

He also acted for ICL before the OFT in the complaint against it by Synstar and in its successful application for a stay of competition law proceedings against it in the High Court pending the outcome of the OFT proceedings.

He acted for the OFT in OFT v. X (compatibility of OFT's powers to "dawn raid" with the Human Rights Act 1998) and in a number of other warrant applications under the Competition Act.

Antonio Martínez Sánchez

Antonio Martínez Sánchez is Responsible of the EU and Competition Department of the Barcelona Office of Uría Menéndez. He joined the firm in January 2001, having previously worked for seven years in the Spanish law firm *Martínez Lage &* Asociados.

He concentrates his practice on EU and Spanish competition law and regularly participates in infringement and authorisation proceedings before the Spanish and Community competition authorities. He has been involved in several cases of private application of Antitrust Rules before Spanish Courts.

Antonio is regularly asked to advise on merger proceedings, both at national and community levels, and on State aid proceedings before the European Commission and the Court of First Instance of the European Communities.

He was named a "Recommended Individual" in Competition Law by Chambers Global 2003, 2004, 2005 and 2006.

He is a Visiting Professor at the Universidad Autónoma de Madrid (UAM) for the "Practicum on Community Law". Madrid.

He is a member of the Editorial Board of "Comunicaciones en Propiedad Industrial y Derecho de la Competencia".

For over five years (from January 1993 to May 1998) he had the opportunity to complement his professional activity by holding the position of Editorial Director of "Gaceta Jurídica de la CE y de la Competencia".

Contributions by experts

Presentation by
Philip Lowe
Director General of DG Competition
European Commission

Damages actions for breach of the EC antitrust rules
European Parliament
Brussels – 6 June 2006

The Commission's Green Paper on Damages Actions for Breach of the EC Antitrust Rules

Philip Lowe
Director General of DG Competition
European Commission

Outline

1. Background
2. Purpose
3. Some key issues
   - Access to evidence
   - Damages
   - Passing on defence and standing for indirect purchasers, in particular consumers
   - Interaction between private and public enforcement
4. Public consultation and follow-up

Background

- 2001: ECJ confirms the European right to antitrust damages (Courage v Crehan)
- 2002: Regulation 1/2003 extends the powers of national courts to apply EC competition law
- 2004: Ashurst report revealed major obstacles to the bringing of antitrust damages claims
- 2005: the Commission Green Paper suggests options to facilitate actions for damages

Purpose of the Green Paper

- to have an open debate on the options in the Green Paper
- to increase the effectiveness of the right to claim antitrust damages, while avoiding unmeritorious claims, thereby
  - ensuring compensation
  - enhancing respect/deterrence

Some key issues

1. Access to evidence
2. Damages
3. The passing-on defence and standing for indirect purchasers, in particular consumers
4. Interaction between private and public enforcement

1. Access to evidence

- Problem: victims do not start or win a case because they have no access to the relevant evidence
- Follow-on actions and stand-alone actions raise different issues

2. Damages

- Main policy question: should damages be confined to mere compensation or should one go beyond?
- Are there enough financial incentives to bring cases?

3. The passing-on defence and standing for indirect purchasers

- Objective: to find a good balance between justice and effectiveness
- Special attention to the situation of final consumers because of their often small damages claims

4. Interaction between private and public enforcement

- Objective: maintaining the effectiveness of public enforcement while allowing for more private enforcement
- Public and private enforcement are reinforcing complements

Public consultation and follow-up

- Public consultation resulted so far in nearly 150 submissions
- Follow-up: depends largely on the outcome of the public consultation

Presentation by
Fernando García Cachafeiro
La Coruña University

US and EU perspectives on antitrust damages claims

Fernando García Cachafeiro
La Coruña University
fgarcia@udc.es

UNIVERSIDADE DA CORUÑA

Outline

- Introduction
- Key features of the US system
  - Access to evidence
  - Burden of proof
  - Treble damages
  - Passing on and indirect purchasers
  - Class actions
  - Litigation costs
  - Harmonization of antitrust litigation only?
- Conclusions

Introduction

- ECJ recognised the right of private parties to claim damages for the breach of EC competition law
- As there is no EC law in this field, damages claims shall be brought before national courts under national procedure laws
- The Green Paper suggests different tools to be implemented by Member States to ensure a satisfactory level of damages claims within the EU

Damages and Private enforcement

- Damages claims are part of the so-called private enforcement
- In private enforcement a party brings an action against another party before a court. The party may seek:
  - Termination of the infringement
  - Interim or final injunctive relief
  - Compensation for damages
- In public enforcement a public authority carries on the investigation of an anticompetitive behaviour and, if violation is found, may order:
  - Termination of infringement
  - Sanctions
- Regulation 1/2003 encouraged private enforcement by granting national courts the power to enforce in full article 81 of the Treaty.

Types of private claims

- Follow-on: claims that follow a previous decision adopted by a competition authority which has found an infringement
- Stand-alone: claims brought before national courts which have to decide on the infringement and the award of damages

1. Access to evidence

- US system
  - Defendant's obligation to show all the documents relevant
  - Pre-trial discovery procedures
- Green Paper
  - Stand-alone claims: mandatory disclosure after fact pleading
  - Follow-on claims: access to documents held by the Commission either by the parties or by national courts

2. Burden of Proof

- General rule: the burden of proof of an infringement rests on the claimant
- US system
  - Clayton Act shifts the burden of proof in follow-on cases
- Green Paper
  - Follow-on claims: shift burden or prior decision binding for national courts
  - Stand-alone claims: shift burden in cases of 'information asymmetry' or 'unjustified refusal' to provide documents

3. Treble damages

- US system
  - The claimant is entitled to recover damages that treble de value of his actual loss.
- Green paper
  - Double damages
  - Interests payable from the date of the injury

4. Passing on & indirect purchasers

- US system
  - No passing on
  - No indirect purchaser's standing to sue
- Green Paper
  - All options submitted for discussion

5. Class actions

- U.S. system
  - Opt-out class actions
- Green Paper
  - Opt-in class actions
  - Consumer association's standing to sue

6. Litigation costs

- US system
  - Contingency fees
  - Each party bears its costs
- Green Paper
  - Only 'unreasonable‘ losers should pay
  - Relief of any costs at the beginning of the trial if the claim is meritorious

One last question

- All the features of the US commented, but treble damages, are part of the general system of civil procedure
- The Green Paper proposals would apply only to antitrust litigation, while the rest of private enforcement would remain un-harmonized

Conclusions

- The US experience on private litigation for more than 100 years is a good starting point for the debate
- Private enforcement implementation shall be viewed as a dynamic process: 'take one or two pills, don’t shallow the whole bottle'
- One option may be to start dealing with follow-on actions where uniform enforcement is easier to achieve

Damages Actions

A critical assessment of the European Commission's Green Paper, highlighting its main problems and confronting the Commission's view with the US experience on damages

Briefing Paper for the Workshop on Damages Actions, 6 June 2006, held by the Committee on Economic and Monetary Affairs of the European Parliament

Fernando García Cachafeiro
Professor of Law, La Coruña University

There is no provision in the EC Treaty that provides for an action before the Court of Justice brought by a private party to recover the damages caused by an infringement of EC competition law. However, the case-law of the Court of Justice has recognised the right of private parties to recover damages by bringing a claim before national courts under national procedure laws. As the Court states in the *Courage v Crehan* case (2001)[1]: "the full effectiveness of Article 81 of the Treaty (…) 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."

Actions for damages are part of the so-called private enforcement in which a private party brings an action before a court against another private party. The claim may ask for the termination of an anticompetitive practice, apply for interim or final injunctive relief or seek compensation for the damages suffered. Private enforcement is different from public enforcement which is conducted by a public authority that carries on the investigation of an anticompetitive behaviour and, if a violation is found, order its termination and impose fines. Regulation 1/2003 has enhanced significantly private enforcement by granting national courts the power to enforce in full articles 81 and 82 of the Treaty.

Despite national courts' extension of powers, no practical framework for implementing private enforcement has been developed yet. Consequently, this matter is actually governed by an 'astonishing diverse' array of national rules which, according to a Commission's sponsored study, has lead to a 'total underdevelopment' of damages actions[2]. The Commission's Green Paper[3] is the first attempt to provide a common set of rules applicable to damages claims within the European Union.

The Green Paper identifies current obstacles to damages recovery and proposes various options for their removal. Although the Commission has expressed its opinion that the excesses of the US private enforcement system shall be avoided, the US model is clearly a good starting point for the debate of the Commission proposals. In the United States, the Clayton Act provides for a private cause of action for the breach of federal antitrust laws. Thus, there is a common private enforcement system that has been operating at the federal level for more than one hundred years. The purpose of this briefing is to highlight the main proposals issued by the Commission and to confront them with the US practice on antitrust damages.

[1] Case C-453/99, *Courage Ltd v Crehan* [2001] ECR I-6297.
[2] D. Waelbroeck et. al., Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules (Aug. 31, 2004).
[3] Green Paper for Damages Actions for the Breach of EC Competition Rules (Dec. 19, 2005).

Access to evidence

Private actions for antitrust damages usually involve complex investigations of a broad set of facts. In the US, access to evidence is governed by the Federal Rules of Civil Procedure which provide for a disclosure-friendly system which compels the defendant to show all the documents relevant for the claim. Disclosure of documents is decided in a pre-trial procedure in which the defendant may be subject to strong sanctions for non-compliance. The risks and costs inherent to pre-trial disclosure are often viewed as an incentive for the defendant to settle the case regardless the merits of the claim.

The Commission is keen to adopt measures to facilitate access to evidence in private enforcement. In stand-alone actions (i.e. claims brought straight to national courts which have to decide on the infringement and the award of damages) one option consists of imposing the defendant mandatory disclosure of relevant documents if the claimant has shown reasonably available evidence to support the case (fact pleading). In follow-on claims (i.e. claims that follow a previous decision adopted by a competition authority which has found an infringement) the Commission envisages different alternatives to grant access to documents held by an antitrust authority, either imposing mandatory disclosure to the parties or granting access to the documents to national courts.

The Commission shall be aware of the potential abuses that may arise from high disclosure requirements in stand-alone claims as the US experience shows. Besides, it shall avoid implementing disclosure obligations that differ radically from the standards governing access to evidence in civil law jurisdictions within the EU. In the latter countries, disclosure must be ordered by national courts on a case-by-case basis.

Facilitating access to evidence is easier in follow-on cases where relevant documents are already held by the Commission or national authorities. Consequently, national courts should be able to order antitrust authorities to disclose the documents relevant for the damages claim except those subject to confidentiality obligations. A controversial issue is whether the Commission should also be compelled to disclose relevant information concerning leniency applicants since it may put under risk the success of its leniency program.

Burden of proof

As a general rule, the burden of proof of an antitrust infringement rests on the claimant. In the US, however, section 5 of the Clayton Act shifts the burden of proof in follow-on claims where a civil or criminal decree resulting from government enforcement of antitrust laws is prima facie evidence against the defendant in a later private action.

The Green Paper suggests different alternatives to alleviate the burden of proof of claimants. In follow-on actions, the previous decision of an antitrust authority might be binding for national courts or, at least, reverse the burden of proof in favour of the claimant. In stand-alone claims, it is possible to shift the burden of proof in cases of 'information asymmetry' between the parties or defendant’s 'unjustified refusal' to provide evidence.

In my opinion, the attempt to alleviate the burden of proof of private parties in follow-on actions is reasonable in terms of enforcement efficiency. If public authorities have shown an antitrust infringement, this decision should be relevant in a later private action. Under article 16 of Regulation 1/2003, national courts cannot make a ruling incompatible with a previous Commission’s decision on the same facts. It may be arguable that this provision relieves the parties from proving the infringement as national courts have to follow the Commission.

More controversial is the issue of whether the decision of a national antitrust authority shall be binding for a national court either from the same or different Member State. In my opinion, a decision of an antitrust authority should be binding for a national court only after all the judicial recourses had been exhausted. Otherwise, the due process clause may be infringed as the parties would miss their right of defence before a judge. In this respect, the Clayton Act provision that makes binding a criminal or civil decree is fully respectful with constitutional rights since in the US the final decision in a claim issued by a public authority is adopted by a jurisdictional body (a key difference with the European system).

As regards to stand-alone claims, I think that the complexity of establishing clear standards for shifting the burden of proof among the parties shall prevent the Commission from setting new rules in this regard. One should bear in mind the difficulties of applying ill-defined concepts such as 'information asymmetry' or 'unjustified refusal' to supply documents.

Treble damages

In the US, section 4 of the Clayton Act entitles the claimant to recover damages that treble de value of his actual loss. Treble damages are designated to punish past infringements and to deter future violations of antitrust law.

The Green Paper proposes to allow national courts to award double damages against participants in horizontal cartels. Double damages may be automatic, conditional or at the discretion of the court. Besides, the effect of double damages would be boosted if the proposal of interests payable from the date of the injury were also implemented (an alternative that goes beyond the relief available in the US).

There are different ways of understanding damages. Damages might be focused on the victim as a means of compensating him for the loss suffered (compensatory damages) but they also might be focused on infringer to recover the illegal gains he has made (punitive damages). In my particular view, compensation and punishment are two different issues in most Member States, but the three common law countries (UK, Ireland and Cyprus), and therefore the Commission shall not implement punitive damages. In this respect, it should be noted that even in those Member States where punitive damages are admitted, they are hardly implemented since they are reserved to extreme cases.

Passing-on defence and indirect purchaser's standing

The passing-on defence allows the defendant to argue that the claimant's loss has been reduced by the claimant passing on to his consumer (indirect purchasers) the overcharge resulting from defendant's behaviour.

In the United States, a 1968 Supreme Court decision in *Hannover Shoe*[4] prevented from invoking passing on by the defendant against his consumers. Consequently, direct purchasers can claim the entire amount of any overcharge rather than their actual loss. The Court rejected passing on defence on the ground that it avoids complex litigation and provides more efficient litigants as direct purchasers have more incentives to sue than indirect purchasers.

[4] 392 US 481 (1968).

The question of whether passing-on defence should be allowed is linked to the assessment of indirect purchasers standing to sue based on the proportion of the overcharge that have been passed by the direct purchaser. In the US, the 1977 Supreme Court decision in *Illinois Brick*[5] denied indirect purchaser standing to claim for damages. In the Court's view, indirect purchaser's claims would allow duplicate recoveries from the antitrust infringer who has to recover the full amount of the overcharge to direct purchaser due to the *Hannover Shoe* doctrine. However, the Supreme Court decision has been strongly undermined by a number of states which adopted legislation granting standing to indirect purchaser.

In my opinion, the EU should not follow US's restrictive doctrines about passing on and indirect purchasers. On the one hand, the constraints on indirect purchases' standing in the US should be examined in the context of strong incentives to litigate, such as treble damages or contingency fees, that do not exist in the EU. On the other, preventing indirect purchasers to sue may be incompatible with ECJ *Courage* doctrine which explicitly permits *any individual* to claim damages for loss caused by anticompetitive conducts.

If indirect purchasers are allowed to sue, defendants should be permitted to argue the passing on defence. Recognition of passing on defence, however, is not likely to impede the handling of damages claims in the EU since obstacles to litigation subsists in most Member States. Moreover, some authors suggest that economic analysis has improved since the *Hannover Shoe* decision and, therefore, it's possible to calculate how much overcharge has been passed on the basis of econometric analysis of market data.

Class actions

A class action is a procedural tool that permits an individual to sue as a representative of a group of injured persons. Although there are different types of class actions, in the US most class actions are opt-out arrangements under which all parties described by the claim are included unless they opt out of the case. It has been estimated that 15 per cent of all collective actions in the US relate to antitrust cases.

The Commission is concerned by the fact that the small amount of loss suffered by individual consumers makes it uneconomical for them to bring claims. Thus, the Green Paper asks whether collective actions by groups of purchasers should be allowed and whether consumer associations should be able to bring claims on behalf of consumer interests in addition to individual claims brought by consumers.

The assessment of class actions is one of the highest controversial issues in private enforcement today. Some Member States are taking steps to introduce mass litigation schemes in antitrust law. In my view, such procedures shall adopt an opt-in system under which only those who opt to join the claim may be represented. Moreover, a fair scheme of distributing awards among all the claimants shall be implemented in order to prevent lawyers from earning a substantial part of the damages granted by the court or settled out of the court.

[5] 431 US 720 (1977).

Litigation costs

There are two key features of litigation costs in the US that do not exist within the European Union. On the one hand, contingency fees which subordinate lawyer's fees to the fact he wins the claim or resolves it out of the court; the lawyer is paid with a reasonable percentage of the judgement or settlement. On the other, each side must pay its own litigation costs, regardless of the result of the claim. Commentators have long argued that both rules strongly encourage litigation in the US. Almost cost-free actions for the claimant facilitate claims with the only objective of forcing the defendants to reach an agreement to avoid the inconveniences of going to court (disclosure of internal documents, damages to corporate image, etc.).

The Commission proposes different approaches to reduce the costs bear by the claimant in an antitrust action. One option is to rule that the loser would pay only if he acted in a 'manifestly unreasonable manner'. Another option would be to permit national court to relief the claimant of any costs at the beginning of the trial if the claim is found meritorious.

The U.S. experience illustrates that litigation costs are another controversial issue that may lead to potential abuses. In my view, there is no need to harmonize litigation costs within the European Union. Member States should be able to maintain their rules forbidding contingency fees and obliging the loser, as a general rule, to pay the reasonable costs of the winner.

Harmonized private enforcement only for antitrust litigation?

The Commission proposal for a harmonized antitrust private enforcement would introduce new procedure tools, such as discovery rules or class actions, which might be considered odd in some Member States, particularly in civil law jurisdictions. This raises the question whether it is convenient to pass new procedure rules that would apply only to antitrust litigation. Is it really antitrust so special as to justify different rules from any other private enforcement? In this respect, consideration shall be given to the fact that in the US, apart from treble damages, most of the features commented in this paper are part of the general system of civil procedure.

Conclusion

In this paper we have assumed that competition policy will benefit from encouraging private enforcement. Individual claimants have a great potential to increase the limited resources that public authorities can dedicate to fight against anticompetitive practices. As one commentator has noted, that private enforcement shall be encouraged does not mean, however, that all manner of private enforcement shall be encouraged, or that there cannot be too much of a good thing[6].

Consequently, the implementation of private enforcement of EC competition law should be regarded as a process of continuous adjustments. We should consider implementing first a few new tools, checking that they work properly and then going for the next step. In this regard, some Member States (namely Germany) preferred to encourage first private litigation in follow-on claims, letting for the future the more ambitious introduction of harmonized rules in stand-alone cases. Throughout this dynamic process, the US experience with its pros and cons provides an interesting point to discuss on the measures to be implemented.

[6] D. Ginsburg, "Comparing Antitrust Enforcement in the United States and Europe", 1 Journal of Competition Law and Economics 427, 435 (2005).

Presentation by
Nils Wahl
Stockholm University

Critical assessment of the Commission Green Paper on Damages actions for breach of the EC antitrust rules

Professor, Dr. Jur. Nils Wahl,
Stockholm University

The rational for a right to damages

- Compensation
- Deterrence
- Deterrence through compensation

Salient features of a system of deterrence

- Picking the best plaintiff
- Incentives for bringing a claim for damages
- Adequate means for bringing claims for damages
- Avoiding over deterrence

Damages Actions

Critical assessment of the Commission Green Paper on Damages actions for breach of the EC antitrust rules

Briefing Paper for the Workshop on Damages Actions, 6 June 2006, held by the Committee on Economic and Monetary Affairs of the European Parliament

Prof. Dr. Jur. Nils Wahl

Holder of the Jean Monnet Chair in European Community law, Stockholm University.

Enforcement of the competition rules may come in different forms. One possibility relies almost exclusively on public enforcement, with only minor possibilities for private parties to initiate private actions. By relying more or less exclusively on public enforcement it is possible to concentrate the enforcement efforts to the most damaging anticompetitive actions. On the other hand, public enforcement will always be limited by the amount of resources allotted to the enforcement agencies. The Community has up until now relied almost exclusively on public enforcement of the competition rules. Another possibility, more favoured on the other side of the Atlantic, is to involve private parties alongside with the public efforts. Such private enforcement may also come in different forms; the one discussed here being a right to damages for infringement of the competition rules. Private enforcement may have the positive effect of increasing the risk of detection for those infringing the rules. On the other hand, private parties cannot be relied on to pursue the most damaging infringements of the competition rules. For obvious reasons private parties will concentrate their efforts to those infringements that hurt them the most, alternatively where they have the most to gain.

If one believes that the Community system of almost exclusive public enforcement is enough to deter companies from infringing the competition rules, there is no need to consider increased possibilities for private parties being active in the enforcement of the competition rules. In such a case, I personally believe that private parties' claims for damages for losses actually suffered – and the consequential positive effects of an increased risk for detection – will be balanced by the increased costs of litigating these claims. The reason for this would seem to follow from the reason for having a competition policy altogether, i.e. the loss in efficiency that follows from anticompetitive actions. Dead weight loss and so called x-inefficiency are losses to society without anyone being able to profit from it, which is not to say that others may not be harmed by the actions in question. More direct losses may follow for consumers having to pay higher prices, such losses representing a potential gain for others. Dead weight losses and losses in efficiency are, as a rule, more severe than the mere reallocation between consumers and those infringing the rules. The mere compensation of those being able to prove an actual loss following upon an infringement is – it is submitted – simply not worth the effort.

On the other hand, if you believe that the present system not is enough to deter from anti-competitive actions, a right for private parties to bring claims for damages might be of interest. Other means of increasing the deterrent effect of the present system are of course possible, such as increased fines, making infringements of the competition rules a criminal offence etc., but it is generally considered that an increased risk of being detected has a stronger deterrent effect than increased sanctions. Private parties pursuing a right to damages will multiply the risk of being detected several times over. For this reason private actions for damages may contribute to the enforcement of the competition rules, while the compensation of losses actually suffered will be secondary to the object of deterrence.

In its Green paper the Commission sets out several different options for how to design a system of damages for competition law infringements. Unless being explicit concerning the motives for a right to damages in the first place, the choice between the different options is not self evident. To me, a right to damages should primarily be used as a means of increasing the risk of detection, thereby increasing the deterrent effect. When designing such a system it is imperative to give the best plaintiff adequate means for bringing claims for damages, while at the same time not create a system that will be over deterrent. The system should therefore encourage the discovery of infringements not dealt with by the public authorities and not simply add an additional punishment. By citing several different motives for a system of damages in its Green paper, the Commission blurs the picture.

The best placed plaintiff

Private parties are at a disadvantage as compared to public authorities when it comes to being able to secure information concerning an infringement. Of course, it is always possible – as discussed in the Green paper – to alleviate the claimant's problems of proving an infringement by having special rules concerning evidentiary standards or a shifting of the burden of proof, but such measures also run the risk of burdening the defendant too much. The risk is that you would create an over litigious system, akin to the American system. To me, it seems obvious that the best placed plaintiff is the one closest to the offence, be that either a contractual partner in a vertical relationship, the direct customer or a competitor. These are the ones that should be encouraged to bring their claims for damages, while others, such as indirect customers or for that matter consumers need not be encouraged.

Consumers are obviously the ones that will always be harmed by infringements of the competition rules. At the same time their individual loss might not (nominally) be that large. In the Green paper there is a discussion concerning the possibility of bringing so called class actions, in order to enhance the possibilities of consumers to get damages for their losses, and the Swedish Group Proceedings Act is specifically mentioned (para 196). Class actions seen from a deterrence point of view may potentially be effective. However, it should also be remembered that the claimants in such cases generally have no special knowledge concerning the infringement, wherefore class actions are generally conducted as follow on suits to investigations already undertaken by the public authorities. Basically class actions therefore do not represent an increased risk of detection, but simply increased costs for the defendant (which in itself will have a deterrent effect, but to a lesser extent). Class actions in combination with rules allocating costs of the procedure more or less exclusively on the defendant will risk making the system over deterrent.

For practically the same reasons I fail to see the usefulness of a system where special interest groups should be allowed to bring claims for damages on behalf of a group of claimants. The idea of having private enforcement is (or at least should be) to increase the risk of detection at lowest possible cost. Giving a right to claim damages to special interest groups risks increasing the total cost of enforcement (including the costs of the defendant's) disproportional to the increased deterrent effect.

Incentives for bringing a claim for damages

Private parties cannot be relied upon to be active unless they have adequate incentives to act. If, for example, defendants where allowed to invoke a passing on defence, presumably fewer parties will find it attractive to bring actions for damages. Besides the fact that awards will be lower, there is also the additional cost of appropriating how much that was actually passed on. Allowing passing on defences will therefore work as a disincentive for claimants having suffered a loss. Allowing passing on defences is generally motivated by a desire that claimants should not reap an illegitimate gain, which implicitly means that one is ready to accept the illegitimate gain of the perpetrator unless all the ones having suffered the actual loss also bring claims for damages. Given the fact that losses from infringements of the competition rules often are spread among several succeeding buyers, frequently none of the potential claimants will have adequate incentives to bring a claim for damages. Furthermore, it should here be noted that indirect buyers generally have lesser knowledge concerning the infringement, wherefore their success rate will presumably be lower.

Taking as a starting point that adequate incentives to act generally can be translated into over-compensating the claimant, normally by multiplying the award, it should here be noted that multiplying will have different effects depending on the offence. Some competition law infringements are easier to discover than others. In order for private enforcement to contribute usefully to an increased probability of detection, over-compensation should preferably be concentrated to infringements not easily discovered, or not easily discovered by public authorities. Besides this, over-compensation might over-stimulate litigation which in turn may have negative consequences for the public enforcement of the rules, such as the proper working of the leniency system. More generally, I believe that compensation for a particular loss (but without having to deduct what might have been passed on) will be an adequate incentive, at least if pre-judgment interest is possible. Just as when it comes to fines, it is not necessarily the amount of damages that contributes the most to the deterrent effect but the frequency by which damages are actually awarded.

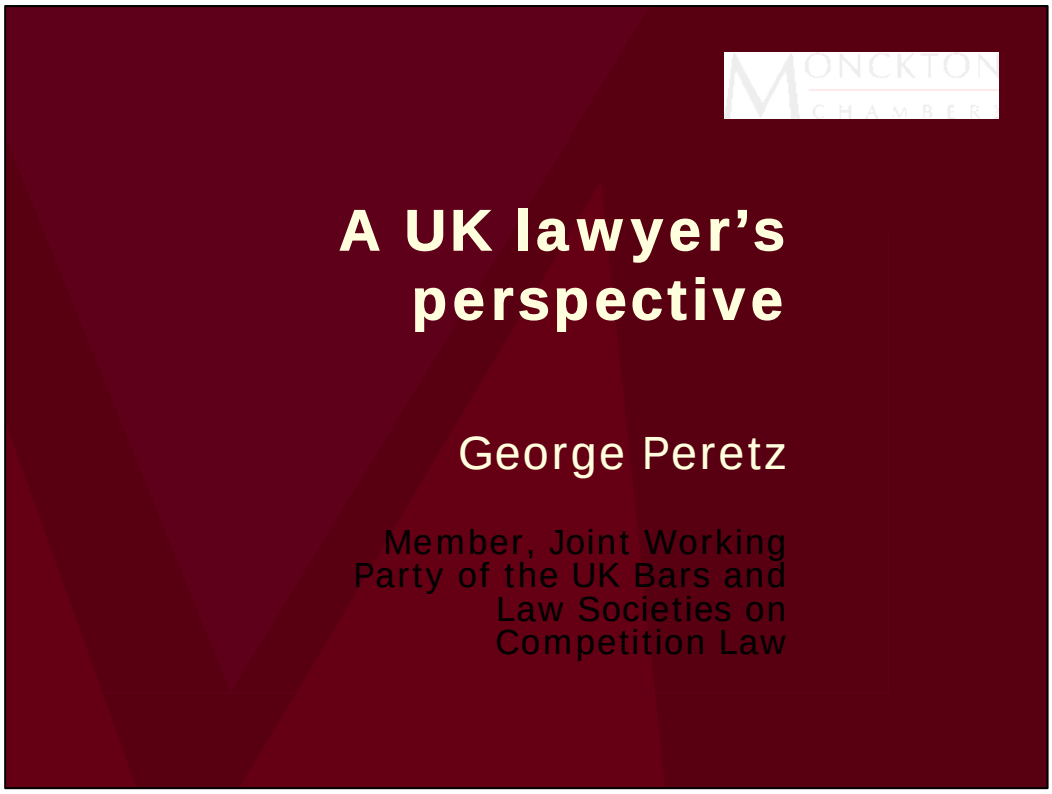
Adequate means for bringing claims for damages

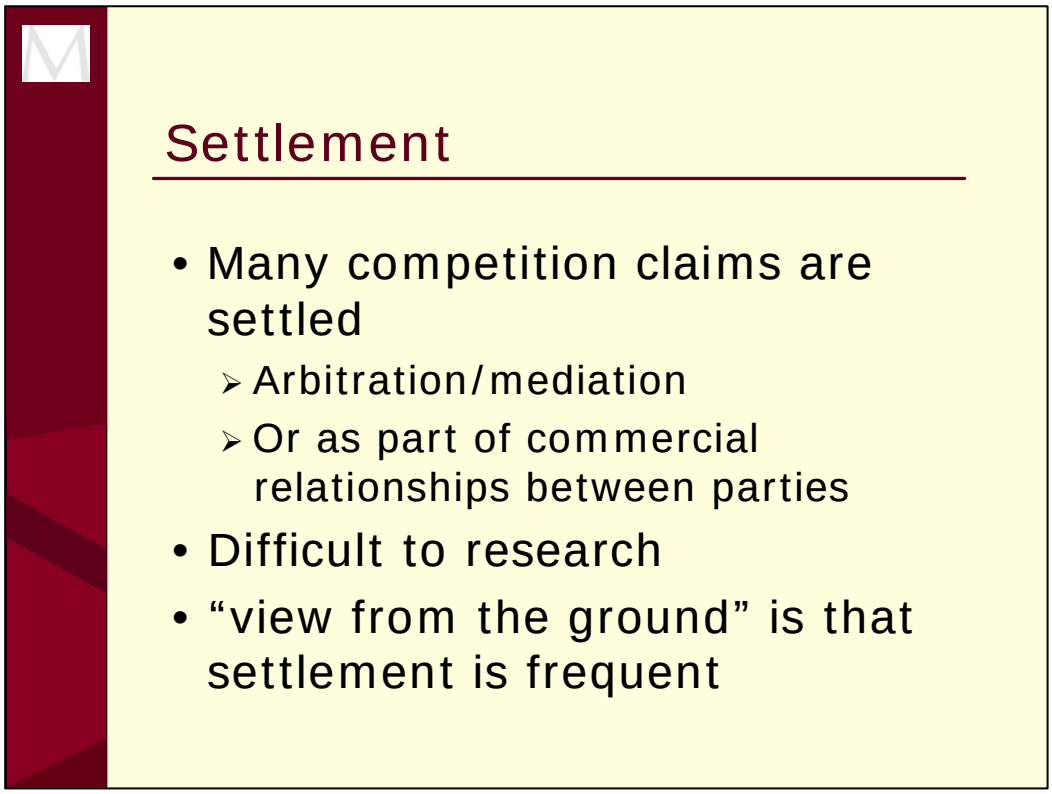
Besides picking the best placed claimant and giving him adequate incentives, a system of damages must also give that claimant adequate means for bringing his claims. As pointed out previously, and although some private parties will have information regarding the infringement not available to others, private plaintiffs will normally need access to documents. As pointed out already in the Ashurst report, one major obstacle to bringing claims for damages in most Member States is inadequate rules on discovery. Without satisfactory rules concerning discovery, a right to damages will be illusory.

Another aspect of interest when it comes to adequate means is whether fault (concerning the loss) should be a requirement for damages. If concentrating solely on the deterrent effect of a right to damages, one could argue that only those infringements that are committed by at least negligence should result in damages. On the other hand, proving fault is never an easy task wherefore strict liability – once the infringement has been proven – will result in more successful claims and for that reason is to be preferred.

By the same token, there should be special rules concerning evidentiary standards. Although in my mind it would be counter-productive to relax the obligation to prove an infringement and the loss that follows upon that infringement, I do believe that there should be special rules concerning the quantification of that loss. Inability to prove the full extent of your loss – and as a consequence a lower award – will mean too small incentives to bring claims.

Presentation by
George Peretz
Joint Working Party of the UK Bars and Law Societies on Competition Law





Injunctions

- May be more important than damages: -
  - Take workload off Commission and NCAs
  - Swift relief

Hard or soft harmonisation?

- Harmonisation of procedural rules
  - Risk that transplant will fail
  - Why only competition law?
- Soft harmonisation
  - Courts look to judgments in other Member States
  - Facilitated by internet/multi-jurisdictional practices

Disclosure

- Important not to confuse UK and US approach
  - UK approach emphasises relevance and avoidance of disproportionate cost
- UK rule depends on: -
  - Strong protection of lawyer/client privilege
  - Strict professional obligation to disclose relevant material

Consumer/SME claims

- Larger claims: -
  - Collective actions (e.g. s.47B of the Competition Act 1998)
- Small claims (e.g. €10 each)
  - US class actions?
  - Consumer representative actions?
    - What happens to damages?
- Why competition law only?

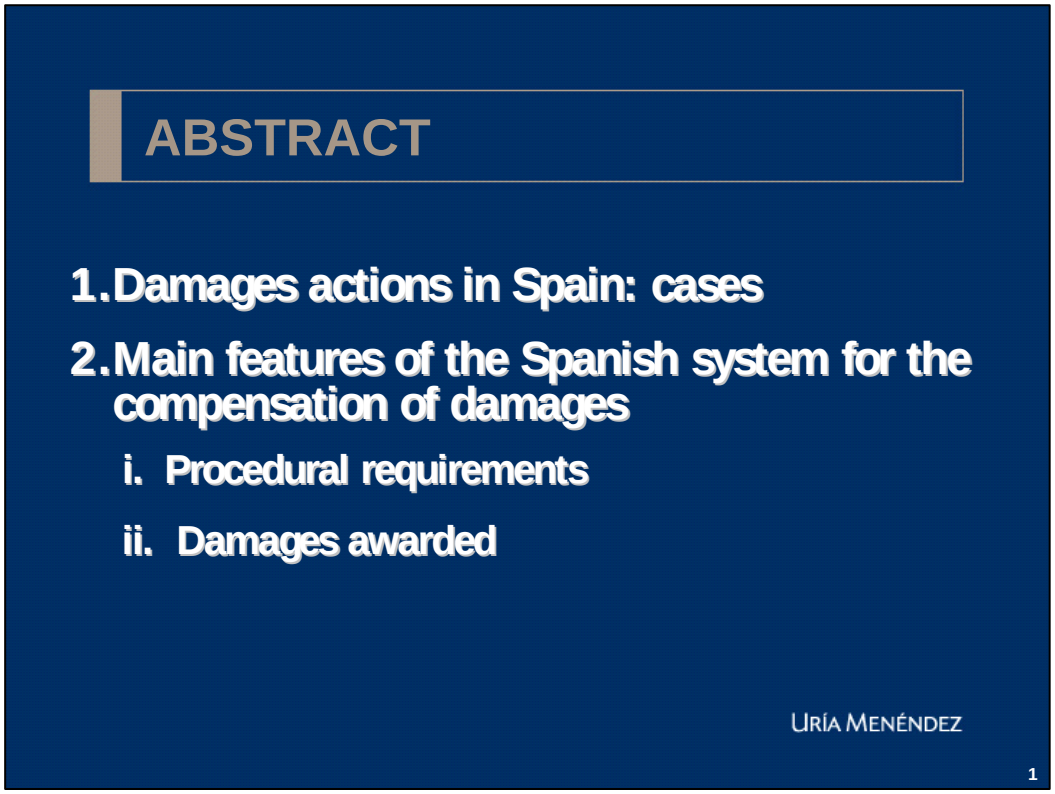
Link between fines/damages

- Reduced fine if agree to compensate victims?
  - *Rover* (EC Commission)
  - *Manchester United v. OFT* (UK CAT)
  - *Private Schools* (UK OFT)

Thank You

For more information
www.monckton.com

Presentation by
Antonio Martínez Sánchez



1. Damages actions in Spain: cases

ACTION FOR BREACH OF SPANISH ANTITRUST RULES	ACTION FOR BREACH OF EU ANTITRUST RULES
- *Claimant*: **Private TV operator** - *Defendant*: **Nacional Football League** - *Charged behavior*: **Abuse of dominant position (Art. 6(2)(b) LDC)** - *Basis for the awarding of damages*: **Article 1902 of the Spanish Civil Code**	- *Claimant*: **Telephone directory services operator** - *Defendant*: **Dominant operator of voice telephony** - *Charged behavior*: **Abuse of dominant position (Art. 82 EC Treaty)** - *Basis for the awarding of damages*: ***Direct effect of Article 82 EC Treaty (Courage)***
Judgment of the Court of First Instance No. 4 of Madrid (7.5.2005) ***Antena 3 de Televisión, S.A. v. Liga Nacional de Fútbol Profesional***	**Judgment of the Commercial Court No. 5 of Madrid (11.11.05)** ***Conduit v. Telefónica***

URÍA MENÉNDEZ

2. Main features of the Spanish system for the compensation of

Procedural requirements

ACTION FOR BREACH OF SPANISH ANTITRUST RULES	ACTION FOR BREACH OF EU ANTITRUST RULES
Need for a final administrative decision in order to be legitimated for claiming damages. Such a declaration sufficient as evidence of the existence of the prohibited practice (Judgment *Antena 3/LFP*)	**Possibility of claiming for damages without previous declaration of the infringement** (Judgment *Conduit/Telefónica*)
Legal Base: **Art. 13(2) LDC** ***"Action for damages based on infringements to the provisions of this law can be exercised by the injured party once the decision has become final in administrative or, as the case may be, judicial way"***	*Legal Base:* ***Regulation 1/2003 and 86ter Organic Law on the Judiciary (LOPJ)*** ***"The commercial courts will be competent for the handling of those questions attributed to the civil jurisdiction in relation to (…) procedures for the application of Articles 81 and 82 of the European Treaty"***

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2

2. Main features of the Spanish system for the compensation of damages (II)

Damages awarded

- ***Damnum emergens*** (i.e. *compensatory damages*: loss suffered by the claimant as a result of the infringing behavior of the defendant)
- ***Lucrum cessans***
- ***Prejudgment interests from the date of the claim***

Euro 25,000,000

(Judgment of the CFI *Antena 3 v. LFP* , Legal Ground Fifth)

Euro 639,003

(Judgment of the Commercial Court, *Conduit v. Telefónica*, Legal Ground Eighth)

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3

2. Main features of the Spanish system for the compensation of damages (III)

Calculation of damages in the Football Case

Damage = Lost of the advertising income that was expected

- ***1/3 rule***
- ***3 hour / match rule***

Minus

Real costs of football TV rights

Minus

Income obtained through alternative programming

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4

2. Main features of the Spanish system for the compensation of damages (IV)

Calculation of damages in "Conduit / Telefónica"

- ***Costs included***
  - *Acquisition of an alternative data base*
  - *"Cleaning" of Telefónica data base*
  - *Legal expenses in administrative proceedings before sector regulator*

- ***Costs excluded (among others):***
  - *Loss of market share (other reasons explain it)*

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5

Damages Actions

Class Actions in Private Enforcement of EC Competition Law

Briefing Paper for the Workshop on Damages Actions, 6 June 2006, held by the Committee on Economic and Monetary Affairs of the European Parliament

Prof. Dr. Astrid Stadler
University of Konstanz, Germany
(not present at the workshop)

1. Scope of procedural devices and situation of prospective claimants

The Green Paper focuses on the question of *damages* actions. This may turn out to be a too narrow restriction for possible solutions. This paper, therefore, takes into consideration as well skimming-off actions against the violator of antitrust rules. On a general basis the core question is how to pool the interests of a number of consumers, direct purchasers and competitors affected by the same violation. On a theoretical basis such a pooling of interests can take four different forms: (1) joint actions, (2) test cases, (3) representative actions by associations or other entities representing a public or group interest and (4) group actions. With respect to the latter one should prefer the expression "group action" and try to avoid "class action" as this immediately sparks all the well-known prejudices and objections against US-style class actions.

In almost all Member States the power of organisations to bring actions for injunctions is significantly broader than the power of such entities to bring claims for damages. Some jurisdictions like the Netherlands explicitly reject actions for damages brought by associations due to the complications involved in the interaction of damages actions brought by individuals and by an association. Group actions which encompass claims for damages are possible only in Sweden and to some extent in Spain, Portugal and Great Britain. In the Netherlands a new law was adopted in 2004 governing the settlement of collective damages.

In order to identify the procedural instrument most suitable for collective enforcement in antitrust cases, one has to take a look at the potential plaintiffs and their situation. In doing so, we will theoretically come across two groups of persons or undertakings able to claim damages from a breach of antitrust rules: first, competitors or direct purchasers who will presumably suffer considerable damages and, second, end consumers or indirect purchasers to whom e.g. higher prices resulting from an illegal price fixing agreement on the supplier lever have been passed on. For the latter the extent of damages depends on the kind of infringement and on the level of the supply chain at which the offence occurred. If the individual suffers only minor damages, he or she will have no incentive to take any legal action against the violator even if liability seems to be quite undeniable. Of course it is difficult to define "minor damages". I would suggest that for an amount of approximately 20-50 Euros, nobody will take the trouble to go to court. This "rational passivity" may endanger efficient enforcement of law if it is not compensated by actions brought by other private entities or by public enforcement. In a situation, where only consumers are affected by the violation and where it provokes *only* minor and dispersed damages, this might result in a severe deficiency of enforcement of the law. We can clearly observe this phenomenon in consumer law.

There, the lack of private enforcement cannot be compensated by injunctions brought by consumer associations as those court orders take effect only for the future and do not deprive the violator of the unlawfully gained profit. Thus, the situation may arise that the infringement of consumer rights is highly profitable for the infringer as long as none of the consumers sue for damages due to the small amount involved. However, the situation in antitrust cases is different. Violation of antitrust rules normally does not only affect the situation of consumers, but as well competitors and direct purchasers who might suffer considerable damage. These persons or undertakings have, from an economical point of few, an incentive to bring action for damages. However, in practice there are very few cases taken to court. A key difficulty in bringing a successful damages claim is to prove and quantify damages including uncertainty as to the availability of the passing-on defence in many jurisdictions. Given the general complexity of antitrust litigation, every plaintiff suing for damages takes a considerably high risk as to the outcome of the litigation and the legal costs. With respect to collective actions, it must, therefore, be carefully considered whether they can overcome these obstacles.

2. Types of collective actions – how to prevent complex mass litigation?

2.1. Joint actions

Another aspect to be considered is mass litigation. In capital investment law courts in the Netherlands, Austria and Germany in recent years have faced cases with thousands of plaintiffs taking actions against one defendant based on the same violation. The traditional two-party-system of civil litigation is not able to manage such mass proceedings in due time. With regard to antitrust litigation, one should therefore keep in mind that it is not sufficient to remove obstacles in substantive or procedural law, such as improving access to evidence etc. At the same time, it is necessary to provide legal instruments which can help courts to deal with large numbers of plaintiffs. Joint actions are no solution to this problem although they allow at least a joint taking of evidence. Nevertheless, all the plaintiffs claims must be treated separately and awards must be made individually.

2.2. Test cases

Likewise test cases are no efficient procedural means in antitrust cases. A key issue is whether the court decision in a single test case should or could be legally binding for the courts with respect to the remaining cases. The German “Law on test cases in capital market litigation”, which came into force in November 2005, reveals a dilemma which seems to be inevitable in test cases. If one prefers to have a simple two-party test case without any participation of the persons who already brought or are thinking of bringing a damages action based on the same violation, the litigation is easy to handle for the court. Nevertheless, the constitutional right to be heard of those, who do not become a party to the test case, precludes any binding character of the decision in the test case to other proceedings. If one grants these rights of participation this, again, results in a multi-party litigation difficult to manage.

2.3. Actions brought by associations

Traditionally actions brought by (consumer) associations are restricted to injunctions. For various reasons only a few jurisdictions offer the possibility for damages actions. This type of action raises a number of difficult questions: Should the association be allowed to claim the total amount of damages that have been suffered by individuals or should they recover only damages of their own, provided the violation in fact caused any financial loss to the association (which it normally does not!)?

If the association sues for damages suffered by individuals, should those be excluded from bringing an action of their own? If not, is there any relation or interaction between the damages actions? If the association sues for damages, should the amount awarded be distributed among the individuals or should the association be allowed to keep the money?

In my opinion the number of problems arising out of damages actions brought by associations indicates that the legislature should be very reluctant to establish this kind of collective enforcement. Instead one should resort to damages actions brought by associations only in cases where it is the only means to enforce law. Whenever persons or undertakings are affected by a violation and suffered damages sufficiently high to be an incentive to bring an action of their own, at least in terms of deterrence there is no need to admit additionally damages claims to associations. Therefore, activities by associations, especially consumer associations, are necessary only in case of minor and dispersed damages. In most antitrust cases there will be a number of persons who suffered considerably high damages. If we give them an efficient means to enforce their claims – for example by a group action -, there is no need for damages actions brought by associations.

A different solution would be necessary only if we could identify antitrust behaviour causing merely minor and dispersed damages. This kind of loss cannot be recovered according to general liability rules. Even if it were possible to sum up the small individual damages in one claim, no association would be in a position to distribute efficiently the amount awarded by the court to all the persons who suffered a loss. Therefore, it seems a more efficient means for the association not to claim for damages, but instead to deprive the violator of the unlawfully gained profit ("skimming-off action"). The main objective of such a claim would not be compensation, but rather deterrence and prevention.

Skimming-off actions as introduced for example by §§ 34a, 33 of the German Act against Restraints on Competition in 2005, become necessary solely if the violation of antitrust rules causes *only* minor and dispersed damages. As far as I can assess, these cases will not appear in a significant number. In particular if we seize the suggestion of the Green paper to entitle claimants in antitrust cases to interest already from the date the infringement occurred, the amount of damages will increase due that rule and will in most cases exceed the minimum threshold of 20-50 Euros.

Answer to Option 25 of the Green Paper:

In antitrust cases it is not necessary to introduce actions for damages brought by (consumer) associations. These actions would cause a large number of problems regarding the interaction of the action brought by an association and individual actions for damages, which are highly probable to be filed in addition. Skimming-off actions by associations may be an efficient means to enforce antitrust law in case of minor and dispersed damages, when no private person or undertaking is supposed to bring the case to court. Another option following the Swedish example would be to entitle associations to initiate a group action.

2.4. Group actions

2.4.1. Group action model

In my opinion group actions (Option 26 of the Green Paper) are the only type of proceeding which can overcome obstacles to individual actions and, at the same time, prevent complex mass litigation.

Group actions are - insofar the US model can be adopted – based on a strict principle of representation. *One* affected individual or association is entitled to bring an action on behalf of all persons or undertakings who suffered damages through the defendant's violation. This should include consumers as well as other persons affected. There are various options for assigning the group plaintiff. He or she may be elected by the group members, appointed by the court or – as in Sweden or the USA – take that part simply due the fact that he or she was the first to bring an action on behalf of the group. In Sweden, the legislature has granted the right to bring a group action as well to specified organisations and public authorities. A representative appointed by the court or elected by the group members does not necessarily have to be affected by the violation himself. He or she may as well be only a representative like the administrator in insolvency proceedings who represents the interests of all creditors.

Theoretically the court's decision will be binding for all group members, although they do not individually participate in the litigation. In practice, group litigation would not have the primary objective to obtain a final judgment but to enhance the settlement of the case. A European model of group litigation must proceed in several steps. After identifying the key issues of fact or law common to all claims raised, the court should either decide on these issues or render a judgement concerning the defendant's liability on the merits. On the basis of such a judgment the court primarily enhances a settlement agreement for the whole group, which could include a rather abstract assessment of damages, lump-sum compensation or even non-monetary compensation. If a large number of group members are involved, awarding damages on an individual basis should be avoided, although individual judgments in a final stage of the litigation should not be barred as a matter of principle. Thus, efficient handling of serial or mass loss cannot be achieved by procedural means alone, but also requires a simplification of the assessment and calculation of damages. In this regard, we can benefit from the US experience, where class action settlements in the majority of damages cases generate a fund from which all group members are compensated.

Due to the fact that the group action is based on the principle of representation, the court must deal with no more than two parties – the plaintiff representing the group members and the defendant. As they are not party to the litigation, the group members are in principle only entitled to be informed by the plaintiff, not to participate directly. Thus, the court is discharged of the necessity of handling a multi-party litigation, which is also a public concern. Since, however, the group members are bound by the outcome of the litigation, requirements of due process must be observed. From a constitutional point of view, only an "opt-in" scheme, as adopted in Sweden, is unproblematic. A mandatory participation of group members in the proceeding like in US class actions must be rejected on the basis of constitutionality (maxim of party disposition, right to a fair hearing).

Therefore, we should not adopt the US “opt-out model”, where group members can avoid legal affects of the group action only by declaring in time, that they will not participate. Group actions based on an opt-in scheme require widespread information at the beginning of the litigation in order to gain the participation of as many persons affected as possible. Due to modern communication technology and the internet this will cause no severe problem. As it requires a positive reaction of the group members, this kind of group action most likely does not constitute a solution to minor and dispersed damages, but might be the right track in antitrust cases where damages normally will be beyond that minimum threshold.

2.4.2. Advantages of group actions as a means of collective enforcement

Of course, as a procedural device, group actions cannot overcome obstacles to enforcement based on substantive law. However, the pooling of interests significantly reduces the risk of litigation in terms of legal expenses. As there is only one lawyer representing the group plaintiff (who in turn represents the whole group) in court and there is only a joint taking of evidence for all claims this is a significant advantage compared to a series of individual actions. Another advantage of group action is that, with an increasing number of group members, the action exerts some pressure on the defendant and offers the chance to settle all claims in one proceeding. As a settlement with the defendant is more likely to be achieved, the difficulties in proving and calculating individual damages – a main obstacle for individual actions - bear less weight in a group action. The pressure put on the defendant to settle the dispute is, in principle, a positive impact and should not be compared to the blackmailing effect of US class actions, which has evolved only under the peculiarities of US law. Punitive damages, expensive pre-trial discovery and the American rule of costs, which offers no reimbursement of legal expenses to the defendant even if the action is dismissed, may create a procedural situation where, from an economic point of view, settlement of the case is the only way out of a lengthy and expensive litigation even in cases where the action is not well-founded or even brought in bad faith. It goes without saying that any group action model to be implemented in the Member States must prevent such misuse.

3. Conclusion

According to **Option 26** of the Green Paper group actions should be available in antitrust cases. They should not be restricted to particular group members. Member States should be free to entitle associations to initiate group proceedings. Nevertheless, one should not rely on group actions alone. A combination of private and public enforcement seems to be the best solution. Only damages which go beyond the threshold of minor damages (approx. 25-50 Euros) can be pooled by “opt-in” group actions. Complementary, in cases where there are – probably as an exception – persons or undertakings who suffered only minor damages, or where there are only damages for which it is not possible to prove a direct causal link, the Cartel Offices or antitrust authorities in the Member States should be entitled to skim-off any profit illegally gained by the defendant. This seems absolutely necessary in terms of deterrence. If one prefers to resort to private enforcement exclusively, associations or organisations representing group interests could take the part of the antitrust authorities instead. In both cases skimming-off actions should avoid conflicts with group actions and should not apply in the same case. The violator should not be forced to pay twice. Therefore, depriving the violator of the illegal profit must be subsidiary to the compensation of victims. For this purpose rules must be established to govern the interaction of group litigation aiming at the compensation of victims and skimming-off actions aiming at deterrence.

In such a double-tracked system of collective enforcement national antitrust authorities or private associations could, for example, in order to prepare a skimming-off action be entitled to initiate an opt-in group action first. This application must be published by the court together with an invitation to all person affected to opt-in. If after a specified time-limit, nobody or only a very small number of persons have opted-in, one can conclude that there are no victims of the anti-competitive behaviour interested in compensation – whatever their reasons might be. In this situation it takes a skimming-off of the illegal gains of the violator in order to enhance deterrence and prevention. Thus, if the group action fails due to the lack of participation, national authorities or any association entitled by the law of the Member States can deprive the defendant of the profit gained by the breach of antitrust rules.