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I. INTRODUCTION

The rather long and bumpy road towards a minimum level of harmonization of substantive rules and procedures for class actions continues with the European Commission's recent launch of a public consultation on collective redress (the "Public Consultation"),² and public hearings on the matter on April 5, 2011. This followed a Joint Information Note of Vice-Presidents Almunia and Reding and Commissioner Dalli on the need for a coherent European approach to collective redress (the "Joint Note").³ These documents discuss the possibility of certain forms of class actions in areas that extend beyond EU and national competition laws, including, in particular, consumer protection laws.

The Public Consultation and Joint Note may also give a jolt of life to more specific initiatives in the area of competition law, and plaintiff recovery in cartel cases in particular. Here, too, the EU has charted a rather languid course with no clear end-point in sight. Key initiatives include:

- An EU Commission Green Paper in 2005 on Damages Actions for Breach of the EC antitrust rules.⁴
- An EU Commission White Paper on Damages Actions for Breach of the EC antitrust rules,⁵ including an accompanying Commission Staff Working Paper⁶ and Impact Assessment Report.⁷ The White Paper suggests specific policy options and measures that would help giving all victims of EU antitrust infringements access to effective redress mechanisms so they can be fully compensated for the harm they suffered.
- In parallel the EU Commission has sponsored various studies on the quantification of harm caused by infringements of the EU antitrust rules. These include a 2004 study,⁸ a further 2007 study on making damages actions more effective in the EU,⁹ and a detailed

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² See http://ec.europa.eu/competition/consultations/2011_collective_redress/index_en.html. Audio recordings of the public hearing are also available at this link.

³ See <http://ec.europa.eu/transparency/regdoc/rep/2/2010/EN/2-2010-1192-EN-1-0.Pdf>. See also speech by Joaquín Almunia, Vice President of the European Commission responsible for Competition policy, *Common standards for group claims across the EU*, University of Valladolid, School of Law Valladolid, October 15, 2010, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/554&format=HTML&aged=1&language=EN&guiLanguage=en>.

⁴ See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005DC0672:EN:NOT>.

⁵ See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008DC0165:EN:NOT>.

⁶ See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008SC0404:EN:NOT>.

⁷ See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008SC0405:EN:NOT>.

⁸ See http://ec.europa.eu/competition/antitrust/actionsdamages/economic_clean_en.pdf.

⁹ See

http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf#page=441.

2009 study by Oxera, an economics consultancy, on more precise quantification methodologies.¹⁰ Following the publication of the 2009 study, the Directorate-General for Competition organized a workshop with external economists to discuss a range of issues concerning quantification of antitrust harm in actions for damages.

- In 2009 a draft EU Directive intended to legislate for a minimum level of common procedures for private damages actions received unofficial circulation among the antitrust community. In the meantime, matters had largely fallen into abeyance until the recent Public Consultation and Joint Note.

II. REASONS FOR THE GLACIAL PACE OF COLLECTIVE REDRESS MECHANISMS IN THE EU

Given the extent to which the EU has encroached on all manner of substantive laws at a national level, it does on one level seem extraordinary that its efforts to have a rather basic minimum procedural law framework for antitrust damages actions have thus far yielded precious little. Reasons may include the following:

First, it should be recalled that the EU comprises 27 sovereign countries, each of which has long and quite different legal antecedents. There are, for example, countries with common law systems where disclosure of all relevant documents and oral testing of evidence is the norm. Many other jurisdictions have civil law systems where disclosure, to the extent it exists, requires a specific request for a category of limited documents. As the Joint Note states “no two national systems are alike in this area” (¶ 9). While U.S. States’ laws also vary considerably, there is at least a core common legal tradition. The U.S. treble damages remedy has, after all, been in place since passage of the Sherman Act in 1890.

A second related point is that it is difficult to make a convincing case for why antitrust law should be uniquely deserving of special rules of procedure or substance designed to facilitate plaintiff recovery. Many query why special rules should apply for antitrust violations, but not for other violations that are equally or more serious (e.g., environmental pollution, securities fraud, consumer product safety). The fact that the Public Consultation and Joint Note tackle the issue of collective redress from a perspective broader than antitrust perhaps recognizes this circumstance and thereby seeks to generate a broader political base of support for reform.

Third, the EU’s cautious steps in this area reflect a widely held aversion to adopting a system that risks mimicking the perceived excesses of the U.S. class action system. Much of this perception does not reflect any serious underlying analysis but it is undoubtedly correct that, over time, socially wasteful or questionable features have crept into treble damages litigation in the United States. Principal among them are:¹¹

- Since the early 1900s U.S. courts have held that co-defendants are jointly and severally liable for each other’s actions under the antitrust laws. This makes defendants significantly more attractive as a class to plaintiffs, since plaintiffs can pursue the defendants with the “deepest pockets.”

¹⁰ See http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf.

¹¹ See D.H. Ginsburg & L. Brannon, *Determinants of Private Antitrust Enforcement in the United States*, 1(2) COMPETITION POL’Y INT’L 31 (2005). See also W. BREIT & K.G. ELZINGA, *THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS* (1976); and W. Breit & K.G. Elzinga, *Private Antitrust Enforcement: The New Learning*, (28) J. L. & ECON. 405 (1985).

- The Federal Rules of Civil Procedure have liberalized pleading rules and facilitated class actions. For example: (a) plaintiffs need only file a “notice pleading” to initiate a lawsuit; (b) liberal standards allow most plaintiffs to advance past the pleading stage and obtain significant discovery from defendants; (c) discovery in U.S. litigation, particularly in antitrust, can take years and be very costly; and (d) federal courts typically apply liberal standards to certifying class actions. That said, recent class action developments in the United States have signaled a potentially significant change in class certification requirements, indicating a stricter test for plaintiffs. In particular, in *re Hydrogen Peroxide*,¹² the Third Circuit made a significant, and pro-defendant, clarification to Rule 23, finding that the Court must: (1) make findings that each Rule 23 requirement is met by a preponderance of the evidence (on which the plaintiffs bear the burden of proof), and not simply as a “threshold showing;” (2) resolve all factual and legal disputes relevant to class certification, even if they overlap with the merits of the cause of action: “an overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met;”¹³ and (3) consider all relevant evidence, including, if presented, expert testimony in opposition to class certification.
- In 1981, the U.S. Supreme Court held that co-defendants in antitrust cases have no right of contribution from co-defendants. Together with joint and several liability, this creates situations in which marginally culpable and relatively small defendants who are unable or unwilling to offer attractive early settlement sums are left with liability wholly disproportionate to their sales after larger and more culpable firms have settled.
- Antitrust law suits are tried by jury, which are notoriously unpredictable.
- Defendants face potential damages claims from multiple sources: (1) government enforcement remains active—both the federal government and multiple state governments can and do bring enforcement actions against antitrust defendants; (2) direct purchasers of a product have standing to sue for overcharges under federal antitrust law; (3) indirect purchasers of a product have standing to sue for overcharges under the laws of a number of U.S. states; and (4) competitors have standing to sue for lost profits under either federal or state law.

Combined, these factors lead to enormous pressure on defendants in a multi-defendant case to settle even a weak case. A defendant that does not settle early faces the prospect of a jury trial in which it may be liable not only for its own actions, but also for the actions of other, more culpable defendants that have already settled with the plaintiffs. At the same time, criminal penalties have increased very substantially over time. The threat of massive fines and even jail time provides the most important deterrence against anticompetitive behavior in the U.S. system. The nature of the U.S. litigation system, including discovery costs—regularly estimated to cost up to \$10 million—can lead risk-averse defendants to settle even unmeritorious claims. Cases are often not decided on their merits, but settled to avoid years of costly litigation and the uncertainty of the U.S. jury system. In fact, perhaps the most surprising aspect of U.S. antitrust treble

¹² In *re Hydrogen Peroxide Antitrust Litigation* 552 F. 3d 305 (3rd Cir 2008).

¹³ *Id.* at 316.

damages actions is the virtual absence of *any* cases that reached a final judgment at trial. This is most likely *not* a tribute to the inherent efficiency of the system in not wasting court resources.

III. SOME POINTERS

Given the impasse reached in the EU, a few modest pointers are set out below:

- A vital starting point is to get the incentives right. There is truth in the fear that the U.S. treble damages system has skewed incentives too far in favor of plaintiff lawyers' interests, with the result that the direct benefit to victims in such actions is often quite limited in practice. But, at the other end of the scale, it is naive in the extreme to think that a system whereby nominated not-for-profit public entities would be vested with exclusive rights to bring collective actions is going to advance the cause of plaintiffs to any material extent. In the draft EU Directive unofficially circulated in 2009, the Commission only provided for a representative action procedure, whereby certain nominated or "qualified" State bodies or not-for-profit entities would be able to pursue collective actions. While the proposed action could be brought on behalf of a group that did not involve individually named plaintiffs (i.e., something more akin to an opt-out action), the reservation of such actions to essentially public bodies would seriously limit its practical effectiveness. There is no particular issue with plaintiff lawyer-driven claims provided there are appropriate safeguards and good judges with effective case management powers.
- A system where claims can only be brought by named or otherwise identified plaintiffs is likely to be ineffective, and some form of collective redress is essential. In many cartels losses may be atomized across a large range of consumers, each of whom has an individual loss that may be small in absolute terms. Collective action problems are therefore inevitable in cases where the plaintiffs are not large, well-resourced purchasers. In the draft of the EU Directive, however, the Commission only provided for an opt-in collective redress procedure whereby two or more named plaintiffs could be joined in the same action. But there is nothing inherently objectionable about a class action that does not list each individual claimant provided the parameters of the class are defined in a way that makes its membership at least ascertainable and the class is constituted in a way that makes it amenable to it being tried in a way consistent with the administration of justice. A good example is the recent U.K. case of *Emerald and others v British Airways*, a follow-on action from the air cargo cartel.¹⁴ In that case, the U.S. class action law firm, Hausfeld LLP, brought a class action on behalf of two named flower importers and "all other direct or indirect purchasers of air freight services the prices for which were inflated by the agreements or concerted practices," seeking a declaration that damages are recoverable in principle from the Defendant by those purchasers. This amorphous action was not surprisingly given short shrift by the High Court and Court of Appeal. There were two obvious problems: (1) the class was defined in a "fail safe" way—only the outcome of the action would tell you who was within it; and (2) including direct and indirect purchasers in the same class created a lack of same interest within the class, since indirect purchaser recovery would depend on showing that direct purchasers passed on any overcharge to

¹⁴ See *Emerald Supplies Limited & Another v British Airways plc* [2009] EWHC 741 (Ch), upheld on appeal in *Emerald Supplies Ltd & Anor v British Airways Plc* [2010] EWCA Civ 1284.

indirect purchasers. But there is no reason in principle why a contiguous class of ascertainable direct or indirect purchasers could not form a representative action.

- A balance needs to be struck between the prohibitive costs of discovery in U.S. treble damages litigation and the real informational asymmetry faced by plaintiffs in the case of secret cartels. As a base line, it must be possible for plaintiffs to get access to a reasonably identified set of documents in the defendants' possession, if not as of right then by way of application. In the draft, Directive national courts in the EU were given the power (to the extent they otherwise lacked it) to order the disclosure of documents where the party requesting disclosure has: (1) shown that evidence lying in the control of the other party or a third party is relevant to substantiate its claim or defense; (2) specified either pieces of this evidence or those precise and narrow categories of this evidence as it can on the basis of reasonably available facts; and (3) shown that it is unable, applying reasonable efforts, to produce the pieces or categories of evidence. It is important, however, the national courts have case management powers to avoid fishing expeditions by plaintiffs. It is notable that the EU Commission has jealously guarded its own leniency system by ignoring and resisting requests for disclosure of corporate leniency statements and related documents in civil litigation in the United States and at national level in the EU. To an extent, this recalcitrance is understandable: the vast majority of cartel cases come from immunity applications so even a marginal disincentive to make such applications caused by follow-on action disclosure rights could lead to less enforcement overall. But the issue needs not be that binary. My own personal view is that the Commission could be much quicker to publish non-confidential versions of its decisions and much tougher on redacting confidential material from such decisions (to an extent, confidentiality in the context of a cartel arrangement seems like an uneasy bedfellow).
- Among the most difficult policy and practical issues is the pass-on defense. The pass-on defense raises issues of substance and policy in both the offensive and defensive senses. In the United States, the *Hanover Shoe* doctrine prohibits defendants from raising the "passing on" defense in federal courts (thereby allowing direct purchasers to obtain damages even if they have passed some or most of the overcharges to their own customers), while the *Illinois Brick* doctrine holds that only direct purchasers can sue for damages in federal courts.¹⁵ The U.S. Supreme Court recognized in *Illinois Brick* that the only ways of avoiding unacceptable multiple liability were either: (1) to allow indirect purchasers to sue but repeal *Hanover Shoe*; or (2) to retain *Hanover Shoe* but prohibit action by indirect purchasers. The Court chose the second option. Many states, however, have passed "*Illinois Brick* repealer" legislation granting standing to indirect purchasers to sue in state courts. This long, and rather difficult, experience with the pass-on defense in the United States ought to have salutary lessons for the EU's foray into this area. My own views are:
 - It seems more or less unthinkable in any system of law in which damages are compensatory that a defendant should not be allowed to argue that a particular plaintiff suffered no loss because it passed on any overcharge to its customers. Indeed, given the punishing levels of fines in the EU, there is, if anything, a weaker case for

¹⁵ See *Hanover Shoe v United Shoe Mach. Corp.*, 392 US 481 (1968) and *Illinois Brick Co. v Illinois*, 431 US 720 (1977).

- saying that such a rule would be justified by deterrence or some other policy consideration.
- It also seems unfair, and wrong, to deny indirect purchasers any standing as a matter of policy simply because giving them standing would make litigation much more complicated and may lead to over-recovery.
 - That said, trying to prove to a standard of proof consistent with civil proceedings who within a complex, fragmented production chain suffered a loss from an overcharge, and in what amount, is fiendishly complicated. The issue may be even more complicated in the EU because there are very limited ways in which the national courts of the 27 Member States can coordinate where there are multiple claims for the same cartel. While the private international law of the EU does allow for mandatory and discretionary staying of the same or related actions, this will not capture all overlapping claims. It is therefore vital that there is some explicit procedural mechanism whereby national courts must (or at least can) take due account of the parallel or preceding actions in order to avoid under- and over-compensation of the harm caused by that infringement. In terms of evidence, the cardinal and fair principle ought to be that the person most likely in possession of the relevant evidence must bear at least some burden of showing a relevant pass on. Thus, while it may be fair to place an initial burden on the defendant to show which direct customers it passed an overcharge on to, it must be recognized that, thereafter, the defendant may have little or no information on the arrangements between other actors further down the distribution chain. It would seem quite wrong therefore to require the defendant to have an exclusive burden of proof, and there is a strong case for a shifting burden of proof.
 - While it may seem like turkeys arguing for Christmas, there is no reason why novel alternative dispute resolution procedures could not play a more important role in follow-on actions. These can often provide quick and relatively inexpensive remedies, and can do things that a court of law typically cannot. In the Marine Hose cartel for example, one of the defendants, Parker ITR, has made available a fund, paid into an interest-bearing escrow account in London, representing 16 percent of specified sales of marine hose from January 31, 2002 to May 2, 2007. In return for giving up rights to litigate against Parker, purchasers can claim against the fund. An independent expert assisted by an independent economist will determine how much of the fund goes to each claimant but there is a presumption that direct Parker purchasers will be entitled to 16 percent of purchases during the settlement period unless they passed on the loss. Parker has also agreed to pay certain legal fees and the costs of notice and administration in addition to the settlement amount.¹⁶

¹⁶ For details of the settlement, *see* http://www.hausfeldllp.com/content_documents/10/ParkerSummaryNotice.pdf. On alternative dispute mechanisms generally *see* COMPETITION LITIGATION: UK PRACTICE AND PROCEDURE, Ch. 22 (Brealey & Green eds), (2010).