VIEWPOINT:

Private Damages Actions: A U.S. Perspective on Importing U.S. Damages Actions to the EU

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Private Damages Actions:

A U.S. Perspective on Importing U.S. Damage Actions to the EU

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I. Introduction

On December 19, 2005 the European Commission published for public consultation a Green Paper on *Damages Actions for Breach of EC Antitrust Rules* ("the Green Paper").[1] The stated aim was to design a more efficient system for bringing private damages actions for infringement of EC antitrust law. The source of many of the suggested changes was United States antitrust litigation practice.

In the debate that has followed, a key point seems to have been overlooked—U.S. antitrust litigation goes together with U.S. substantive antitrust law. Regardless of what one thinks of the U.S. litigation system in the context of U.S. substantive law, to graft that system onto the very different approach embodied in EC competition law raises a whole host of potential problems. This may well not be a hybrid that the EC wants to create.

II. The Structure of the Two Systems

U.S. antitrust law is based on a common law tradition; a broad statute with details to be filled in by case law. Section 1 of the Sherman Act of 1890 states: "Every contract, combination…or conspiracy, in restrain to trade of commerce…is hereby declared to be illegal." However, since 1918[2] U.S. courts have applied the so-called "Rule of Reason" under which only unreasonable restraints of trade are barred. This is key to understanding U.S. law and practice—freewheeling competition is allowed and encouraged. Only if the party *challenging* the conduct can prove that the adverse impact on competition (not just a competitor) outweighs the pro-competitive impact, is the contested conduct banned. There are some exceptions (such as cartel price-fixing which is condemned as illegal *per se*), but these are indeed the exceptions, and the rule of reason is the general rule for evaluating potentially anticompetitive conduct.

There is no counterpart to the Rule of Reason in EU law. In fact, the analytical structure created by the combination of Article 81(1) and 81(3) of the EC Treaty is the reverse of the U.S. structure. In the EU, the party *defending* the conduct must show that the pro-competitive aspects outweigh the anticompetitive ones.

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[1] COM(2005) 672 final, 19.12.2005.

[2] Chicago Board of Trade v. United States, 246 U.S. 231 (1918).

A similar split between U.S. and EU law can be observed in the rules governing the actions of companies with power in a given market. Section 2 of the Sherman Act of 1890 states: "Every person who shall monopolize, or attempt to monopolize . . . shall be deemed guilty of a felony…." The U.S. courts have interpreted this provision to mean that to make out a case of monopolization requires (A) the willful acquisition or maintenance of monopoly power (B) by the use of exclusionary conduct.[3] As Judge Easterbrook noted approvingly in *Ball Memorial Hospital*, "competition is a ruthless process. A firm that reduces cost and expands sales injures rivals – sometimes fatally. … [but] the antitrust laws are for the benefit of competition not competitors."[4]

In contrast, in Europe, large firms are not entitled to take such an aggressive approach. In EU markets, dominant firms must keep an eye on maintaining competition by rivals. To quote the Court of First Instance in the *British Airways* case, "[W]hilst the finding that a dominant position exists does not in itself imply any reproach to the undertaking concerned, [the dominant undertaking] has a special responsibility, irrespective of the causes of that position, not to allow its conduct to impair genuine undistorted competition on the common market."[5]

The difference is basic, and profound. EU law seeks to control the conduct of firms that are dominant, while U.S. law is directed at monopolies; the creation or maintenance of monopoly power. This practical comparison of market share thresholds is instructive. The EC standard for market dominance—the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers[6]—presumes market dominance where a single undertaking controls 50% or more of the relevant market. And, in some cases, a smaller percentage may be considered enough to presume dominance. The U.S. standard—the ability to raise price and exclude competition—would rarely be proved where market share is less than 70%. In any event, dominance is not monopoly.

Second, another difference is in the nature of the conduct that may violate the law. Both the U.S. and the EC describe the forbidden conduct as "exclusionary." However, the threshold for what sort of conduct qualifies as exclusionary is lower in Europe, where EU law requires only that the EC establish that the conduct in question prevents rivals from competing by means other than "normal competition" or "competition on the merits," or that it otherwise violates the special responsibilities of dominant firms.[7]

In contrast, U.S. law will not condemn conduct as exclusionary unless it violates the standard appropriate to the specific type of conduct at issue. What the standard should

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[3] Spectrum Sports v. McQuillan, 506 U.S. 447 (1993).
[4] Ball Mem'l Hosp. v. Mutual Hosp. Ins, 784 F.2d 1325 (7th Cir. 1986).
[5] Case T-219/99, British Airways plc v. Commission of the European Communities [2003] ECR II-5917, ¶ 91, [1979] 3 CMLR 211, at 290-291.
[6] Case 27/76, United Brands v. Commission of the European Communities, [1978] ECR I-207, ¶ 65, [1978] 1 CMLR 429, at 486–87.
[7] Case 85/76, Hoffmann la Roche v Commission [1979] ECR 461, ¶ 91, [1979] 3 CMLR 211, at 290-291.

be is the subject of considerable debate. The government advocated the "no economic sense" standard in *Trinko*[8] but many others have been seriously proposed. One could argue that under U.S. law even a monopolist has substantial freedom to operate.

Another key difference is that while in both jurisdictions a dominant/monopolist firm will be liable for refusing to deal only if its refusal has a negative effect in the market, what that means is different on either side of the Atlantic. In the EU, at least in the past, the focus has been on the likely and sometimes presumed impact on the "effective competition structure" and on competitors as a proxy or substitute for a showing of impact on consumers. EU policy has been based on the premise that consumers are best served by protecting the competitive process, and therefore in Europe it has not been necessary to show direct consumer harm. This may be changing, but the old law and court decisions are still present. When firms with market power engage in conduct determined (sometimes presumed) to be anticompetitive, consumer harm has been presumed to occur.

In the U.S., more attention is given to evidence of actual or likely price or output effects, and consumer harm is more directly implicated because the prohibition is against monopolies, not just abuse of dominance. This distinction makes sense, when you realize that the U.S. system developed with the expectation that the Government would handle criminal cases, but private parties would seek their own damages. Indeed, a private right of action, with treble damages, and recovery of attorneys' fees, was written into U.S. law in the Clayton Act of 1914. In such a system, each party pursues its own self-interest as far as it will go.

The EU, by contrast, has relied largely on a government enforcement and fine structure. The enforcer makes the policy judgments about what conduct to pursue, and how far to pursue it. The substantive law favors enforcement, because the enforcer is the government and is charged with taking into account the greater public good. In the U.S. system, the private party seeks only his or her own good, regardless of the impact on the wider legal and social structure. Accordingly, the substantive law favors free conduct and narrower prohibitions.

III. Results of the U.S. System

The U.S. has a limited governmental enforcement role, focused on cartels. The Federal Trade Commission also has broad "unfairness" jurisdiction, but it alone can enforce it. Private suits, therefore, help to define the contours of the law. Except for a small group of *per se* offenses (such as price fixing) where proof of the agreement is proof of liability, a plaintiff has the burden of showing that the anticompetitive aspects of the conduct at issue outweigh the pro-competitive aspects, and that it was damaged by

[8] Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004).

what made the conduct illegal. Recent U.S. Supreme Court cases have curbed attempts to expand antitrust liability.[9] The clear message is to let the market play out.

However, the U.S. antitrust litigation model is very expensive. Many cases are brought as "opt out" class actions, in which claims of many allegedly injured people are combined into one large case. In such litigation, not only is there no government interest there may, in fact, be no effective client control at all, with the case being effectively run by the lawyers (more on this below). The combined costs of discovery and exposure to treble damages (and joint and several liability) are a drag on the economy (a "litigation tax") and may lead to settlements without evidence of wrongdoing. Discovery costs routinely run into the millions of dollars per defendant, and the potential exposure (trebled, for the entire alleged violation) can mount to the heavens.

A recent U.S. case illustrates both of these concerns. In *Bell Atlantic v. Twombly*[10] the courts were faced with a very tactically drawn complaint. It alleged that because local telephone companies did not pursue certain business opportunities (which the plaintiffs felt the companies should have pursued), therefore there must have been a conspiracy not to compete. Even if all the facts alleged were proven, they did not make out a violation of the law. Yet a United States Court of Appeals held that the case should be allowed to move forward on behalf of a class of essentially everyone who bought telephone services, because there might be some facts not alleged that made out a case. Fortunately, the Supreme Court reversed.

If there was some further fact that could have been alleged in *Twombly*, then this becomes very interesting. It was in the interest of the plaintiffs' lawyers to expand what is a permissible pleading to get a case into court, but it was not in the interests of the clients to have their case dismissed because their counsel may have been trying to achieve a broader goal. Had this been a claim by one person, such a strategy and an outcome would have been highly unlikely. But given the structure of a class action claim, the real control lay in the hands of the lawyers.

IV. Implications for the EU

U.S. antitrust litigation arose when there was no statutory mechanism to provide restitution or damages to parties harmed by anticompetitive activity. In most cases the "Rule of Reason" allows for robust defense of conduct, and puts the burden on the plaintiff to prove a violation, and injury caused by the violation. Even so, there is a litigation industry, which brings class action cases on behalf of people with very small claims, and settles them on terms that generate large attorneys fees but which may provide little compensation for plaintiffs (and less economic benefit).

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[9] Texaco Inc. v. Dagher, 126 S. Ct. 1276 (2006); Illinois Tool Works Inc. v. Independent Ink, Inc., 126 S. Ct. 1281 (2006); Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.,127 S. Ct. 1069 (2007)..
[10] Bell Atlantic v. Twombly, 127 S. Ct. 1955 (2007).

The war between the costs of allowing "notice" pleading and the pressure from alleged victims claiming that they do not have the facts at the start, still often tends towards allowing these cases to proceed. Anyone who believes that judges can effectively "control" U.S. style litigation has not lived through enough of it.

Finding solutions "firmly bedded in our European cultures and traditions"[11] that allow for private class actions will not be easy but importing the U.S. model without its Rule of Reason analysis, burden of proof, and attitude that hard competition is good, would be an economic and competition policy disaster.

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[11] Speech by Commissioner Kroes of March 8 2007 at the Commission/IBA Joint Conference on EC Competition Policy, Brussels, entitled Reinforcing the fight against cartels and developing private antitrust damage actions: two tools for a more competitive Europe, *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/128&format=HTML&aged=1&language=EN&guiLanguage=en