Federal Trade Commission

Striking a Balance?
Some Reflections on Private Enforcement in Europe and the United States

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For much of the twentieth century, antitrust law was largely an American phenomenon. Today antitrust – or competition law as it is known in much of the world – is global, with laws in over 100 countries. However, there are significant differences in application and interpretation of the law from jurisdiction to jurisdiction, particularly when one compares our experience in the United States with that of other countries. Much has been written and said about these differences, and the causes of divergence are manifold. Today I would like to focus on a factor that I believe is particularly important, and that is private enforcement.

The United States is unique in that it statutorily allows – and indeed encourages – private enforcement of antitrust law. With the exceptions of merger and cartel enforcement, one could argue that American antitrust law has been largely shaped by private parties. That stands in contrast with jurisdictions like Europe where the European Commission, and to a lesser extent the Member States, have dominated the development of competition law. That may be changing. Europe is moving towards greater private enforcement of its competition laws, and it may diverg

[1] The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor Kyle Andeer for his invaluable assistance in preparing this paper.

[2] *See, e.g.*, William Kovacic, Chairman Federal Trade Commission, *Competition Policy in the European Union and the United States: Convergence or Divergence?* at p. 9, Bates White 5th Annual Antitrust Conference (June 2, 2008) *available at*: <http://www.ftc.gov/speeches/kovacic/080602bateswhite.pdf>.

[3] *See, e.g.*, Neelie Kroes, European Commissioner for Competition Policy, *Damages Actions for Breaches of EU Competition Rules: Realities and Potentials*, Cour de Cassation, Paris (Oct. 17, 2005) *available at:* <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/613&format=HTML&aged=0&language=EN&guiLanguage=en>; Mario Monti, *European Commissioner for Competition Policy, Private Litigation as a Key Complement to Public Enforcement of Competition Rules and the First Conclusions on the Implementation of the new Merger Regulation*, International Bar Association's 8th Annual Competition Conference, Fiesole (Sept. 17, 2004) *available at:* <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/04/403&format=HTML&aged=0&language=EN&guiLanguage=en>.

[4] Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, STUDY ON THE CONDITIONS OF CLAIMS FOR DAMAGES IN CASE OF INFRINGEMENT OF EC COMPETITION RULES, 1 (Aug. 2004) *available at*: <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf> (the study identified a total of twe82 study ident000 5.2800 0.0000 TD(ee0000 TD0 TD/F11 9.0000 TD0 T

As someone who spent the bulk of his forty-plus year career defending and litigating private antitrust actions in the United States, I have followed the developments in Europe with interest. I understand that the Europeans did not want to import the American system, and I for one hope that they succeed in that effort. But that is by no means certain. This is not to say that the Europeans are destined to follow in our footsteps. It is simply to say that there are ambiguities in the White Paper that may lead to some unexpected outcomes for the drafters of that document. Before I turn to these subjects, let me make one thing very clear at the outset. I am not here to tell the Europeans – or any other jurisdiction – what they should do. As I have said in the past, I think that is inappropriate. Rather, I simply want to share some reflections based on my experiences as a litigator.

I. Thoughts & Reflections on the European Commission's Private Enforcement White Paper

There is a lot to like in the European proposal. For example, I was heartened to see that it eschewed private enforcement of merger regulation. In my experience, private enforcement of Section 7 in the United States has sometimes been manipulated by firms seeking to fend off takeovers, aggrieved suitors, and plaintiff lawyers seeking attorney fees. I believe that public merger enforcement is generally more than sufficient.

The White Paper embraces three basic principles. First, victims have the right to full

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available at: <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf>; Commission of the European Communities, Staff Working Paper on accompanying the White Paper on Damage Actions for breach of the EC Antitrust Rules ("Staff Working Paper on Damages") (April 2, 2008) *available at:* <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/working_paper.pdf>.

compensation. Second, private enforcement should be a complement to, not a substitute fore

[6] White Paper on Damages at pp. 2-3.

[7] *Id.*

[8] *Id.*

[9] *See, e.g.*, Neelie Kroes, European Commissioner for Competition Policy, *Reinforcing the Fight against Cartels and Developing Private Antitrust Damage Actions: Two Tools for a more Competitive Europe*, Commission/IBA Joint Conference on EC Competition Policy (Mar. 8, 2007) *available at*: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/128&format=HTML&aged=0&language=EN&guiLanguage=en>.

A victim's right to compensation for antitrust violations is at the heart of the White Paper.[10] There can be little disagreement with this basic principle. The challenge however, is in its meaning and its application. The White Paper embraces the concept of "full compensation of the real value of the loss suffered" as the minimum standard for damages. "Full compensation" is not merely compensation for actual loss but also loss of profit as a result of any reduction in sales *and* interest.[11] Although the Commission did not provide guidance as to how damages should be calculated, it did announce its intent to issue non-binding guidance later this year.[12] I wish them luck because in my experience the calculation of damages is no easy task. Indeed, American courts have grappled with damages in antitrust cases for decades, and it remains a hotly debated question in both the criminal and civil context.

The White Paper did not retain the Green Paper's proposal for double damages in horizontal cartel cases.[13] Nor did it adopt any other punitive damages proposal. At the same time, however, it did not explicitly rule them out. Instead, the Commission chose to leave the question to the discretion of the individual Member States.[14] It also left the door open to revisit the issue later. The Staff Working Paper suggests that if the current measures fail to result in increased private enforcement then the staff may recommend punitive damages as an incentive

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[10] White Paper on Damages at p. 2 ("Any citizen of business who suffers harm as a result of a breach of EC antitrust rules (Articles 81 and 82 of the EC Treaty) must be able to claim reparation from the party who caused the damage.").

[11] *Id.* at p. 7; *see also* Staff White Paper on Damages at pp. 55-61.

[12] Staff Working Paper on Damages at p. 60.

[13] Commission of the European Communities, GREEN PAPER Damages actions for breach of the EC Antitrust rules, § 2.3 Damages, p. 7 (Dec. 19, 2005) *available at:* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005DC0672:EN:NOT>.

[14] Staff Working Paper on Damages at pp. 57-58.

[15] *Id.* at 59.

[16] *Id.* at p. 55.

[17] 15 U.S.C. § 15(a) ("The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period there

[19] White Paper on Damages at p.4 ("there is a clear need for mechanisms allowing aggregation of the individual claims of victims of antitrust infringements"); Staff Working Pape

in court.

I agree that opt-out class actions have led to "excesses" and abuses in the United States. However, I am not sure how the European recommendations will play out in practice, and it is not altogether clear to me whether they will avoid the problems that plague American "opt-out" class ac

[23] Staff Working Paper on Damages at pp. 18-20.

[24] *See generally, In re Brand Names Drug Antitrust Litigation*, 1999-1 Trade Cas. (CCH) ¶ 72,446 (N.D. Cal. 1999).

standards of proof in these cases.[28] At the same time, the Commission was wary of "the negative effects of certain systems of disclosure."[29] Specifically it cited concerns with wide-ranging, time consuming, and expensive discovery that could be easily triggered. Thus, the Commission was confronted with a conundrum that is familiar to those of us in the United States: how to provide the tools necessary to litigate these cases without unnecessarily burdening parties with the excesses of discovery.

The Green Paper outlined several alternative proposals, such as lowering the standard of proof and shifting the overall burden of proof. In the end it rejected those proposals and settled on a recommendation that provided for a minimum level of disclosure. In an effort to minimize the burdens on parties and third parties, the Commission suggested that claimants should meet several conditions before obtaining a disclosure order from the court. First, the claimant must establish a threshold of plausibility in their initial factual pleading.[30] Second, the claimant must demonstrate that the evidence sought is unavailable through other means.[31] Third, the claimant must specify sufficiently precise categories of information, documents or other means of evidence relevant to the claim.[32] However, at its core, the European Commission's recommendation relies on the "central function of the court" to control discovery: "[d]isclosure

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[28] *Id.* at pp. 28-29.

[29] Staff Working Paper on Damages at p.30 ("In some (non-European) jurisdictions, opponents or third persons are obliged to cooperate in potentially very wide-ranging, time-consumer and expensive disclosure procedures on the basis of rather low thresholds.").

[30] *Id.* at pp. 31-32.

[31] *Id.* at pp. 32-33.

[32] *Id.* at p. 33.

measures could only be ordered by judges and would be subject to strict and active judicial control as to their necessity, scope and proportionality."[33]

The European proposal looks good on paper but, as with the other proposals, it remains to be seen how it will work in practice. Indeed, it struck me as I read the proposal that it was not altogether different from the system we have

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[33] *Id.* at p. 30.

[34] *Bell Atlantic Corp. v. William Twombley et. al.,* 127 S.Ct. 1955 (2007).

[35] Federal Rules of Civil Procedure 26(b)(2)(C)(i).

[36] *Id.* at Rule 34(b)(1).

[37] *Id.* at p. 31.

[38] *Id.* at p. 32.

[39] *Id.* at 1961 ("the question in this putative class action is whether a § 1 complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action. W

that a motion to dismiss should be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 4546. Courts interpreted that language as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings. Howeve

manifestly unreasonable manner by bringing the case."[46]

In the end, however, the Commission simply recommended that the national courts be given discretion to depart from the "loser pays" rule by the Member States. The Commission encouraged Member States "to reflect on their cost regimes so as to facilitate meritorious antitrust litigation, particularly for cases brought by claimants whose financial situation is significantly weaker than that of the defendant, and/or situations where costs prevent meritorious claims being brought due to the uncertainty of the outcome."[47] It is unclear whether the recommendation will result in a shift away from the "loser pays" rule.

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In sum, the Commission sought to strike a delicate balance between a consumer's right to recovery and an abusive litigation system that serves the interests of lawyers. The proposal – at least on paper – may be better than what we have in this country. The true test, however, will be in the application of these measures.

II. American Private Enforcement Experience: Lessons & Reforms

The Europeans may suffer from "total underdevelopment" of private enforcement but I would suggest we are suffering from the effects of "overdevelopment." While countries around the world have emulated much of our legal system, most, if not all, are wary about many aspects of our system of private enforcement. One need look no further than the European Commission's White Paper on private enforcement. The Staff

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[46] *Id.* at p. 74.

[47] *Id.* at p. 75.

[49] *See, e.g.*, II P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 332, p. 154 (1st ed. 1978) ("[C]lass action[s] . . . can consume massive judicial resources, result in enormous coss for all parties, and threaten gigantic recoveries. A class action can be the vehicle for strike suits designed to coerce a settlement."); *see also DM Research, Inc. v. College of Am. Pathologists*, 170 F3a

billions, of dollars in damages.

The size of the liability in these cases is a function of several contributing factors. The opportunity for treble damages is one obvious factor but it is hardly the only one. Joint and several liability, the rule prohibiting contribution in antitrust cases, and the class certification process (some courts have certified classes with far too little scrutiny) all combine with treble damages to make settlement the most attractive option for potential defendants in some cases. These factors may combine to make a class action a vehicle for extortionate settlements: if a defendant does not settle, it faces the prospect that it may be held liable for treble damages caused to an entire class of plaintiffs not only by itself, but by all of the other defendants against which the lawsuit is brought.

Let me illustrate the point with an example. A decade ago I representtf00 0.00 rgBT10 Tdtion a

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[55] *Twombly*, 127 S.Ct. at 1975 (Justice Stevens writing in dissent noted that "[t]wo practical concerns presumably explain the Court's dramatic departure from settled procedural law. Private antitrust litigation can be enormously expensive, and there is a risk that jurors may mistakenly conclude that evidence of parallel conduct has proved that the parties acted pursuant to an agreement when they in fact merely made similar independent decisions.").

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enforcement in some cases.[57] When the agencies go to court they are treated the same as any other plaintiff. The standards designed to curb excessive private enforcement are used against the government as well. One needs to look no further than the Department of Justice's predatory pricing case against American Airlines where the government's case failed to survive even summary judgment.[58] Predatory pricing standards are a good example of a rule designed to minimize excessive litigation rather than necessarily getting it right.

B. Common Sense Procedural Reforms

As I said earlier, I don't think the answer to these problems is in a rewrite of the substantive antitrust laws. I would encourage the courts to focus more on tightening procedural rules rather than scaling back substantive rules if they are concerned about the costs and burdens of excessive private enforcement. In this sense, I think *Twombly* was a good decision. I would rather see the Court toughen pleading standards than the standards for proving conspiracy. Among the proposals I would urge the courts to consider are the

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[57] *See, e.g.*, William E. Kovacic, Chairman Federal Trade Commission, *Competition Policy in the European Union and the United States: Convergence or Divergence?* at p. 9, Bates White 5th Annual Antitrust Conference (June 2, 2008) *available at*: <http://www.ftc.gov/speeches/kovacic/080602bateswhite.pdf> ("In roughly the past 30 years, judicial fears that the US style of private rights of action – with mandatory treble damages, asymmetric shifting of costs, broad rights of discovery, class actions, and jury trials – excessively deter legitimate conduct have spurred a dramatic retrenchment of antitrust liability standards."); William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 Colum. Bus. L. Rev. 1, 51-64 (2007).

[58] *United States v. AMR*, 335 F.3d 1109 (10th Cir. 2003).

There is no right of contribution in the United States. A minor cartel participant

[62] *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) ("we find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."); *Dukes v. Wal-Mart, Inc.* 474 F.3d 1214, 1227 (9th Cir. 2007); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F 80

certification stage, and that includes requiring the plaintiffs' experts to satisfy the requirements of *Daubert*. If universally adopted by the courts, this would be00 cm1.00000 0.00000 p 1.00000

[65] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

[66] Sherman Act, ch. 647, § 7, 26 Stat. 209, 210 (1890); 15 U.S.C. § 15(a).

[67] *See, e.g.*, Robert Bork, Comments on the Status of the Antitrust Laws, *available at:* <http://govinfo.library.unt.edu/amc/comments/bork.pdf>.

[68] Antitrust Remedies Improvement Act of 1986, S.2162, H.R. 4250, 99th Cong. (1986); *see also* Research Joint Ventures: Hearings before the Subcomm. on Investigations and Oversight of the Subcomm. on Science, Research and Technology of the House Comm. on Science and Technology, 98th Cong., 1st Sess. 154, 159 (1983) (testimony of William F. Baxter); Edward D. Cavangh, *Detrebling Antitrust Damages: An Idea Whose Time has Come?*, 61 TUL. L. REV. 777, 830 (1987).

Modernization Commission ("AMC") to recommend limits on treble damages.[69] While treble damages will likely remain the rule in antitrust cases, I do think that juries should be instructed that the damages they award will be trebled. This seems to me to be a common sense instruction.

Conclusion

In sum, there are several reasons for complementing public enforcement of the

[69] *See, e.g.*, Robert Bork, Comments on the Status of the Antitrust Laws, *available at*: <http://govinfo.library.unt.edu/amc/comments/bork.pdf>; Comments of the Business Roundtable Regarding the Issues Selected for Study by the Antitrust Modernization Commission, pp. 3-4 (Nov. 4, 2005) *available at*: <http://govinfo.library.unt.edu/amc/public_studies_fr28902/enforcement_pdf/051104_BRT.pdf>.