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I. Introduction

The private enforcement of antitrust remedies through civil action in federal and state courts is vital to the detection and deterrence of antitrust violations in the United States. U.S. filings of antitrust claims total around 600 to 1000 a year, of which private claims account for roughly 90%. By contrast, in the European Union ("E.U."), there are virtually no cases in which damages have been awarded for breach of the key E.U. competition provisions Article 81 (which prohibits anti-competitive agreements) and Article 82 (which prohibits abuses of a dominant market position). Recent developments in the E.U., however, are now providing an impetus for change.

The E.U. has already followed the U.S. example in relation to increased regulatory enforcement and rapidly escalating fines. In November 2001, the European Commission imposed fines totaling $775 million on members of the vitamin cartel, in addition to those already imposed in the U.S. In March 2001, the Office of Fair Trading ("OFT") in the U.K. issued its first fine for an infringement of the Competition Act 1998 against Napp Pharmaceutical, a subsidiary of the U.S. Perdue Pharma Group. Napp was ordered to pay £3.2 million for abuse of a dominant position in the market for slow release morphine. This figure was based on a formula that allows a maximum fine of 10% of U.K. turnover. Although the fine

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was reduced to £2.2 million on appeal in January 2002, Napp remains subject to controls on pricing in relation to future sales.

Over the last 12 months, the OFT and the European Commission have been very active in conducting dawn raids and investigations in relation to suspected cartels. This will likely lead to further fines. Now, private damage claims are set to become an integral part of the antitrust landscape in the E.U. and its member states.

The detail of how the award of private damages will be approached within the E.U. and at the national level within the member states is at this stage, to a significant degree, an open question. This can only be answered as claims are pursued through national and European courts. However, this is an opportune time to compare the long established experience in the U.S., with the approach that is likely to be taken in such cases on the basis of existing principles on damages in the E.U. There are many key differences between the U.S. and E.U. approach, many of which are likely to remain despite the increasing convergence of antitrust regulation and practice between the U.S. and E.U. generally. This paper provides a background to the E.U. position and highlights some of the key differences of antitrust regulation and practice between the U.S. and E.U.

II. Background

The Treaty of Rome, now known as the E.C. Treaty, the cornerstone of the E.U., envisioned that antitrust or "competition" law would primarily be enforced by a centralized system through the E.U. regulatory authorities. The current system places emphasis on advance clearance through Brussels of potentially anti-competitive agreements via notification procedures seeking the granting of exemptions. It is now recognized, however, that this has led to levels of congestion, which precludes effective progress. Thus, as part of its "modernization policy," the E.U. Commission is seeking to both divest itself of much of its enforcement activities to national regulatory authorities and courts of member states, and to encourage an increasingly litigation-based approach.

In order for the "modernization policy" to be effective, the national courts of member states need to adopt a unified approach governing both procedural issues and private damage awards. This is because all E.U. member states have an obligation to recognize the supremacy of E.U. law. However, there is no statutory provision in E.U. law equivalent to the U.S. federal antitrust law in Section 4 of

the Clayton Act. Therefore, until E.U. legislation and E.U. case law develops, the basis on which private damages are claimed through national courts will depend upon the relevant principles of national law, provided that these principles give an effective remedy to claimants injured by breaches of Article 81 or 82.

Currently, national law governs not only the measure of damages claimed, but also the underlying legal basis of entitlement to damages. For example, England's House of Lords, in *Garden Cottage Foods v. Milk Marketing Board*, held that a breach of Article 82 (then Article 86) would give rise, in principle, to a remedy in damages.[1] In *Garden Cottage Foods*, however, because an injunction was granted to compel the Milk Marketing Board to resume supplying milk, damages were not awarded. Following this case, it was thought that the basis for any damage claim under English law would be characterized as resulting from a breach of statutory duty. However, academic debate continues as to whether, for example, the economic torts of unlawful interference with business relations or conspiracy provides a preferable approach. This is because the test for causation of damages for a breach of statutory duty is a relatively unsophisticated factual one, which could give rise to a liability for an indeterminate time to an indeterminate class of claimants.[2]

Over the last 20 years, many cases have been decided in the U.K., E.U. member states, and in the European Courts confirming the availability of private actions for damages without giving rise to concrete examples of damages awards (with only one exception, so far as I am aware, in the Netherlands). A key decision was *Francovich v. Italian Republic*.[3] This case demonstrated the determination of the European Court of Justice to ensure that the effectiveness of E.U. law was upheld by means of civil remedies through the national courts.[4] *Francovich*, however, did not deal with any breach of antitrust laws. At issue was whether Italian employees of an insolvent company could bring a private damages claim as a result of the Italian Government's failure to implement a Commission Directive that would enable the employees to recover substantial

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[1] [1984] AC 130, 141.

[2] Mark Hoskins, *Garden Cottage Revisited: The Availability of Damages in the National Courts for Breaches of the EEC Competition Rules*, EUR. COMPETITION L. REV. 1992, 13(6), 257-265, 260.

[3] Joined cases C-6/90 and C-9/90, Francovich v. Italian Republic, 1991 E.C.R. I-5357 (E.C.J.).

[4] *Id.*

arrears of salary.

While there have been many instances across the E.U. of interim relief granted to private defendants for competition law breaches, the availability of damages has continued to be a matter for theoretical debate rather than practical application. A change in approach within the E.U. is, however, clearly evident in recent Commission proposals.[5] This change is reflected in legislation now proposed within individual member states. For example, the U.K. Government recently published its Enterprise White Paper on Competition, which is likely to find its way onto the statute books by autumn 2002.[6] The new White Paper contains critical changes updating the national regime set out under the Competition Act 1998, which made no express reference to private claims for damages. For instance, the new White Paper contains a full section setting out proposals on how private claims for damages are to be encouraged. This includes procedural changes allowing compensation awards by the Competition Commission Appeal Tribunals. Moreover, it encourages the pursuit of such claims in civil courts. Another important development is the introduction of antitrust criminal offenses in the U.K. The paper suggests that certain consumer organizations will be given an officially recognized representative status to bring claims for compensation and damages on behalf of consumers who may, for example, be victims of cartels.

Similar developments are taking place in other member states across the E.U., with the result that the floodgates for civil damage claims are now potentially opening. Both the courts of member states and of the European Union will be heavily influenced by the U.S. experience in relation to such claims. However, unless new legislation and case law at the E.U. level imposes a radically different approach, certain important distinctions from the American model will remain.

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[5] *See A facelift for EC Competition*, GC, 2000, V(10), 37, *available at* http://www.practicallaw.com/scripts/article.asp?Article_ID=16270 (last visited Feb. 17, 2002); *see also Reforming EC Competition Rules: The End of Notification?*, PLC, 2001, XII(2), 23, *available at* http://www.practicallaw.com/scripts/article.asp?Article_ID=17215 (last visited Feb. 17, 2002); *see also* http://www.europa.eu.int/comm/competition/antitrust/others/ (last visited Feb. 17, 2002).

[6] *A World Class Competition Regime*, *available at* http://www.dti.gov.uk./cp/whitepaper/523302.htm (last visited Feb. 17, 2002).

III. Key Issues

This section highlights important distinctions in antitrust laws between the American and European models.

A. Treble damages

As noted above, there is no provision in E.U. law, or the laws of member states, equivalent to Section 4 of the Clayton Act. Ironically though, Section 4 of the Clayton Act has its roots in the treble damage provision contained in the obsolete English Statute of Monopolies of 1623. The prospect of treble damages under the Clayton Act provides a greater incentive for claims than currently exists in the E.U. Treble damages provide the claimant the possibility of a windfall over and above compensation for their actual loss. The principle of treble damages, however, is at odds with the damage principles applied in the E.U. and the national courts of most member states. Rather, civil damages serve as a matter for criminal sanctions through fines and other penalties versus serving as a public policy deterrent. Therefore, due to the increasing regularity and size of fines by the regulatory bodies at the national level, as well at the E.U. level, there is no likelihood that the statutory treble damages approach will be followed in the E.U.

B. Exemplary Damages

It has been suggested that a viable alternative approach to treble damages in the E.U. can be accomplished by a separate and additional grant of punitive or "exemplary" damages. Although punitive damages are far more widely available in the U.S. than in England and other E.U. countries, I understand they cannot be awarded in the U.S. in addition to the statutory treble damages measure.

The instances in which exemplary damages are available in the U.K., however, are extremely limited, and very rarely made available.[7] A recognized category applied in antitrust cases arises where wrongful conduct by a defendant is calculated to make a profit exceeding the likely compensation payable to the injured claimant. For example, the establishment of a cartel based on the calculated risk that the illegal profits generated will exceed any damage award

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[7] Rookes v. Barnard, [1964] A.C. 1129 (H.L.); Cassell & Co. v. Broome, [1972] A.C. 1027 (H.L.); A.B. v. S.W. Water Servs. Ltd., [1993] Q.B. 507.

resulting from the discovery of the cartel.

The Law Commission has recommended that exemplary damages should be more widely available, particularly in relation to breaches of statutory duty.[8] Antitrust cases, wherein the conduct of the defendant clearly merits the strongest disapproval, may prompt further development in this respect, either through legislation or case law. In contrast to punitive damages in the U.S., however, a judge, rather than a jury, would award exemplary damages, and the level of damages enhancement, therefore, is unlikely to reach U.S. proportions.

C. Measure of Loss

As already indicated, the national courts of each member state will potentially approach the problems inherent in establishing the measure of loss for the purpose of calculating damages differently, at least until a substantive body of E.U. case law is developed to provide them with clear guiding principles. On the basis that breaches are characterized as torts, in particular breaches of statutory duty, the starting point for any claim will be to determine the measure of damages required to restore the claimant to the position it would have been in if the defendant had not breached its duty. Therefore, a claimant seeking damages from a member of a cartel for breach of Article 81 would be entitled to claim the difference between the price actually paid for the relevant goods or services, and the price that would have been paid in a competitive market.

The burden of proving loss by a claimant, certainly in the U.K., is heavy and discharging. It is likely to be the major hurdle in pursuing a claim, particularly where liability is not an issue because of a previous finding of infringement of competition law by the regulatory authorities. In the U.S., a less restrictive approach is taken to the assessment of damages. The U.S. Supreme Court will allow jury verdicts to stand where they represent "a just and reasonable estimate of the damage based on relevant data,"[9] provided that the loss resulting from anti-competitive acts is distinguished from injury due to lawful competition.[10]

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[8] *See The Law Commission: Aggravated, Exemplary and Restitutionary Damages*, *available at* http://www.lawcom.gov.uk/library/lc247/contents.htm (last visited Feb. 17, 2002).

[9] Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264 (1946).

[10] MCI Communications Corp. v. Am. Tel. and Tel. Co., 708 F.2d 1081, 1161 (7th Cir. 1983).

D. Types of Damages

The types of damages most commonly recognized in U.S. cases – overcharges and enhanced price damages, lost profit, diminished revenue damages, and damages for the terminated business – are logical classifications that must, in practice, be traced back to the facts of each case. In principle, all of these types of losses are also recoverable in E.U. antitrust cases. In *Factortame III*, the European Court of Justice was asked to consider whether E.U. law required national courts (Germany in this case) to award damages and interest under a number of damage types, including various categories of expense, lost profit and exemplary damages.[11] The court confirmed that E.U. law imposed "no specific criteria," provided that national remedies did not discriminate and were adequate. As a matter of common sense, lost profit must be recoverable if effective compensation is to be achieved in antitrust cases.

E. Approach to Quantification

The methodologies applied in U.S. cases to assess such losses are also likely to be recognized by the E.U. to provide useful methods of approaching the question of quantification. For example, in the case of overcharge damages, depending on the particular facts of the case and the nature of the infringement, an E.U. claimant may utilize the "pre-post" approach, the "yard-stick" measure, or a variety of other economic models and cost measurement. As in the U.S., an E.U. claimant has the flexibility in deciding what approach to adopt in making out their case. However, a defendant can counter with a number of different alternatives if the claimant's chosen method of quantifying loss places the measure of loss alleged in a completely different light.

If civil claims are to be effectively encouraged in the E.U., there needs to be a degree of relaxation in the approach by the courts of at least some E.U. member states, including the U.K. – for example, the rigor of the burden imposed on a claimant in a claim based on anticipated profits. Again, the U.S. provides a useful lead that is not inconsistent with E.U. laws. The U.S. places a stricter requirement on the need to show the fact of damage, rather than establishing the amount of damages. Moreover, U.S. courts tend to try and find a way in which damages can be awarded once it has been

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[11] Joined Cases C-46/93 and C-48/93, Factortame III, [1996] Q.B. 404 (E.C.J.).

determined that a wrong has been done.

F. Passing On

A key area where there is likely to be a distinction between the ability to claim damages in the E.U. and in the U.S. is in the approach of passing on overcharges by the claimant to a subsequent purchaser. Although mitigated to some extent by state legislation, the Supreme Court's approach in *Illinois Brick Co. v. Illinois* established the basic rule that indirect purchasers are denied the right to claim damages.[12] This rule, however, is contrary to E.U. law and to the law of most E.U. member states. As a result, indirect purchasers able to prove injury will be free to pursue their claims in the E.U. However, the resulting complexities of establishing causation of loss and determining at what level in the supply chain it has been incurred, is likely to be substantial. As recognized in *Illinois Brick*, this will add to the difficulties of proving loss for both the immediate customer and remote purchasers if overlapping compensation claims are to be avoided.

This leads to the question of what approach will be taken in the E.U. with regard to the U.S. rule established in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.* The Court in *Hanover Shoe* precluded a defendant from using evidence of the passing on of losses as a defense to a damages claim brought by a direct purchaser.[13] The U.S. example, creating a legal presumption that the direct purchaser incurs the full loss, is contrary to the approach generally taken in the U.K. and other E.U. jurisdictions. To follow *Hanover Shoe*, yet allow indirect purchasers to pursue claims, would give rise to the possibility of what would be characterized in the E.U. as "unjust enrichment," since double counting and overlapping of claims would result. This approach would also place an additional, and arguably unfair, burden on the defendant, which in some cases may cause insolvency. It has, however, been forcibly argued that the effectiveness and objectives of E.U. antitrust law are more likely to be achieved if the wrongdoer is required to pay the full amount of any overcharge to the direct purchaser, as well as bearing the risk of claims from any more remote customers who are able to prove their loss.[14] Any unfairness to the defendant would arguably be less

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[12] 431 U.S. 720 (1977).

[13] 392 U.S. 481, 494 (1968).

[14] CLIFFORD A. JONES, PRIVATE ENFORCEMENT OF ANTITRUST LAW IN THE

extreme than in the U.S. since any damage overlap would not amount to treble damages. Although it seems likely that it will not be long before this issue is tested in an E.U. court, the outcome is, at present, a matter of speculation.

G. Pre-judgment Interest

The award of pre-judgment interest is generally precluded in the U.S. However, under E.U. law, and that of most other E.U. jurisdictions, it is common to award interest at a commercial rate from the date when the damage first began. In many cases where anti-competitive conduct may have taken place over a period of many years, the award of pre-judgment interest potentially represents a very significant addition to a damages claim itself. Therefore, the interest will go at least part of the way to bringing total potential claims in the E.U. more in line with the level of damages available in the U.S. through the operation of the treble damages rule.

H. Rights to Contribution

As in the U.S., defendants in the E.U. will generally be jointly and severally liable for damages resulting from concerted unlawful conduct – for example, operating a cartel. A defendant in such circumstances, in accordance with general principles, would seek a contribution from any other defendants if found liable for damages. The distinction drawn by the Supreme Court in relation to price fixing cases, where it has been held that a party liable for damages cannot seek such a contribution,[15] has no parallel in the E.U. at present. The U.S. rule may be seen as unfair to cartel members with a lesser degree of responsibility or who are less able to sustain the costs of defending a claim. However, the perceived advantage of increased pressure for early settlement will, to this extent, also not apply in any E.U. action. This may result in a greater incentive for an E.U. claimant to join all potential defendants, rather than concentrate their fire on one.

I. Participation in the Infringement

Until very recently, it was thought that an E.U. claimant that had itself been party to an illegal agreement or arrangement might be

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EU, UK AND USA 193-98 (Oxford Univ. Press 1999).

[15] Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S 630, 646 (1981).

precluded from pursuing a claim. This is in contrast to the basic rule in the U.S. However, the recent European Court of Justice decision in *Courage v. Crehan* confirmed that this would not give rise to an absolute bar.[16] The case also recognized that an appropriate proportion might reduce the damages recoverable by such a claimant in order to reflect the degree of their own involvement, since a full recovery in these circumstances represents an unjust enrichment. This was particularly relevant in *Crehan*. In this case, Bernard Crehan, the claimant, was one of a large number of tenant publicans upon whom a new lease was imposed as a result of the merger of the catering and beer businesses of Grand Metropolitan and Courage. One of the terms of the standard tenancy required publicans to purchase all beer exclusively from Courage. In an instance like this, the degree of culpability on the part of Mr. Crehan, in originally signing the tenancy, was arguably negligible in view of the discrepancy in bargaining power.

Furthermore, the English Court of Appeals has addressed similar issues to the *Crehan* case with similar results. The court was clearly influenced by the U.S. Supreme Court's decision in *Perma Life Mufflers, Inc. v. International Parts Corp.*, which addressed similar issues to the *Crehan* case with similar results.[17] In *Perma*, Mr. Justice White, in a concurring opinion, stated that he would only deny recovery to a plaintiff who was himself in breach of unlawful agreements if he bore "substantially equal responsibility" to that of the defendant.[18]

J. Off Setting Benefits and Mitigation

As in the U.S., where a claimant has received a benefit as well as incurring a detriment as a result of an antitrust infringement, the general approach in the E.U. is that both the benefit and detriment must be taken into account. This principle applies not only in cases where (as in *Crehan* and *Perma*) the claimant has received part of the benefit of an illegal arrangement in which he himself participated, but also to those where the claimant is purely a victim. The duty to mitigate losses in the E.U. is likely to be approached in a similar way as in the U.S., in that the defendant would need to establish that the claimant's conduct was unreasonable if the claim is to be reduced, or

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[16] Case C-453/99, Courage Ltd. v. Crehan, [2001] C.M.L.R. 28 (E.C.J.).

[17] 392 U.S. 134, 146 (1968).

[18] *Id.*

negated altogether, on this ground.

K. Costs

The Clayton Act specifically allows a successful plaintiff to recover the cost of suit, including reasonable attorney's fee. Recovery of costs by the winner is the general principle in the U.K. in any event. However, the level of costs awarded is likely to be very much less in the E.U., where contingent fees on the U.S. model are not available, and class actions are far less common.

IV. Summary

In view of the substantial history of antitrust damage claims in the U.S., it may seem surprising that private claimants in the E.U. have been slow to follow their lead. This has, at least partly, been a result of the way in which national and E.U. law, and their enforcement systems, have interrelated. Recent developments confirm, however, that this is about to change rapidly. As the European Commission frees itself to focus increasingly on the investigation of cartel cases, resale price maintenance, and serious instances of abuse of dominance, the national courts of the E.U. member states are likely to see a marked rise in private claims.

Presently, there is a new awareness among U.K. businesses of the ability to use antitrust law to obtain practical remedies, rather than to simply view antitrust law from the perspective of compliance. U.S. and multinational businesses operating in the E.U. will need to be aware of the resulting risks, and also the key differences between the damages regimes. These differences are likely to be of interest to potential claimants as they indulge in forum shopping to enhance the prospects and the size of any damage awards.

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