

Litigation culture versus enforcement culture

A comparison of US and EU plaintiff recovery actions in antitrust cases

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Private antitrust litigation in the United States provides a “significant supplement”² to the enforcement efforts of the US antitrust agencies, the Antitrust Division of the Department of Justice and the Federal Trade Commission. Private damages actions are at the forefront of antitrust enforcement in the United States. Most notably, the Clayton Act permits plaintiffs to recover treble damages in private antitrust lawsuits. In addition, the US Federal Rules of Civil Procedure facilitate the heavy use of private damages actions by granting broad discovery rights to plaintiffs and by enabling small numbers of plaintiffs to pursue class action lawsuits. Furthermore, in the United States, plaintiffs’ lawyers take antitrust cases on a contingent fee basis; plaintiffs can thus institute and prosecute a case without having to pay a lawyer to do so. These aspects of US litigation practice, among others, provide powerful incentives for plaintiffs to sue for money damages and, in many cases, for defendants to settle these cases.

In comparison, in the European Union, private enforcement actions are rare and play less of a role than public enforcement in the fight against anti-competitive behaviour. Several obstacles hinder actions for damages in member state national courts, including a plaintiff’s limited access to evidence, the unavailability of class actions and the potential that the plaintiff may have to pay the defendants’ costs if the plaintiff loses the case. To address these obstacles and the great diversity of damages actions among the member states, the European Commission recently published a green paper on Damages Actions for Breach of the EC Antitrust Rules.³ The green paper examines those aspects of EU litigation practice that have led to a pronounced underdevelopment of private damages actions in the EU. Since its publication in December 2005, the green paper has sparked significant debate within the international antitrust community about the role of private enforcement of EC Treaty competition law and about damages actions in particular. The general expectation is that private damages actions will emerge (albeit slowly) in the European Union. This article compares the state of plaintiff recovery actions in antitrust cases in the US with that of the EU and explores why the United States is more litigious than the EU.

Private antitrust damages actions in the US

Rightly or wrongly, the United States has earned the reputation of having a ‘litigation culture’ that permeates its entire legal system.⁴ If that is true, it certainly earned its stripes this past year in the area of antitrust litigation. Although the number of civil cases filed in the United States dropped by 10 per cent from 2004 to 2005, the number of antitrust civil filings, almost all of which were initiated by private plaintiffs, rose by 8.8 per cent.⁵ In the first six months of 2006, the number of antitrust class actions doubled over the same period in 2005.⁶ Some experts speculate that “[h]ard-charging regulators, a more aggressive plaintiffs['] bar, and the implementation of [CAFA]” may contribute to the increase in antitrust litigation.⁷ But in all likelihood, the explanation is far more elementary. As discussed in greater detail below, the pot of treble damages available to plaintiffs in the United States, as well as pro-plaintiff discovery and procedural rules, make private damages extremely easy and attractive to pursue.

The treble damages remedy

In 1914, the US Congress passed the Clayton Act, codified at 15 USC sections 12-27. Section 4 of the Act extends the Sherman Act’s prohibitions on anti-competitive behaviour and, most notably, allows “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws” to sue for and “recover threefold the damages by him sustained”.⁸ Treble damages were designed to deter illegal conduct, deprive antitrust violators of the “fruits of their illegal activities” and provide compensation to victims of wrongdoing.⁹

The Clayton Act’s treble damages provision is not without its critics.¹⁰ Many practitioners and policy makers contend that trebling damages creates too great an incentive for plaintiffs to sue. Additionally, they argue, treble damages actions can result in a windfall to plaintiffs. Furthermore, some believe that large fines and the potential for criminal penalties create just as much of a deterrent against violations, without the need for treble damages.¹¹ Nonetheless, the ability of a US private plaintiff to recover treble damages is so sacred and well protected that earlier this year the First Circuit held in *Kristian v Comcast Corp*¹² that, although Comcast could contract with its subscribers to arbitrate antitrust claims, the arbitration agreements could not bar treble damages because “the award of treble damages under the federal antitrust statutes cannot be waived”.¹³

Although exceptions to the treble damages provision remain few and far between, congress enacted the Criminal Penalty Enhancement and Reform Act (CPERA) in June 2004. CPERA eliminates the treble damages remedy for corporations that qualify for amnesty under the Department of Justice’s Amnesty Programme.¹⁴ Under CPERA, a corporation must report its own anti-competitive behaviour to the DoJ and enter into the Corporate Leniency Programme.¹⁵ If a private plaintiff sues the corporation for the same behaviour, the civil court may assess single damages against the participating corporation, but only if the judge in the civil action determines that the corporate defendant is cooperating with the civil claimant by providing a full account of the conduct, furnishing all potentially relevant documents, and securing testimony, depositions and interviews from employees.¹⁶

Discovery and evidence

Plaintiffs enjoy broad discovery rights in the United States under the Federal Rules of Civil Procedure. These rules provide significant incentives for plaintiffs to file damages suits, even if they have very little factual bases for the underlying claims. At the outset of a case, the parties are obliged to make certain disclosures to one another, including the name of each individual “likely to have discoverable information” and a description by category and location of all documents in the party’s possession or control that it may use to support its claims or defences.¹⁷ Thereafter, during the fact-finding or discovery period, plaintiffs may seek a defendant’s business documents through written requests¹⁸ as well as answers to questions through written interrogatories.¹⁹ Plaintiffs may also ask questions of a defendant’s employees (regardless of seniority), who must sit for depositions and testify under oath.²⁰ Moreover, plaintiffs may seek documents and testimony from non-parties with relative ease.²¹

Armed with such easy access to a defendant's or non-party's documents and employees, plaintiffs with limited evidentiary bases for their lawsuits may be inclined to sue and go on 'fishing expeditions' to discover facts to support their case.

Contingent fees

Plaintiffs that file antitrust damages actions in the United States routinely do so on a contingent fee basis. Under such an arrangement with counsel, the plaintiff client does not pay any fees to his or her attorney unless and until the plaintiff collects damages either by settling with the defendant or prevailing at trial. Typically, plaintiffs' attorneys demand 33 per cent of the recovery as the fee.²² The result is a win for both client and attorney. The fee arrangements allow plaintiffs with limited funds the freedom to pursue their lawsuits without having to fund the litigation along the way. The plaintiffs' attorney, on the other hand, is attracted to the prospect of treble damages, and thus a larger fee, and therefore is willing to front the litigation costs in the hopes of earning a sizeable fee at the conclusion of the suit.

Class actions

Class actions are the procedural device that enable one or more plaintiff members of a proposed class to sue on behalf of all similarly situated members of the same proposed class.²³ Courts in the US have recognised that class actions can be appropriate mechanisms for promoting private enforcement of the antitrust laws.²⁴ In this way, large numbers of potential claimants can prosecute their claims in a cost-efficient manner.²⁵ The objective of any class action lawyer is to get the class certified. To do so, the court must find that the proposed class is "so numerous that joinder of all members is impracticable", that there are "questions of law or fact common to the class", that the "claims or defenses of the representative parties are typical of the claims or defenses of the class" and that the proposed class representatives "will fairly and adequately protect the interests of the class".²⁶ In addition, in most antitrust cases, the court must determine that the "questions of law or fact common to the members of the class predominate over any questions affecting only individual members" and that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy."²⁷ Under rule 23, proposed class members are afforded the opportunity to decline to join or to 'opt out' of the class. But if the class is certified, all class members who do not affirmatively opt out are bound by the decision in the case and cannot pursue their claims individually. Class actions remain a popular means among plaintiffs' lawyers to litigate antitrust conspiracy claims because they are regularly certified.

State indirect purchaser actions

In *Illinois Brick Co v Illinois*,²⁸ the US Supreme Court held that, in order to maintain a claim for damages under section 4 of the Clayton Act, a plaintiff must have purchased the product in question directly from the alleged defendant-antitrust violator. The landmark decision thus precludes plaintiffs in a federal court from seeking alleged damages that were 'passed through' from the defendant down the chain of distribution in the form of overcharges. In direct response to *Illinois Brick*, many US state legislatures passed antitrust statutes that permit indirect consumers (ie, below the direct purchaser in the distribution chain) to sue the alleged violator. Today, 29 states permit such suits, or, alternatively, allow the state attorney general to pursue antitrust claims on behalf of indirect consumers.²⁹ In these 'Illinois Brick repealer' states, as they are known, defendants face the real prospect of defending against lawsuits that mirror direct purchaser lawsuits pending against them in a federal court.

Huge jury verdicts and settlements

One natural result of the ease with which plaintiffs can pursue treble damages actions in the United States is huge jury verdicts in private antitrust cases. In *Conwood v US Tobacco*, the plaintiff manufacturer of moist smokeless tobacco (snuff) sued a competitor, the manufacturer of Copenhagen and Skoal, for unlawful monopolisation in violation of section 2 of the Sherman Act, among other claims.³⁰ The jury awarded plaintiffs approximately US\$350 million in damages, which, when trebled, resulted in an award that exceeded US\$1 billion. The award is thought to be the largest antitrust jury verdict ever recorded.³¹

Additionally, the several aspects of US litigation highlighted above are a catalyst to settlement. Even before discovery begins, some defendants, confronted with the promise of invasive and expensive discovery, will choose to settle with plaintiffs in order to spare their employees from intrusive discovery and to save on exorbitant legal fees. Plaintiffs routinely extract large settlements from defendants after gaining access to corporate documents and information that, although not dispositive of any wrongdoing, are damaging or embarrassing enough to justify settlement. Similarly, class actions may contribute to settlement of private damages actions because, if certified, defendants do not want to risk losing at trial and therefore pay treble damages. The same is true for state indirect purchaser actions. Defendants often settle these suits in order to avoid duplicative litigation costs.³² Settlement is also preferable for many defendants in this situation who rightly fear the application of collateral estoppel if they are adjudicated liable in even one state.³³

The ultimate risk of large jury verdicts inspire settlements even if the defendants litigate the cases for years and at great expense. In 1998, in *In re NASDAQ Market-Makers Antitrust Litigation*, MDL Docket No. 1023, plaintiffs settled with 37 defendants for a total of US\$1.027 billion.³⁴ And in 2003, on the eve of trial, defendant Visa USA settled with plaintiffs in *In re Visa Check/Mastermoney Antitrust Litigation*, 297 F Supp 2d 503, 506-508 (EDNY 2003) for approximately US\$2 billion. Two days later, defendant MasterCard settled for approximately US\$1 billion. The combined US\$3.05 billion settlement has been described as "the largest antitrust settlement ever".³⁵

Private damages actions in the EU

In stark contrast to the United States, private damages actions in the EU are few in number and have never played much of an antitrust enforcement role. Although the European Court of Justice (ECJ) in 2001 explicitly recognised a right to damages for breaches of EC competition law,³⁶ plaintiffs have pursued very few damages claims for violations of competition rules. According to a 2004 study (the Ashurst Study), private damages actions based on the violation of either EU or national antitrust rules are in a state of "total underdevelopment" due to various obstacles in bringing such lawsuits.³⁷ To address these obstacles, the EC recently published a green paper, in which the Commission has sparked significant discussion on the present and future role of private enforcement in the EU. This section explores that role.

EU antitrust laws and enforcement

In the EU, there are two levels of antitrust laws and enforcement. The Commission enforces EU antitrust rules at the EU level, which is limited to public enforcement. At the member state level, however, national antitrust authorities and national courts apply both EU and national antitrust laws. Member states permit private enforcement, including damages actions, through national courts.³⁸ Within this two-tiered system, national antitrust authorities and national courts may apply both EU and national antitrust laws, though substantively there is often little difference between the two.

Articles 81 and 82 of the European Community Treaty govern antitrust enforcement. The ECJ long ago decided that these provisions create rights for private parties that national courts must safeguard.³⁹ In *Courage v Crehan*, the ECJ held that these rights include the right to damages,⁴⁰ and recently it clarified that such a right includes compensation not only for actual loss, but also for loss of profit plus interest.⁴¹ Moreover, with the adoption of Regulation 1/2003,⁴² the Council of the European Union ‘modernised’ antitrust enforcement by including new procedural rules for the application of articles 81 and 82. In particular, by devoting specific provisions to national courts, the EU legislative branch has recognised the fundamental role that national courts play in the private enforcement of EU antitrust law for the first time since the inception of EU antitrust enforcement in the early 1960s.

The green paper

These developments, however, have not been sufficient to ensure an effective system of private antitrust enforcement, particularly damages actions, throughout 25 jurisdictions with very different legal traditions and markedly diverse substantive and procedural rules. According to the Ashurst Study, to date there have been only 28 successful private actions for damages for violations of the antitrust laws in the EU.⁴³ More often than not, only single large companies that allege anti-competitive behaviour by dominant competitors have pursued private damages actions. For these well-financed plaintiffs, the damages that they seek are large enough to offset the trouble and costs of private litigation before a national court.

In light of the obstacles to private enforcement in the EU, the Commission published its green paper in 2005 to facilitate damages actions, enhance the overall effectiveness of antitrust enforcement and, ultimately, increase compliance with antitrust laws. In response to criticism from those practitioners who fear the adoption of a US-style system that could lead to ‘excessive litigation’, the Commission has stated that the objective is that of building “an enforcement culture, not a litigation culture”, in which private enforcement would complement public enforcement.⁴⁴ For each obstacle to damages actions, the green paper proposes several solutions, although the Commission has not yet indicated how it intends to implement any of these solutions (eg, by means of an EU Directive harmonising certain aspects of national law, or thorough ‘soft law’ such as Commission guidelines).

Amount of damages

Treble damages are not available in the EU. It is also not likely that they will be any time soon; the Commission notes that the US treble damages system can lead to “unmeritorious or vexatious litigation”.⁴⁵ Instead, compensation is limited to the harm suffered, without the possibility of obtaining punitive or exemplary damages. Plaintiffs may thus usually recover only the loss actually incurred, as well as, in some countries, the loss of profits.⁴⁶ The Ashurst Study, however, revealed that this system of limited recovery provides disincentives to private litigation.⁴⁷ To provide balance, the Commission proposes to maintain the rule of single damages, while contemplating the possibility of awarding double damages in cartel actions.⁴⁸ On this issue, it recognises that the addition of double damages will require the implementation of appropriate measures to avoid jeopardising the effectiveness of leniency programmes (eg, successful immunity applicants would be exposed to single damage recovery only).⁴⁹

Discovery and evidence

The Commission acknowledges that, in Europe, a major obstacle to plaintiffs engaged in litigation is obtaining access to evidence of the antitrust violation, particularly evidence of cartel mainte-

nance.⁵⁰ Although member states allow private follow-on actions to public investigations, in most jurisdictions National Antitrust Authority decisions do not have precedential value and thus cannot be used as evidence of infringement in private actions.⁵¹ At most, such decisions create a rebuttable presumption of the infringement. As a result, plaintiffs must collect evidence in each and every private damages suit. In addition, the US procedural rules governing discovery, discussed above, which provide for the compulsory pre-trial disclosure of all relevant documents is almost non-existent in the member states.⁵² In continental Europe, for example, plaintiffs generally only have the right to request the court to order the disclosure of certain documents, and then only after identifying them in advance with a certain degree of precision and justifying their relevance to the case.⁵³

The Commission proposes measures intended to facilitate the disclosure of documents in possession of the parties, as well as of those contained in a National Antitrust Authority file.⁵⁴ Alternatively, the green paper suggests alleviating the plaintiff’s burden of proof by rendering national antitrust authorities’ decisions legally binding for civil courts in follow-on actions, as is done in Germany and the UK.⁵⁵

Litigation costs

The cost of litigation is a significant obstacle to private enforcement in the EU. In most jurisdictions, the losing party must pay the costs incurred by the prevailing party at trial, which can easily discourage consumer actions. This is especially true in jurisdictions, such as the UK, where legal fees for a trial are especially high. Moreover, with rare exception (eg, in the UK and Italy), contingent fee arrangements are not permitted.⁵⁶ The green paper proposes to introduce special rules under which plaintiffs would only have to pay the defendant’s legal costs if plaintiffs acted in a “manifestly unreasonable manner”.⁵⁷ Alternatively, the green paper suggests that new rules could provide for the court’s discretionary power to order at the outset of a trial that a plaintiff not be exposed to cost recovery if unsuccessful.⁵⁸

Representative and collective actions (class actions)

Collective or class actions are still in their infancy in the EU and are not explicitly contemplated by the Commission. The procedural rules of most jurisdictions do not allow for class proceedings. The general rule is that each person needs to defend his or her interests in court individually. Over the past decade, however, some member states, including Portugal,⁵⁹ Sweden,⁶⁰ the Netherlands⁶¹ and the UK,⁶² have introduced reforms allowing for some kind of class action. Other member states, including Finland,⁶³ France⁶⁴ and Italy⁶⁵ are considering such reforms. The green paper proposes introducing a cause of action for consumer associations without depriving consumers of the right to bring individual actions.⁶⁶

Indirect purchaser actions

An additional barrier to private litigation is the defendant’s use of the ‘pass-on’ defence to damages actions that exists in certain member states.⁶⁷ The pass-on defence permits an antitrust defendant to argue that a plaintiff who had overpaid when purchasing a product directly from the defendant was not injured because it had ‘passed on’ the illegal overcharge to its own customers.⁶⁸ In this circumstance, a defendant may limit the damages it is liable for by subtracting the overcharge earned by the plaintiffs. To increase the damages paid by defendants, the Commission proposes to allow indirect purchasers to pursue damages suits. These indirect purchaser suits would allow a second group of purchasers to also recover damages from defendants.

A glimpse at future private damages cases

Although plaintiffs did not actually recover damages in the following two private cases, they are indicative of the types of damage recovery actions that the EU will see in the future. In *Provimi v Aventis*,⁶⁹ a national court held for the first time that when a subsidiary of a cartel participant has, even unknowingly, implemented the cartel by charging inflated prices, courts from that country have jurisdiction over damages actions against the subsidiary by any European customer affected by the cartel activity, even if the plaintiff customer and defendant subsidiary lacked a direct contractual relationship. In a follow-on action to the ‘Vitamins cartel case’,⁷⁰ Trouw, a German plaintiff, sued various English and German subsidiaries of the Aventis and Roche groups before the UK’s High Court of Justice, seeking damages for the losses incurred as a result of the cartel. Though Trouw only purchased vitamins from German subsidiaries, and thus had had no direct relationship with the UK subsidiaries, Trouw brought the action in the UK because it is a particularly ‘friendly’ jurisdiction for plaintiffs. The court decided that Trouw was entitled to sue the English subsidiaries in the UK. Relying on the antitrust law notion of ‘undertaking’, ie, where a parent and its subsidiaries comprise a ‘single economic unit’, the court accepted that the parents’ conduct could be imputed to their UK subsidiaries on the ground that they had implemented the cartel by charging cartelised prices.

In 2005, the Italian Supreme Court held that consumers harmed by violations of national antitrust law possess standing to sue for damages. The court rejected the same contention in earlier rulings on the ground that national antitrust law is aimed at protecting companies only; however, in *Unipol v RM*,⁷¹ the court reconsidered its position. Relying on *Courage*, the Supreme Court held that antitrust laws protect all natural and legal persons, including consumers, who have a qualified interest in safeguarding the competitive structure of the market.

Conclusion

The degree to which plaintiffs pursue antitrust damages actions in the US and the EU varies considerably. For almost 100 years, private enforcement of the antitrust laws through damages actions has played a major role in the development of US antitrust jurisprudence. In the EU, however, although private suits have increased in number in recent years, successful actions have been limited, and legislative advances are piecemeal and limited to certain jurisdictions. Though practitioners do not expect the EU to embrace the litigation culture of the United States anytime soon or even allow for treble damages, recent cases as well as the Commission’s proposed changes in its green paper suggest that plaintiffs will pursue damages actions in Europe with more frequency in the years to come. Thus, despite the cultural differences concerning damage recovery actions in the US and EU, antitrust practitioners on either side of the Atlantic would do well to understand the significant impact that damages actions have on the shape of antitrust litigation.

Notes

- 1 The authors would like to thank Júlia Samsó and Luca Crocco, associates in Latham’s Brussels’ office, for their contributions to this article.
- 2 See *Reiter v Sonotone Corp*, 442 US 340, 344 (1979) (“Congress created the treble-damages remedy of section 4 precisely for the purpose of encouraging private challenges to antitrust violations”).
- 3 Commission of the European Communities, green paper: Damages Actions for Breach of the EC Antitrust Rules, {SEC(2005) 1732}, (green paper) at 3.
- 4 Commission Staff Working Paper, annex to the green paper: Damages Actions for Breach of EC Antitrust Rules, of 19 December 2005

(SEC(2005) 1732) (working paper), at 12. In fact, a Federalist Society survey found that the number of class action filings in US federal courts rose 340 per cent between 1988 and 1998. ‘Federalist Society, Analysis: Class Action Litigation – A Federalist Society Survey Part II 3’ (Spring 1999).

- 5 Administrative Office of the United States Court, Judicial Business, 2005 Annual Report of the Director, (2005).
- 6 Bailey Somers, Antitrust Case Filings Soar in 2006, Portfolio Media, New York, 4 August 2006, available at <http://competition.law360.com/pdfs/444378bb26b94d42aa2dd85145bd0ed8.pdf>.
- 7 Id.
- 8 15 USC section 15(a). The Clayton Act also permits plaintiffs to obtain injunctive relief against threatened loss or damage, 15 USC section 26, enables plaintiffs who successfully recover treble damages to also recover attorneys’ fees, 15 USC section 15, and allows for limited rights to prejudgment interest from the date the lawsuit is filed, 15 USC section 15(a)(1)-(3).
- 9 *Blue Shield of Virginia v McCready*, 457 US 465, 472 (1982).
- 10 Comments of the Section of Antitrust Law and the Section of International Law of the American Bar Association in Response to the Request for Public Comment of the Commission of the European Communities on Damage Actions for Breaches of EU Antitrust Rules (ABA Response), April 2006, at 26-27. The validity of treble damages continues to be a topic of conversation in the US legal community and was the subject of an Antitrust Modernisation Committee hearing in July 2005.
- 11 Id.
- 12 446 F3d 25 (1st Cir 2006).
- 13 Id at 48.
- 14 CPERA of 2004, Pub L No. 108-237, 118 Stat 661, 665 (2004).
- 15 Id at section 213, 118 Stat 661, 667-668 (2004). To qualify for the programme, the corporation must: (i) be the first to report the illegal activity, (ii) have terminated its participation in the activity as soon as it learned of it, (iii) report wrongdoing with candor, (iv) make restitution to victims if possible, and (v) not have originated the activity or coerced others to participate. Additionally, the corporation’s confession must truly be a corporate act. See 10 August 1993 DoJ Leniency Policy; see also *Stolt-Nielsen SA v US*, 442 F3d 177, 179-180 (3rd Cir 2006) (describing the policy and agreement entered into by Stolt-Nielsen).
- 16 Section 213(b), 118 Stat at 667.
- 17 Fed R Civ P 26.
- 18 Fed R Civ P 34.
- 19 Fed R Civ P 33.
- 20 Fed R Civ P 30.
- 21 Fed R Civ P 45.
- 22 Adam Liptak, ‘In 13 States, A Unified Push to Limit Fees of Lawyers’, *NY Times*, 26 May 2003, at A5.
- 23 Fed R Civ P 23.
- 24 *In re Carbon Black Antitrust Litig*, 2005-1 Trade Cases ¶ 74, 695, 2005 WL 102966, at *9 (D Mass 18 January 2005).
- 25 Id.
- 26 Fed R Civ P 23(a).
- 27 Fed R Civ P 23(b); see also *Alabama v Blue Bird Body Co*, 573 F2d 309, 315 (5th Cir 1978).
- 28 431 US 720 (1977). The Supreme Court previously had held that, in the converse situation, an antitrust defendant could not argue that a plaintiff who had overpaid when purchasing a product directly from the defendant was not injured because it had ‘passed on’ the illegal overcharge to its own customers. *Hanover Shoe Inc v United States Mach Corp*, 392 US 481 (1968). To maintain consistency, the Supreme Court held in *Illinois Brick* that plaintiffs also could not use the ‘pass on’ theory to recover damages and that only direct purchasers are ‘injured’ in a manner that permits them recovery of

- damages under section 4 of the Clayton Act. *Illinois Brick*, 431 US at 724.
- 29 Alabama, Arizona, Arkansas, California, Colorado, District of Columbia, Florida, Hawaii, Idaho, Illinois, Kansas, Maine, Maryland, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, West Virginia and Wisconsin.
- 30 *Conwood v US Tobacco Co*, 290 F3d 768, 772 (6th Cir 2002).
- 31 The Sixth Circuit upheld the damages award as reasonable, *id* at 780, 795, and the Supreme Court denied certiorari. *US Tobacco v Conwood*, 537 US 1148 (2003).
- 32 Microsoft Corporation found itself in just this position following its investigation by the Department of Justice. Indirect purchasers of software and end user licence agreements sued the company for antitrust violations in federal court and in many states. Though the federal MDL cases were dismissed under *Illinois Brick*, see *Kloth v Microsoft*, 444 F3d 312 (4th Cir 2006), the company settled with plaintiffs in at least 17 states. See Consumer Class Action Settlement Information, available at www.microsoft.com/about/legal/consumersettlements/.
- 33 Comments of David Tulchin, Summary of Indirect Purchaser Hearings, Antitrust Modernization Commission, 27 June 2005.
- 34 *In re NASDAQ Market-Makers Antitrust Litig*, 187 FRD 465, 470-73 (SDNY 1998).
- 35 *Wal-Mart Stores Inc v Visa USA Inc*, 396 F3d 96, 103 (2d Cir 2005) (citation and internal quotation omitted).
- 36 Case C-453/99, *Courage v Crehan* [2001] ECR I-6297.
- 37 Denis Walebrook, Donald Slater, Gil Even-Shoshan, Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules (Ashurst Study), at 1.
- 38 Green paper at 3.
- 39 Case 127/73, *BRT v SABAM* [1974] ECR 51.
- 40 See *supra* at 36.
- 41 Joined cases C-295/04 to C-298/04, Manfredi, judgment of 13 July 2006 (not yet published in the *European Court Reporter*).
- 42 Council Regulation (EC) No 1/2003 of 16 December 2002, on the implementation of the rules on competition included in articles 81 and 82 of the treaty 2003 OJ (I 6) 1.
- 43 Ashurst Study at 1.
- 44 Working paper at 8.
- 45 *Id* at 15.
- 46 In the United Kingdom, plaintiffs can seek exemplary damages for particularly serious violations. To date, however, there are no reported cases where a UK court has awarded exemplary damages for a breach of EU or UK antitrust rules.
- 47 Ashurst Study at 7.
- 48 Green paper at 7.
- 49 Working paper at 66.
- 50 Green paper at 18; see also Ashurst Study at 4-5.
- 51 Germany and the UK are the exceptions to this general rule.
- 52 Notable exceptions are the UK, Cyprus and, to a lesser extent, Ireland.
- 53 Green paper at 18.
- 54 *Id* at 5-6.
- 55 *Id* at 6.
- 56 Ashurst Study at 93-94. Italy repealed the prohibition against contingent fee arrangements on 2 August 2006, with a law not yet published in the country's Official Journal.
- 57 Green paper at 9.
- 58 *Id*.
- 59 Port Const art 52 and Law No. 83/95 (31 August 1995) (the collective action is known as *acção popular*).
- 60 2003 Swedish Group Proceedings Act (2202:599).
- 61 Dutch Civil Code, 3:305a, 305b.
- 62 Competition Act, 1998, section 47B (Eng).
- 63 A group commissioned by the Finnish Ministry of Justice submitted its report on the subject to the Ministry on 1 April 2005. See 'Introducing Class Actions in Finland?' available at: www.gala-marketlaw.com/pdf/classactions.pdf#search=%22introducing%20class%20actions%20in%20finland%22.
- 64 Working paper at 55.
- 65 'Class Action in Italy: A Bill Under Discussion', available at www.acca.com/chapters/program/acce/classaction.pdf#search=%22class%20action%20in%20italy%22.
- 66 Green paper at 9.
- 67 In Italy, for instance, civil courts have accepted the pass-on defence, whereas in Germany a recent legislative change has now barred the use of this defence, thus resolving once and for all the divided case law on the subject. Although not yet tested in court, it would appear that French, Spanish and UK courts would accept this defence, but not Dutch courts.
- 68 See *supra* at 28.
- 69 *Provimi Ltd v Aventis Animal Nutrition and others* (2003) EWHC 961.
- 70 Decision No 2003/2/EC of 21 November 2001 (Case COMP/E-1/37.512 – Vitamins) 2003 OJ (I 6) 1.
- 71 Ruling No 2207 of 4 February 2005, *Unipol v RM* (car insurance cartel), in *Giur it* 2005, 5, 967.

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