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Will Europe Provide Effective Redress for Cartel Victims?

*Vincent Smith**

This article gives an overview of the history of the development of private redress for competition law breaches in Europe. The article begins by reviewing the current proposals to improve private actions, examines the areas where further development is still required, and makes some suggestions as to how to tackle the most important of these. The issues discussed include how to determine which court should hear competition claims, how to institute a process that does not result in a multiplicity of actions across the European Union, and what system would ensure that claimants achieve effective redress while also being fair to defendants.

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I. Historical Perspective

Recent attention to the lack of redress available to the victims of cartel and other competition law breaches in Europe has highlighted the main difference between the competition regimes in Europe and that of most other countries in the Organization for Economic Cooperation and Development ("OECD"): the relative lack of redress for victims (especially the smaller ones). Although there may be more hidden resolutions and settlements of competition cases than are readily apparent publicly,[1] the overall recovery for competition law victims has been much lower than in, for example, the United States, where civil damages actions in this area have been encouraged for nearly 40 years. This article seeks to assess the extent to which the current initiatives (particularly those undertaken by the European Commission) will help tip the scales towards a better equilibrium, particularly for consumers and small businesses who have been the victims of cartels. This article then suggests some issues which would benefit from further consideration.

At the outset, it is worth recalling that competition law (and competition enforcement in particular) is a relatively new phenomenon in Europe. In contrast to the United States, where the need for private parties to have a means of tackling abuses of market power (whether cartel conspiracies or misuse of monopoly power) was recognized early,[2] European countries preferred an economic policy based on substantial state intervention. This normally took the form, especially in the decades following the Second World War, of either central state planning of the economy with all enterprises under direct state control (as in central and eastern Europe), or a mixture of regulation and state ownership (in western Europe). This pattern only began to change in the 1980s with the beginning of a withdrawal from state ownership of industrial firms in Western Europe, in some cases accompanied by a new set of ex ante regulatory requirements to ensure full service to all customers. These latter were prominent in "network" industries[3] and became increasingly important throughout Western Europe as the decade progressed.[4]

AT THE OUTSET, IT IS WORTH RECALLING THAT COMPETITION LAW (AND COMPETITION ENFORCEMENT IN PARTICULAR) IS A RELATIVELY NEW PHENOMENON IN EUROPE.

With the change in regime in Central and Eastern Europe in the late 1980s and early 1990s, countries in those regions opened their markets to competition

1. Barry Rodger, *Private Enforcement of Competition Law: The Hidden Story*, 29(2) E.C.L.R. 96 (2008).

2. U.S. Sherman Act, 15 U.S.C. § 1-7 (1890).

3. United Kingdom, The Telecommunications Act of 1984 (Apr. 12, 1984).

4. Germany, Telecommunications Act (Telekommunikationsgesetz, TKG), Federal Law Gazette I (Jul. 25, 1996), at 1120, as amended by subsequent Acts.

relatively quickly and introduced competition laws based on the EC model; indeed, it was a condition of accession to the European Union that they did so.[5] Thus, the Member States which joined the European Union in 2004 all had functioning competition regimes from the late 1990s onwards.

Before the 1980s, there were two exceptions to the then prevalent European picture of state ownership and direct intervention in preference to the use of competition laws. Germany introduced its first law against restrictions of competition in 1949, but substantially updated it in 1958. At more or less the same time, the Treaty of Rome and its fundamental principles established both a prohibition on anticompetitive agreements (cartels and others) and a prohibition on abuse of market dominance.

The German emphasis on competition was a reaction against the corporatism, and encouraged by the state, under the National Socialist regime before the Second World War. It was part of a wider group of laws and constitutional provisions designed to address the excesses of the capitalist system which were widely believed to have contributed to the events leading to the war. The most prominent example of these German laws is, of course, the law on worker co-determination (Mitbestimmungsgesetz). This emphasis carried over into the negotiations leading to the Treaty of Rome and gave a "constitutional" importance to the EC competition rules. Although the emphasis was on protecting "free competition", the reasons for doing so were more a result of political reaction to historical events than the overtly ideological, freedom-based, U.S. and other Anglo-Saxon systems of competition law.

These developments, of course, had a significant impact on the enforcement regime envisaged in each legal system. Whereas the U.S. Sherman Act proceeded on the basis that everyone (including the public authorities) could bring a claim, the Treaty of Rome proceeded on the basis that the relevant provisions of the Treaty would be enforced by the European Commission, a public enforcer with a wide-ranging remit to ensure that the law contained in the Treaty is observed.[6]

In one of the first cases (1966) brought by private parties under the European competition rules, the European Court of Justice ("ECJ") confirmed that an anti-competitive distribution agreement (a "vertical" agreement between a supplier and its distributor) fell within the scope of the prohibition on restrictive agreements.[7]

5. *See, e.g.*, Hungary, The Competition Act on the Prohibition of Unfair Market Practices (Act LXXXVI of 1990); Poland, The Act on counteracting monopolistic practices and protection of consumers interests of 24th February 1990; and Czech Republic, The Act on the Protection of Economic Competition, No. 63/199, as amended Act No. 495/1992 Coll.

6. European Community, Treaty Establishing the European Community, as amended by subsequent Treaties, Rome (Mar. 25, 1957), at art. 89(1).

7. Joined Cases 56 & 58/64, Consten and Grundig v. European Commission, 1966 E.C.R. 299.

A German manufacturer, Grundig, and its French distributor, Consten, had appealed against a Commission decision finding that their distribution agreement, which prevented all competition to Consten in France for the sale of Grundig branded products, had breached Article 85 (now Article 81) EC Treaty.

This is not the most obvious case of anticompetitive behaviour. It does, however, demonstrate a further strong theme which runs through competition law enforcement at the European level—the emphasis on creating a single economic market across the European Union. Free trade is a main vehicle for creating the single market, unrestricted not only by state barriers (import duties and the like), but by also private barriers through restrictive agreements and abuses of market power to keep prices higher in some Member States than in others.

IT DOES, HOWEVER, DEMONSTRATE A FURTHER STRONG THEME WHICH RUNS THROUGH COMPETITION LAW ENFORCEMENT AT THE EUROPEAN LEVEL—THE EMPHASIS ON CREATING A SINGLE ECONOMIC MARKET ACROSS THE EUROPEAN UNION.

Despite their ubiquity and obvious harm to economic efficiency, it was not until the early 1970s that the European Commission levied its first significant fines against a cartel.[8] Cartel enforcement increased significantly in the following decade and, beginning in the mid 1990s, became the centerpiece of the Commission's competition law enforcement programme.[9] One of the reasons for the change of emphasis may well have been the completion of the "single market" programme and the Commission's realization that it needed to concentrate its resources on the larger and more serious competition breaches, in particular EU-wide cartels.

EC (and German) competition law nevertheless remained the exception in Europe until the 1990s. Even the other European countries that had competition law regimes did not (generally) use them effectively against anticompetitive behaviour. Far less was there any acceptance that private parties should have a right to redress for loss caused by such behaviour.

For example, although the United Kingdom introduced its first competition statute in 1949,[10] the law did not provide for a cartel enforcement regime. Instead, it gave a new state body (then called the Monopolies Commission) the power to look into sectors of the economy, at the request of the government, and make recommendations for changes to the industry structure (usually through

8. Joined Cases 40-48, 50, 54-56, 111, & 113-114/73, Suiker Unie v. European Commission (Sugar Cartel), 1975 E.C.R. 1663.

9. EUROPEAN COMMISSION, DG COMPETITION REPORT ON THE AMOUNT OF FINES IMPOSED BY THE COMMISSION, 1990-2008 (2008), *available at* http://ec.europa.eu/comm/competition/cartels/statistics/statistics.pdf.

10. United Kingdom, Monopolies and Restrictive Practices (Inquiry and Control) Act (1948).

government secondary legislation). This mechanism typified the approach to economic regulation during the immediate post-war period and was used relatively little, not least because the state had more direct means of control over industry through the government ownership of key industrial and commercial concerns. (The coal, steel, and railway industries were all nationalized at the beginning of the post-war period, as was the Bank of England.)

Direct enforcement of competition law only became a reality with the establishment of the 1976 Restrictive Trade Practices Act. Of course, by that time, European competition law also applied in the United Kingdom following its accession to the EEC in 1973. However, the Act was formalistic—and, therefore, difficult to apply—and the sanctions provided in the law (such as imprisonment for contempt of court if restraining orders were breached) were felt to be inappropriate in many cases. Public enforcement through formal sanctions was therefore extremely rare, and private litigation was almost unheard of. The 1976 Act, despite its shortcomings, was not replaced until the 1998 Competition Act introduced a European-style prohibition system to the United Kingdom statute book, with effect from March 2000.

Another important element of an effective private redress regime is providing an efficient set of civil law procedures to enable private actions to be brought. Until very recently (and as is still the case in the large majority of EU Member States), the general civil procedure rules were the only vehicles for bringing a claim for redress in the competition field and they have a number of drawbacks when applied to competition law claims.

First, most civil procedure rules have difficulty in dealing with expert evidence—although the nature of these difficulties varies from system to system. This is particularly important for competition claims which are essentially economics-based: legal systems traditionally have difficulties dealing with areas in which the essence of a decision is non-legal. The problem differs depending on whether the litigation system is adversarial (as in common law countries) or inquisitorial (as in civil law countries). In an adversarial system, in which the experts appear as witnesses for each of the parties, the (non-expert) judge is left to adopt one or other of two conflicting sets of testimony. In the inquisitorial system, in which an expert is appointed by and gives evidence on behalf of the court, the judge essentially delegates an important part of (and in some cases most of) the decision-making function to the "witness", with relatively little opportunity for the parties to challenge (or, in many cases, even to address) the content of the evidence being given.

Second, all European civil procedure systems start from the basic premise that the dispute which is to be adjudicated is between one (or a very small number) of claimants against one (or an even smaller number of) defendants. For competition litigation, in particular against cartels, this paradigm does not hold true. The typical cartel case (if it is to be dealt with at all efficiently) will have a large num-

ber of claimants and almost certainly more than one party being pursued. The typical reaction of civil courts is to treat such cases as a bundle of bilateral disputes and to try them as such with varying, but until now relatively modest, success. This "bundling" phenomenon is seen in particular in the need for each claimant to issue proceedings separately in his or her name (and to pay a separate court fee), and to run the risks of litigation (e.g., the adverse costs risk) as if he or she were acting alone, rather than as part of a much wider group. This has had a chilling effect on competition claims, in particular for consumers and small businesses.

Third, the embryonic state of recognition and enforcement of civil judgments (especially for cartel and other competition claims) makes bringing an effective action for redress across Europe even more problematic. The structure of the current European rules (contained in Regulation 44/2001) has not been significantly modified since 1968 when the Brussels Convention (on which the Regulation is more or less wholly based) was made. The central paradigm of the Convention, unsurprisingly, is the bilateral dispute and generally its rules work well in such cases. But the system breaks down when multiple claimants face multiple defendants in what is essentially the same dispute. Although the Regulation permits courts (other than the court first seized of the dispute) to stay proceedings in subsequent claims brought relating to that dispute (but between different parties),[11] there is no requirement to do so. Furthermore, the coordination mechanisms between the national courts provided in the Regulation are weak (almost nonexistent). The prospect, as cartel enforcement increases, of a large amount of relatively uncoordinated cartel litigation across Europe in relation to essentially a single infringement is a very real one.[12]

II. Recent Policy Developments

The lack of competition redress in the European Union, in particular for smaller claimants, was highlighted in a report written for and published by the European Commission in mid 2004 ("Ashurst report").[13] The Ashurst report's sweeping but portentous conclusion that private enforcement of competition law across the European Union showed "astonishing diversity and a state of total under development" generated headlines. Although this conclusion was contested by those who pointed out that there was much more activity than the Ashurst report suggested, especially in the form of injunction proceedings and private set-

11. Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2001 O.J. (L 12) 1, at art. 6(2).

12. Devenish Nutrition Ltd v. Sanofi-Aventis SA ("Vitamins litigation"), 2007 E.W.H.C. 2394 (Ch).

13. D. Waelbroeck et al., Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules: Comparative Report (Ashurst report) (2004), *available at* http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/study.html.

tlements, the European Commission was nevertheless encouraged to carry forward its work in this area.

As a result, in December 2005, the Commission published a Green Paper which made a number of recommendations as to how to improve access for justice for cartel victims.[14] The proposals sent out for consultation included a recommendation that collective actions should be made easier, especially for consumers, and that incentives for claimants to come forward and litigate (if necessary) for them to obtain redress should be improved. Most controversially, the Commission suggested that the damages awarded could be doubled to compensate claimants for both their loss and the risk of bringing the claim in the first place—an idea modeled on (but not replicating) the U.S. treble damages system for cartel claims under the Sherman Act.

The responses to the Green Paper were considerable, varied, and vociferous (notably with respect to multiple damages). The Commission took some time to consider them and reflect on its policy aims and it was not until April 2008 that the Commission finally published its firm proposals. The incentives to claimants were remodeled and the controversial "copy" of the U.S. damages multiplier was dropped, but the proposals on collective actions were retained, refined, and made a little more detailed.

THE RESPONSES TO THE GREEN PAPER WERE CONSIDERABLE, VARIED, AND VOCIFEROUS (NOTABLY WITH RESPECT TO MULTIPLE DAMAGES).

The Commission now proposes two types of collective action, both of which it expects Member States to introduce. First, the Commission recommends a group action where claimants opt-in to a claim against a cartel and which Commission officials have suggested might be particularly useful for claims by small- to medium-sized enterprises. Second, the Commission proposes a "Community-wide" representative action requirement, where consumer and other representative bodies, designated by their Member State government or the court in which the action is brought, can bring claims on behalf of groups of affected consumers or small businesses. The Commission believes that this type of collective action would be particularly well-suited to consumer claims or claims in which there is a defined group of consumers (rather than a listed group of individuals) that are represented unless they opt-out. Variations of both of these collective actions exist in a number of Member States (as the Commission has emphasized) and Commission officials have made an effort to point out that these actions are also very different from the U.S. "class action" system.

The Commission's changed view on the desirability of multiple damages may have been conditioned not only by the opposition voiced to it, but also by devel-

14. Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules [hereinafter "Green Paper"], COM(2005) 672 final (Dec. 19, 2005).

opments in the case law of the European Courts. In particular, the ECJ decided in the *Manfredi* case[15] that both pre-judgment interest (running from the time the competition law infringement took place until judgment) and compensation for loss of future profit (lucrum cessans) were recoverable as a matter of European law, which takes precedence over contrary national laws across the European Union. Where cartels have been ongoing for a number of years, the interest on the overcharge (as well as any loss of future profit) can sometimes double the original overcharge paid to the cartel.

In parallel with the initiatives at a European level (and encouraged by them), a number of the EU's Member States have also begun considering the issue of collective redress for cartel victims—either as a standalone policy issue or (more usually) as part of an overall consideration of collective redress in their civil procedure systems.

In the United Kingdom, the Office of Fair Trading ("OFT") published a discussion paper in April 2007 recommending that the existing, and limited, form of representative action[16] for "follow-on" cartel action in the Competition Appeals Tribunal ("CAT") should be extended. At present, only pre-designated consumer bodies can bring such claims on behalf of named consumers. Since only one consumer body has been designated since the law came into force in 2003,[17] and only one consumer claim has been brought against a cartel (in the sale of soccer shirts to football fans), there is concern that the existing system is not working well.

The OFT therefore recommended that representative actions in the competition area should be extended in a number of ways:

- the court, as well as the government, could decide if a body is an appropriate one to bring a representative action;
- representative actions should be available not only to consumers, but also to small businesses who have suffered harm from an anticompetitive practice;
- the representative mechanism should be available not only in claims which "follow-on" from a competition authority's decision, but also in claims which "stand alone"; and
- the bodies should be able to represent not only named claimants, but also claimants who fall within a defined group.

15. Joined Cases C 295-298/04, Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni [hereinafter *Manfredi*], 2006 E.C.R. I-6619, at para. 5(2).

16. U.K. Office of Fair Trading, Private actions in competition law: effective redress for consumers and business (OFT Discussion paper, No. 916, Apr. 2007).

17. The U.K. Consumers' Association "Which?", *at* http://www.which.co.uk/.

Following a period of consultation, the OFT slightly refined and confirmed its view in recommendations to the government in November 2007. As of October 2008, the publication date of this article, the government's response was still pending.

Other Member States have also been considering collective actions for compensation, with competition law usually included in a wider initiative to promote collective redress. For example, in France, a number of legislative texts (some sponsored by the government) have been put forward in the last two years or so, although none of them have been adopted by the National Assembly. Italy has also recently passed a law on representative actions, although its commencement has been suspended by the newly elected government pending further consultation.[18] More Member States have laws which promote collective redress in particular areas such as Germany's capital markets law (Kap MuGe),[19] Portugal's "popular action" for consumer, public health, and environmental actions,[20] and the Netherlands "mass tort settlements" law,[21] which is general in scope, but only applies where the parties have agreed to settle a case (its fairness is then endorsed by the court in Amsterdam and applied to all those in the represented group).

III. Towards a European Cartel Damages System?

Will the policy impact, in particular at the European level, reverse the situation of "total under development" found in the Ashurst report? The "astonishing diversity" also found there applies very much to the civil procedure rules of the (now 27) EU Member States.

Clearly the proposals in the Commission's White Paper will improve the situation if they are carried through, but there are limits on the EU's competence in this area. Civil procedure coordination across Europe is done through cooperation, notably through Regulation 44/2001 and the Regulations on the law applicable to contractual and non-contractual obligations.[22] There are very few cases

18. Law 244/2007, L'azione collettiva risarcitoria ("la ACR"), Il Codice del Consumo, sub-Art. 140-bis (2007).

19. The Bundestag, Germany, Act on the Initiation of Model Case Proceedings in respect of Investors in the Capital Markets (Nov. 1, 2005).

20. Lei No. 83, Lei de Acção Popular ("LAP") (Aug. 31, 1995).

21. The Netherlands, Act on the Collective Settlement of Mass Damage Claims (Aug. 1, 2005).

22. Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), 2008 O.J. (L 177) 6; and Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), 2007 O.J. (L 199) 40.

in which EU law instruments have interfered with Member States' choice of how they ensure the enforcement of European law in their internal legal order[23] and, for the most part, these have related as much to criminal law as civil enforcement. This lack of interaction sits uncomfortably with public competition law enforcement which is increasingly being carried out (in fact, if not in law) on a centralized European basis.

The European public enforcement regime was dramatically overhauled beginning on May 1, 2004 in accordance with Regulation 1/2003. Although on its face it devolves more competition enforcement to the Member States' national competition authorities by giving them the power to fully apply EC competition law (and a number of them have taken advantage of this), it has also had two, possibly rather more surprising consequences. First, it encourages the "soft" harmonization of public enforcement procedures across the European Union as Member States increasingly adopt an EU-style enforcement process for their national competition authorities. Second, despite the new "devolution", the European Commission is enforcing EU competition law, particularly against cartels, as energetically as ever, at least as measured by the amount of fines levied.[24]

THIS SHARP CONTRAST BETWEEN AN INCREASINGLY CENTRALIZED PUBLIC ENFORCEMENT PROCESS AND A SHARPLY "DECENTRALIZED" CIVIL REDRESS MECHANISM ACROSS EUROPE IS HEIGHTENED BY THE ALMOST TOTAL ABSENCE OF ANY TOOLS FOR COORDINATING THE TWO SYSTEMS.

This sharp contrast between an increasingly centralized public enforcement process and a sharply "decentralized" civil redress mechanism across Europe is heightened by the almost total absence of any tools for coordinating the two systems. Regulation 1/2003 makes brief reference to the issue by giving national courts the power to apply EU competition law in full in cases before them,[25] on the condition that they do not take decisions which may conflict with any decisions made or expected from the European Commission.[26] The latter provision reflects the case law of the ECJ,[27] and it is the case law of the Court which otherwise provides the (relatively thin) glue which holds the two systems in some relationship to each other.

23. Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, 1998 O.J. (L 166) 1; and Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, 2004 O.J. (L 157) 1.

24. *See supra* note 9.

25. Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1, at art. 6.

26. *Op. cit.* at art. 16.

27. Case C-344/98, Masterfoods, 2000 E.C.R. I-11369.

In addition to the "no conflict" rule (or, perhaps more accurately, the "no contradictory action" rule) set out in Regulation 1/2003, the European Court has relied on two guiding principles in assessing whether national civil procedure rules properly allow the enforcement of EU law: the principle of equivalence and the principle of effectiveness.[28] The principle of equivalence means that, for the enforcement of directly effective EU law obligations in the national courts, all remedies available for similar breaches of domestic law must also be available. The principle of effectiveness means that, even where those remedies are applied, they must be capable of producing a result. National law "must not render impossible, or excessively difficult" the exercise of EU law rights.[29]

In principle, the European institutions leave the choice and form of civil procedure to each Member State subject to some very high-level benchmarking against relatively few general principles. Recently, the European Courts have shown signs of using the principle of effectiveness in a more interventionist manner, but the fundamental principle remains untouched.

Effectively, the EU acts as a confederation rather than a union in civil procedure matters. Given the huge diversity both in current civil procedure laws and in legal traditions, this is probably inevitable and to be welcomed. But there are significant issues over the coordination mechanism (discussed earlier in this article) which, despite the non-interventionist stance the European Union currently takes, nevertheless needs to be addressed if the Commission's policy objective of improving access to justice is to succeed.

IV. Possible Solutions to These Issues

Before turning to propose some possible solutions to the issues raised above, it is worth considering briefly what the aim of any changes should be. As with the overriding objective in the English civil procedure rules,[30] the aim of any EU-approved change should be to deal with claims justly. This means not only having regard to the eventual outcome, but also to the speed and economy of the process and, therefore, to its efficiency on a European level.

The ideal should, therefore, be one civil claim per cartel (or other infringement) in a single EU Member State court. The outcome of that claim should be binding and easily enforceable across the European Union. This of course implies less choice of court for claimants and therefore needs to be accompanied by some guarantees that effective redress will be available in the competent court. The

28. *Manfredi, supra* note 15, at para. 2(2).

29. *Id.* at para. 3.

30. U.K. Ministry of Justice, The Civil Procedure Rules (2008), at §§ 1.1(1) & 1.1(2).

reminder of this article suggests what might be appropriate after considering how best to determine which court should hear the case.

Although the question of which court should hear the case is the first issue for claimants, the choice of which law the court should apply is also highly relevant. The recently adopted Regulation 864/2007 provides that, for competition claims, the applicable law shall be the law of the Member State where competition is or is likely to be affected by the infringement.[31] If that leads to the choice of more than one law, then the claimant may instead choose the law of the court seized (provided the law chosen has a real connection with the infringement alleged). The choice of court therefore has a substantial effect not only on the civil procedure rules to be followed, but also on the substantive law to be applied.

How best then should the court competent to hear the case be chosen? The basic premise of the current Regulation 44/2001 is that the place of the defendants' domicile is the appropriate forum for the case to be heard. It is only where there is more than one defendant domiciled in different Member States that a choice of court comes into play.

Most claims for redress for competition law breaches will be brought as a breach of a non-contractual obligation (tort, delict, or quasi-delict). Regulation 44/2001 (as interpreted by the European Court of Justice) currently provides that the claim may be brought in a court where the harmful event occurred or may occur. This has been held to be either the court of the place where the tortious act took place or the courts of the place where the effect of the act occurred. The application of those rules can lead to a wide range of available jurisdictions in cartel cases—a way needs to be found to narrow the choice.

It is suggested that there are three possible options for criteria to choose the competent court: First, and most mechanistically, a turnover-based test could be used. Where an infringer (or its EU subsidiaries) earned turnover in the products affected by the infringement through activities in a number of EU Member States, the country in which the highest such turnover was earned would have jurisdiction. Where there are a number of infringers (e.g., in a cartel), there appear to be two choices: either the courts of the country with the highest total turnover of the affected products or services, or the courts of the domicile of the defendant cartelist with the highest such turnover.

The difficulty with such a test is obtaining a complete set of the relevant turnover figures before proceedings have begun. For follow-on cartel actions, it is possible that the competition authorities' decision will contain the relevant information if it is needed to calculate fines (many competition authorities use this as a metric when setting fining levels). For standalone actions and those fol-

31. Commission Regulation (EC) No. 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (rome II) L199/40 at art. 6(3).

low-on actions where turnover information is not available, pre-action disclosure in a likely forum may be the only way forward.

As with the choice of jurisdiction in the merger control context, where turnover thresholds are used to determine whether a merger has a "community dimension" giving the European Commission exclusive oversight of it, turnover-based thresholds may give early certainty as to which body is entitled to deal with the case. However, given that there is no EU-wide authority capable of handling borderline cases, this certainty may come at the price of some (and possibly a significant number of) inappropriate choices of jurisdiction, in particular in cases where many of the infringers have their main turnover outside the European Union.

Second, a refined version of the current "effects-based" test could be applied. At present, the Member State court first seized could in principle hear the entire compensation claim as it applies to that infringement. Rather than rely on claimants having the best or most comprehensive claims to get to the door of their chosen court first, it may be more realistic for the court where the greatest effect was felt from the infringement first to hear the claim. This could be the court of the place where the known claimants suffered the most loss—although this may be extremely difficult to quantify—or, more simply, but possibly more arbitrarily, the place where (after a suitable period of, say, 6 to 12 months from the first claim being brought) the claimant(s) with the largest total claimed loss bring their claims, provided that that forum was in some way affected by the infringement. Again, however, arbitrary results cannot be ruled out.

NONE OF THE POSSIBLE BASES FOR ATTRIBUTING JURISDICTION IS, THEREFORE, WITHOUT SERIOUS DRAWBACKS, AND THE TRADE-OFF BETWEEN CERTAINTY AND THE EFFECTIVENESS OF REDRESS IS A DIFFICULT ONE.

The third option would be to use the place of the act which caused the infringement (e.g., the first cartel meeting), which could be the best forum on the basis that the evidence relating to the infringement may best be found there. However, the problem of determining where the infringing act occurred in competition cases should not be underestimated. This is particularly true for long-running cartels, where the cartel meetings may have taken place in various international locations (some of them not in the European Union), or for abuses of a dominant position, where it may not be easy to find where the decision or the action constituting the abuse was initiated.

None of the possible bases for attributing jurisdiction is, therefore, without serious drawbacks, and the trade-off between certainty and the effectiveness of redress is a difficult one. Without some reduction in the availability of "all courts" where a defendant or its subsidiaries has a domicile to hear competition claims, the possibility of ongoing claims being made across the European Union for many years is too real to be sensible. A less radical change would be to sup-

plement the current basic and existing rule in Regulation 44/2001. The "domicile" rule could be amended so that, where more than one country is indicated by the defendants' domicile, only the court where either the largest amount of infringing turnover was earned (either by the cartel as a whole or a reasonably representative proportion of it if the turnover information is not fully available) or, where different, the court of the place in the European Union where the claimant can prima facie show that the cartel or abuse had its most significant effect. For this solution to work effectively, courts across the European Union will need to be willing to grant pre-action disclosure of the relevant turnover information to prospective claimants to establish the turnover test. Clearly some form of improved mechanism for publicizing which competition claims are also pending (and where in the European Union they are pending) is needed for this system to work optimally.

It is unlikely, however, that anything as developed as the U.S. Multi-District Litigation Panel, where cases are allocated at a federal level to the various U.S. Federal District Courts around the United States, would be sensible in an EU context. Other jurisdictions which have developed good collective redress mechanisms have not found it necessary to introduce such a system.

There are certain minimum conditions which will need to be met before the European Commission can sensibly reconcile its policy of encouraging private redress actions with the need to streamline and simplify the civil enforcement mechanism across Europe. First, all of the courts which are eligible to take a competition claim in each Member State must have civil procedure rules which meet the minimum standards as set out in the Commission's White Paper (or the legislation which will flow from it). Courts in countries which do not meet these criteria should not be within the system of handling jurisdiction and enforcement of competition claims discussed earlier in this article. If claimants are to lose the ability to choose from a potentially significant number of courts in which to bring their claims, and thus themselves to make a choice between the effectiveness of competing civil procedure rules, then the court to which their claim is directed *must* be capable of providing them with a proper remedy within a reasonable time.

Second, where the court chosen is one where the language of the proceedings is likely to be different from the language of the majority of the evidence, the court should be prepared to accept evidence in the original language, rather than put to the claimants or defendants the cost of experts to translate it. Of course, some expenditure may be required for language training for judges (or for court interpreters and translators), and the claims may need to be heard before a panel of specialists within the general civil courts for this reason. Some countries (e.g., the United Kingdom and Italy) have already taken steps to direct competition cases falling within their country's jurisdiction to particular courts or tribunals, a trend which should be encouraged.

Third, given that many claimants in competition cases will be smaller enterprises and consumers, who will likely not have the funds to launch an action without assistance from third parties, providing a level playing field for the parties will require third-party litigation funding in all courts for which competition claims can be allocated. Claims are not normally brought (at least on a collective basis) unless a funding mechanism has been put in place. It is probably sensible to provide that, as long as a particular funding mechanism permitted under the (EU Member State) law properly applies to it, it should be recognized and given effect in any court in the European Union. As with the "single passport" home state regulation system for financial services in the European Union,[32] this would, in addition to allowing claimants to support their claims financially, expand the available sources of funds to claimants which, in turn, can be expected to improve their chances of gaining compensation.

Finally, all Member States will need to allow the publicity necessary to make sure that all claimants are aware of the claim being brought in the allocated court. This will mean that those Member States (e.g., France) which currently have strict bans on soliciting for litigation will need to relax them—at least so far as directed by the court properly seized—to permit residents in their countries to be aware of and participate in the claim if they are affected by it.

V. Conclusion

The diversity of civil procedures and therefore of effective outcomes for cartel victims noted in the Ashurst report four years ago,[33] is the direct result of two or more centuries of different legal history across Europe. Clearly, even moving a little towards a more coordinated approach to achieving redress for victims of European competition law breaches will take time. But such moves need to happen if redress for the victims of Europe-wide cartels and other anticompetitive practices is to be made available. The operation of Regulation 44/2001 is due to be reviewed in the near future and may give a good opportunity to revisit these issues.

CLEARLY, EVEN MOVING A LITTLE TOWARDS A MORE COORDINATED APPROACH TO ACHIEVING REDRESS FOR VICTIMS OF EUROPEAN COMPETITION LAW BREACHES WILL TAKE TIME.

If no progress can be made on a coordinated approach, then it may be worth considering direct access to the European court system for those seeking redress—at least in those cases where a breach of EC competition law has been found. However, this

32. Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, 2004 O.J. (L 145) 1, as subsequently amended.

33. *Supra* note 15.

is likely to require an amendment to the Treaty of Rome, and as the recent experience of treaty amendments has shown, this route is also far from straightforward.

Some incremental change is very likely to happen soon, through a combination of legislation (or recommendations or similar) at both the EC and national level and through European Court jurisprudence. Whether these developments will lead to a coherent system for claiming redress across Europe which effectively meets the needs of both claimants and defendants remains to be seen.