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Private Antitrust Damages in Europe: The Policy Debate and Judicial Developments

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THERE IS WIDESPREAD SUPPORT in Europe for the principle that legal and natural persons who have suffered loss as a result of an antitrust infringement should be entitled to recover damages to compensate them for that loss. On the other hand, the current policy debate over whether private litigation should be facilitated and encouraged to supplement public enforcement of the antitrust rules has raised a number of controversial issues. This article explores the background to, and the position of the European Commission and other stakeholders in, this debate, as well as relevant, parallel developments in European and national jurisprudence.

Background

Damages actions for violation of the U.S. antitrust laws are a commonplace and important feature of the U.S. legal system. In Europe, the low level of reported cases suggests that such actions are still relatively rare (although it is generally believed that in a significant number of cases antitrust arguments are raised, either by the claimant or by the defendant, and these antitrust claims are subsequently settled). With a view to analyzing the incidence of private antitrust litigation, the European Commission authorized a report (which became the Ashurst Study[1]) into the possible obstacles faced by potential claimants for damages where loss has been suffered as a result of an antitrust infringement. Published in August 2004, the Ashurst Study identified a number of reasons why there had been relatively few actions for damages proceeding to trial and judgment.

The Commission believes that neither it nor the national competition authorities (NCAs) in the Member States have the resources to investigate and issue decisions in all of the cases necessary to promote a true competition culture in European markets. Having reviewed the Study and after consultation with the Member States, the Commission decided that it would be appropriate to enhance the role of private enforcement to support and supplement public enforcement of the competition rules. While there is no doubt that governments in Europe recognize the importance of applying the competition rules efficiently and effectively, they equally recognize that effective enforcement is costly. In the Commission's view, any increase in private litigation, for example through more actions for damages, would serve the purpose of more effective antitrust enforcement without placing greater strains on the public purse.

The Commission expressed confidence that, in principle, private litigants should be well placed to enforce their rights, including through actions for damages, and that the national courts will increasingly be in a position to hear, and render consistent judgments in, such cases. The Commission is emphatic in its insistence that it wishes to encourage "a competition rather than a litigation culture." At the same time, the Commission is keenly aware of concerns that any proposed changes to the status quo ante in Europe should not lead to what are referred to by some as the excesses of the U.S. system. Nevertheless, the highly developed U.S. system represents one model for the Commission to consider critically in seeking to promote changes in Europe which would facilitate, and even encourage, private litigation.

The Green Paper

In December 2005, the Commission published a Green Paper[2] setting out the possible obstacles to successful private actions for damages and identified a number of remedial options in relation to each obstacle for consultation. The Commission opened a debate on a number of key issues: whether special rules on disclosure of documentary evidence should be introduced; how damages should be defined and calculated; who should be able to claim damages and whether the passing-on defense should be permitted; whether there should be special procedures for bringing collective damages actions; and how to ensure that any policy of facilitating damages actions does not detract from another important policy objective of the Commission and the NCAs, namely the encouragement of whistle-blowing through leniency programs in cartel cases.

Access to Evidence. It is acknowledged that, in the absence of a prior decision of either the Commission or one of the NCAs, claimants in Europe may face difficulties in

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obtaining evidence of an alleged antitrust infringement. In particular, the Commission recognizes that, where there is an "asymmetry of information" in favor of defendants (as is often the case), it will be difficult to bring successful, private stand-alone actions unless evidence is made available to potential claimants by defendants and/or third parties.

While procedures permitting disclosure of documents exist in the EU Member States, these powers have rarely been used outside of the common law jurisdictions. The concept of disclosure of documents between the parties is not an integral part of the civil law system, and, therefore, it is not surprising that the Commission's options for increasing disclosure have met with stiff criticism from a large number of civil law respondents. Such an approach would, some argue, be incompatible with fundamental principles of their national legal systems including, most notably, the protection against self-incrimination. Furthermore, it is argued that there is no sound policy reason why there should be rules of procedure which differentiate between claims for damages in competition cases and claims in other areas of the law, and that a move towards a U.S.-style approach to discovery would prove highly disruptive and costly.[3]

The Commission, possibly in anticipation of such criticism, identifies (in the Staff Working Paper[4]) other European and international initiatives designed to enhance the ability of claimants to obtain documentary evidence from defendants and third parties. In particular, the Commission refers to Directive 2004/48 on the enforcement of intellectual property rights,[5] the European Code of Civil Procedure[6] and the ALI/UNIDROIT Principles of Trans-national Civil Procedure[7] to show that the prospect of introducing greater disclosure of documents in civil litigation is neither radical nor particularly novel.

In the absence of measures to increase the disclosure of documents in private litigation in the civil law jurisdictions of Europe, the Commission expects that the vast majority of claims would be based on a finding of infringement contained in decisions issued by it or an NCA. The Commission is concerned that such "follow-on" actions would not, in and of themselves, lead to an increase in private actions which supplement public enforcement. The primary burden of proving the infringement would still lie with the competition authorities. For successful stand-alone actions to become a reality, claimants would need to have greater procedural rights to oblige defendants and third parties to disclose relevant evidence in their possession or under their control. However, given the overwhelming level of opposition in the responses received during the consultation period to significant procedural changes,[8] it seems that the most acceptable option in civil law jurisdictions would be disclosure ordered by a court and limited to relevant and reasonably identified individual documents. Were this to be the result of the consultation, the requirement that a claimant identify specific documents to be disclosed would most probably not materially improve the claimant's position.

Damages. The Commission considers it appropriate to create incentives for claimants to bring private actions for damages. One of the options advanced in the Green Paper is the introduction of double damages for horizontal cartels, with such awards being either automatic, conditional, or at the discretion of the court. The Commission points out that Community law does not prohibit the granting of exemplary or punitive damages and describes the solutions adopted in jurisdictions where this is permitted, for example, Ireland and the UK.

This option has been criticized by a strong lobby of business organizations and public institutions supporting the compensatory principle for the recovery of damages.[9] They argue that, according to European "ordre public," sanctions should be a matter only for public authorities and that damages should not be punitive in nature. Moreover, given the possibility of heavy fines under the public enforcement regime, some commentators deny that there is a need to introduce punitive damages from the point of view of deterrence. Adding punitive damages to a fine imposed by a competition authority would, some respondents believe, even violate the rule against double jeopardy. Other commentators and respondents refer to the potential misuse of multiple damages. Businesses, they fear, could be put under pressure to settle unmeritorious claims and might, as a result of the introduction of multiple damages, refrain from practices that are procompetitive and essential to the economic well-being of the European Community.[10]

Respondents also argue that multiple damages could undermine the incentive to apply for leniency.[11] The Commission could, however, easily meet this concern by, for example, proposing a rule that a successful leniency applicant should be at risk only for single damages. Such a rule would mirror the approach taken in the United States, where successful amnesty applicants are liable, in private litigation, only for single (as opposed to treble) damages and are no longer jointly and severally liable with the other cartel members.

The Commission and the Member States will have to determine appropriate policy objectives and priorities before deciding whether the benefits of private litigation in the field of competition law justify a deviation from the principles which normally apply in civil litigation, such as the compensatory principle.

The "Passing-On" Defense and Indirect Purchasers. The Green Paper raised the debate on the difficult issues of the standing of indirect purchasers and the availability of the "passing-on" defense which, again, highlights the conflict between the compensatory principle and effective deterrence. The solution adopted in the U.S. federal courts is a good example of a legal system that prioritizes effective deterrence: it generally allows only direct purchasers to bring actions for damages in federal courts while indirect purchasers are precluded from bringing claims[12] (albeit such actions are permitted in a number of U.S. states under state antitrust laws).

Moreover, U.S. federal law prohibits the defendant from claiming that the direct purchaser has passed-on the overcharge (or some of it) to its customers.[13] Consequently, a direct purchaser is able to claim damages for its part of the total overcharge, despite the fact that it may not, in reality, have suffered any loss. This feature of the U.S. (federal) regime clearly provides an incentive to direct purchasers to bring claims.

In Europe, for policy reasons, a solution which gives only direct purchasers standing to bring actions for damages is unlikely to be acceptable. The judgment of the European Court of Justice (ECJ) in *Crehan*[14] suggested that all those who suffer loss as a result of a violation of EC antitrust law should be able to seek compensation. This position is supported by the vast majority of European governments and competition authorities in their comments on the Green Paper, and has recently been confirmed by the ECJ in *Manfredi*[15] (which is discussed in greater detail below).

This puts the Commission in a dilemma over the passing-on defense. On the one hand, by prohibiting it (but not limiting standing to bring a claim to direct purchasers), the Commission becomes vulnerable in certain cases to the allegation of double jeopardy: infringers could be liable to pay damages to both direct and indirect purchasers, despite the fact that only the latter may have suffered loss. On the other hand, allowing the passing-on defense creates uncertainty in the calculation of the loss suffered by different potential claimants and increases the risk that bona fide claimants (both direct and indirect purchasers) may be discouraged by the prospect of complex litigation.

Representative and Class Actions. In its efforts to facilitate damage actions by European consumers, the Commission has advanced options for the introduction of special procedures for collective or other representative actions. The Commission makes reference to the amalgamation of small claims in the United States as providing strong incentives to litigate. In Europe, litigation is normally conducted by individually named parties. In some Member States, class actions are theoretically possible but the procedure is often cumbersome and only subscribers to the "class action" can share in the benefits flowing from a court judgment or settlement. In the UK, a provision is made for certain forms of representative action whereby appointed representative bodies, such as the Consumer's Association, may file claims on behalf of two or more identified consumers who have suffered economic loss as a result of anti-competitive behavior.[16] Nevertheless, these representative claims are not similar to class actions in the United States, where an individual (including a lawyer) may file a claim on behalf of a class of plaintiffs (once certified) who are not required to show individual loss at the liability stage and who do not need to be individually identified during the proceedings.

Aside from the U.S. precedent and a limited number of European examples (including the Swedish Group Proceedings Act 2002 to which specific reference is made in the Commission's Green Paper), the Commission seeks support for a move towards representative claims by referring to the proposal for a Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure,[17] as well as to the Opinion of Advocate General Jacobs in the *Österreichischer Gewerkschaftsbund* case,[18] in which he states:

> Collective rights of action are an equally common feature of modern judicial systems. They are mostly encountered in areas such as consumer protection, labour law, unfair competition law or protection of the environment. The law grants associations or other representative bodies the right to bring cases either in the interest of persons which they represent or in the public interest. This furthers private enforcement of rules adopted in the public interest and supports individual complainants who are often badly equipped to face well-organized and financially stronger opponents.

The majority of business organizations commenting on the Green Paper are opposed to the introduction of special procedures for bringing collective actions and protecting consumer interests. The main reasons appear to be the alleged excesses of the U.S. system, which are said by many to result in a "litigation culture" and the misuse of procedure. Similar consequences, it is argued, would follow the introduction of a class action system in Europe with undertakings being pressured into settling unmeritorious claims rather than face adverse publicity and potentially ruinous financial consequences if ultimately unsuccessful in court. It is argued that claimants aware of such possibilities might well have an increased incentive to target financially healthy businesses by bringing representative claims irrespective of their merits. The introduction of procedures to improve representative actions by consumers and the avoidance of unmeritorious claims are not, of course, mutually exclusive. Nevertheless, there appears to be little appetite for the introduction of procedures that would significantly facilitate collective consumer actions.

It is also argued that class actions give rise to difficulties regarding the quantification and distribution of damages, that the high costs associated with representative actions often bear no relation to the anticipated benefits to consumers, and that any expected benefits accrue disproportionately to intermediaries and lawyers. Respondents opposed to the Commission's options point out that existing procedural law provides sufficient protection to consumers and note that, in most Member States, there is already provision for joint actions and the assignment of claims. In addition to Sweden and the UK, consumer associations in Germany are already able to bring actions for injunctions and, under French law, consumer associations are entitled to specific remedies that enable them to bring claims for collective or individual losses.

Overall, the public institutions appear to be more open to the idea of facilitating damage claims through collective or

representative actions. Some respondents, such as the UK's Office of Fair Trading, favor a cause of action for consumer associations where this will not deprive individual consumers of the ability to bring an action. The same applies to actions by groups of purchasers other than final consumers. In light of responses to the Green Paper, the Commission will have to consider carefully the role to be played by collective actions as part of any policy to facilitate greater private enforcement within the European Union.

Crehan

Parallel to the policy debate stimulated by the Green Paper, the national courts and the ECJ continue to hand down judgments in cases in which competition law is pleaded, either as a sword or as a shield. Over time, many of the issues over which there is debate at the policy level will, in any event, be raised before these courts, whose judgments will continue, slowly but surely, to establish the legal framework for damages actions. Two recent judgments, one by the UK House of Lords (*Crehan*) and one by the ECJ (*Manfredi*) are particularly relevant.

On July 16, 2006, just as the Commission was collating the responses received during the consultation period, the UK House of Lords overturned the landmark Court of Appeal judgment in *Crehan*,[19] the first and only case in the UK in which damages had been awarded for breach of Article 81(1) of the EC Treaty, which prohibits anticompetitive agreements that have an "appreciable" effect on competition at the European level. The House of Lords judgment has given rise to significant comment: how should its impact on the promotion of private litigation within the EU be assessed?

The *Crehan* case reviewed the legality of a "beer tie," under which Mr. Crehan had been obliged, as a term of his pub lease, to purchase most of his beer from one supplier. Mr. Crehan, defending a claim for payment for beer supplied, counterclaimed that the beer tie was unlawful and had driven him out of business because he could not compete with independent pubs, which were able to purchase beer at more competitive prices.

The case began against a backdrop of reviews by the Commission and the relevant UK competition bodies of the UK beer market, including agreements containing beer ties and certain other restrictions imposed by a number of large brewers and pub companies on pub tenants. The Commission eventually issued three decisions,[20] the most cited of which related to the relevant agreements of the UK brewer, Whitbread. In its 1999 *Whitbread* decision, the Commission concluded that the Whitbread agreements in the UK did infringe Article 81(1) but benefited from an exemption under Article 81(3) because these agreements gave rise to economic benefits which outweighed the detriments to competition of the agreements' restrictions. Inntrepreneur, with whom Mr. Crehan had his agreement, had also applied to the Commission for a negative clearance (i.e., a decision that the agreement in question did not infringe Article 81(1)) or an exemption. The Commission did not issue a decision on the Inntrepreneur agreements, and Inntrepreneur eventually withdrew its application.

As a preliminary matter, the English High Court was asked whether Mr. Crehan, as a party to an allegedly illegal agreement, could claim damages. The question was referred to the ECJ for a determination of the point of European law. The ECJ ruled that Mr. Crehan would be entitled to recover damages, notwithstanding that he was a party to the allegedly unlawful agreement, providing that the national court was satisfied that he was not significantly responsible for the infringement. The judgment of the ECJ is generally regarded as establishing the principle that any individual or company suffering loss as a result of an agreement which infringes EC antitrust law is entitled to recover damages and cannot be defeated in that right by conflicting provisions of national law (a position recently confirmed by the ECJ in *Manfredi*).[21]

Mr. Crehan argued that the High Court should follow the assessment and conclusions in the Commission's *Whitbread* decision and, therefore, conclude that his agreement with Inntrepreneur also infringed Article 81(1). The High Court held that it was not bound by findings of the Commission's decision in *Whitbread* because the Commission's analysis concerned different agreements and was addressed to different parties. Following its own extensive assessment of the UK market on the basis of the evidence before it, the High Court held that certain important findings of the Commission's decision were incorrect and should not be followed in the domestic proceedings and that, on the evidence before it, the Inntrepreneur agreements (and, specifically, the beer tie with Mr. Crehan) did not infringe EC antitrust law. The judge accordingly rejected Mr. Crehan's claim for damages but went on to deal with quantum in the event that Mr. Crehan had been successful.

The judgment was appealed to the Court of Appeal, which concluded that the judge in the High Court should have followed the decision of the Commission in *Whitbread* and, in not doing so, had failed to comply with the "duty of sincere co-operation" owed by national courts to the Commission. In particular, the judge had failed to give sufficient weight to the long-term investigation of similar agreements carried out by the Commission and was wrong to consider, and take into account, evidence contrary to the Commission's findings. The Court of Appeal then considered quantum and concluded that the damages which the judge in the High Court would have awarded were too high and undertook its own quantification. Mr. Crehan was awarded a considerably lower sum than he would have received in the High Court had his claim been successful there.

The case was then appealed to the House of Lords, which ruled that, as a matter of European law, the judge in the High Court was not bound to adopt the Commission's market assessment in *Whitbread* because that decision related to a different subject matter and different parties, and,

therefore, there was no prospect of a conflict between the Commission's decision and an eventual judgment of the High Court. Inntrepreneur had not had an opportunity to challenge the *Whitbread* decision because it was neither an addressee nor directly and individually concerned by it; it could not, therefore, have brought an appeal as a third party before the European Court of First Instance and ultimately the ECJ. The House of Lords accordingly held that Inntrepreneur would be denied the right to a fair trial if the economic and legal assessment in its case were determined by a Commission decision over which it had no influence and in respect of which it had no right of appeal. The House of Lords further observed that the Court of Appeal had not criticized the High Court's assessment of the market and held, therefore, that this assessment should stand. Accordingly, there had been no infringement of Article 81(1), and Inntrepreneur was not liable to pay damages to Mr. Crehan.

So what does the reversal in *Crehan* mean for the Commission's objective of increasing the incidence of private litigation within the EU? Is the House of Lords's decision, as some would suggest, a setback for the Commission? In considering this question, a first point to note is that the House of Lords ruling does not undermine the right of private litigants to pursue actions for damages before national courts for infringement of EC competition law.

The Commission's objective in publishing, and seeking responses to, the Green Paper is to explore options to facilitate the *exercise* of this right. In this respect, it is important to note that none of the options put forward in the Green Paper would have saved Mr. Crehan from the House of Lords's ruling. The Commission, during its consideration of Inntrepreneur's application for negative clearance and exemption, had always anticipated that the High Court would rule on the dispute and had never suggested that its *Whitbread* (or other relevant) decisions were binding on the court. It was only the Court of Appeal which considered that the judge at first instance should have adopted the Commission's assessment of the market in *Whitbread*. In the absence of a binding Commission (or NCA) decision that makes a relevant finding of infringement, claimants still need to prove their case on the facts.

This issue goes to the heart of the Commission's initiative: public resources are not sufficient to pursue all of the cases in which public intervention is necessary to create a sufficient deterrent effect against infringing activity. The relatively few cases proceeding to judgment in national courts suggest that there are either obstacles to private litigation or insufficient incentives to bring private claims. While the Commission is, of course, clear that it wants to create a competition rather than a litigation culture, the achievement of its objective (supplementing public enforcement by private enforcement) necessarily implies more litigation and therefore, in the Commission's view, greater incentives to litigate.

Because European law defines relatively narrowly the circumstances in which a decision of the Commission is binding on a national court hearing an action for damages, the need for claimants independently to prove the infringement will remain undiminished in many cases. This requirement focuses attention on issues addressed in the Green Paper like disclosure of documents. However, there was no suggestion in *Crehan* that the claimant was hampered by a lack of evidence: the court had before it numerous experts and witnesses of fact. The relevant issue in *Crehan* was rather the interpretation and application of the jurisprudence of the ECJ[22] for the purpose of assessing whether a network of similar, vertical agreements creates a sufficiently serious foreclosure effect in the market and, if so, whether the agreement in issue in the litigation and other agreements in the system of which it forms a part (in *Crehan*, the Inntrepreneur agreements) contribute in a significant way to such foreclosure. If the answer to both these questions is in the affirmative, the restrictions of competition in the agreement are prohibited under Article 81(1) because they are appreciable. This is a complex assessment, and one which necessarily gives the national judge a margin of discretion.

In stand-alone actions, the claimant will nearly always be faced with the issue of appreciability. The recent moves by the Commission to introduce a more economics-based approach to the application of both Article 81 and Article 82 (abuse of dominance)[23] will, at least in some cases, render the task of proving an infringement more complex for claimants. A decision of the Commission or an NCA which, although not binding in the national court, relates to the same market will be admissible evidence in the national proceedings alongside other evidence. Both sides, as in *Crehan*, will typically retain expert economic witnesses. The expert evidence will almost invariably differ on important issues, and the introduction of efficiency arguments (for example under Article 82) will render the legal assessment of similar types of conduct (e.g., tying practices) in different economic contexts more difficult than has been the case under the more formalistic approach previously adopted by the Commission and supported by the European Courts.[24] Claimants may, therefore, be reluctant to bring actions in cases involving complex economics in the absence of a decision by the Commission or an NCA.

However, these issues go to the substantive application of antitrust law in Europe rather than to the procedural issues which may act as an obstacle to private actions for damages and to which the Commission draws attention in the Green Paper. The Commission is aware of the potential conflict between its dual objectives of introducing a more economics-based approach and encouraging private litigation.

The Commission has indicated that it would still propose to continue to investigate serious antitrust infringements, such as international cartels, with respect to which it has the necessary powers to conduct an investigation and reach a decision. Decisions of the Commission against cartel members will be binding on them in national court proceedings in which they are sued by claimants for damages. Accord-

ingly, even though a decision in a cartel case will not be addressed to a claimant (unless one cartel member is suing others), the claimant will be able to rely on the finding of infringement to support an action for damages.

On the other hand, the Commission has also indicated that, in the future, it may exercise its discretion not to investigate, and reach a decision in, cases in which there is a contractual relationship between a complainant and a defendant. The Commission may rather suggest to the complainant that it bring an action in a national court. In such stand-alone actions, the claimant will be required to prove the infringement of Article 81(1) without the benefit of a Commission decision.

The Future of Private Damages Actions

The Commission's initial reaction to the responses to the Green Paper was to ask whether, notwithstanding the conclusions of the Ashurst Study, there was a need to take any action to facilitate, and even encourage, private actions for damages. After all, the majority of responses appear to suggest that the existing legal systems in Europe are not broken in this respect and, therefore, do not require fixing.

The Commission may have found it hard to reconcile stakeholders' responses with its own views regarding the development (or relative lack thereof) of private actions in Europe. For example, if respondents are right, then why have we not witnessed more private actions for damages? Is it also really the case that nearly all claims (or counterclaims) based on infringements of EC antitrust law are settled and, if so, are the terms of such settlements generally favorable to the claimants?

Despite the relative paucity of reported cases and stakeholders' relatively cautious approach towards suggested procedural reform, the Commission has cause for some optimism for at least the following reasons:

First, in its *Manfredi*[25] judgment of July 2006, the ECJ reinforced and developed the legal principle first enunciated in its own judgment in *Crehan*. *Manfredi* concerned a reference from an Italian court in a case involving a claim for damages against a number of insurance companies which had been found by the Italian competition authority to have increased auto under an unlawful agreement. The ECJ confirmed (among other points) that:

- Article 81(1) must be interpreted as meaning that any individual can rely on the invalidity of an agreement or practice prohibited under that Article, and can claim compensation where there is a causal relationship between the latter and the harm suffered.
- Punitive or exemplary damages in actions founded on EC antitrust laws must be possible if such damages may be awarded in domestic actions similar to actions founded on EC antitrust law (without prejudice to the ability of national courts to take steps to ensure that the protection of rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them).
- In accordance with the principle of effectiveness and the rights of individuals to seek compensation for loss caused by a contract or conduct liable to restrict or distort competition, injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest.

Second, the policy debate to which the Green Paper has given rise has in itself focused considerable attention on the possibility for those injured by antitrust infringements in Europe to claim damages. As a result, claimants and courts are increasingly aware of the issues involved. Many of these issues (e.g., the status of the passing-on defense) will be determined in national court proceedings (possibly following a reference to the ECJ) whether or not the Commission takes any further action in the light of the Green Paper and responses to it.

Third, the Commission has in recent years issued a number of important and valuable guidelines and notices that will assist claimants, defendants, and courts in many, but not necessarily all, cases to make appropriate assessments for the purpose of determining whether a particular agreement (or network of agreements) or conduct of a dominant undertaking constitutes an infringement of EC antitrust law.

Conclusion

The central issue in the policy debate is now well defined: should private actions for damages in Europe be facilitated and encouraged in order to supplement public enforcement by private enforcement.

It is clear that the Commission and Member State governments need to balance the policy objective of greater antitrust enforcement, which would, in principle, contribute to the creation of a competition culture in Europe, with sensitivities (some better-founded than others) over the introduction of significant modifications to existing legal and judicial systems. These systems reflect cultural roots which are part of Europe's diversity, a heritage which Europe's political leaders are anxious to preserve. It is clear, however, that greater antitrust enforcement without an increase in stand-alone actions would necessarily require the commitment of greater public resources.

The Commission, looking at the issues from its side of the debate, rightly considers that it is necessary to create incentives to bring claims for damages. Stakeholders on the other side immediately identify potential conflicts with various legal principles that they regard as fundamental, like the principle that damages should compensate the claimant for the loss suffered but not, in addition, impose a financial penalty on the defendant. The reconciliation of these different stances is not straightforward. But that is the role of the policy maker.

At the same time, the judicial train has left the station. The European courts and the national courts are confronted on an increasingly regular basis with legal questions directly relevant to the policy issues in the debate which they are required to, and do, decide.

There is no doubt that Europe will continue to see an increase in the number of cases in which competition law is pleaded, whether those cases settle or come to judgment, and the number of cases in which damages for antitrust infringements are claimed and awarded. The open question is whether, at the end of the policy debate, a decision will be taken to facilitate and encourage such actions by the introduction of procedural changes to national legal and judicial systems which make the enforcement of antitrust law in Europe a special case. On that question, the jury is still out. ■

[1] The Study is available at http://ec.europa.eu.int/comm/competition/antitrust/others/actions_for_damages/study.html.

[2] Commission Green Paper: Damages Actions for Breach of the Antitrust Rules; COM (2005) 1732 (Dec. 20, 2005).

[3] See, for example, Vodafone Group's response, in which it claims that there is "no compelling argument that a claimant in an antitrust claim is necessarily in any worse position regarding evidence than a claimant in other types of claim." Vodafone's comments as well as other stakeholders' responses to the Green Paper can be found at http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/gp_contributions.html.

[4] Commission Staff Working Paper—Annex to the Green Paper: Damages Actions for Breach of the Antitrust Rules, COM (2005) 672 final (Dec. 19, 2005).

[5] Council Directive 2004/48 art. 251, 2004 O.J. (L 157) 45.

[6] Rapprochement UniDroit Judiciare de l'Union Européenne—[Approximation of Judiciary Law in the European Union] (Marcel Storme ed., 1994).

[7] The International Institute for the Unification of Private Law (UNIDROIT) and the American Law Institute (ALI). The Principles were adopted by UNIDROIT/ALI in 2004. UNIDROIT 2004 Study LXXVI-Doc 11.

[8] For example, see the response of the European Chemical Industry Council (Cefic) in which it argues that "a system of discovery is incompatible with the majority of the Members States' legal systems, and could in some cases conflict with the fundamental principle of non-self incrimination." The European Justice Forum notes that U.S.-style discovery is an "alien concept" to civil law jurisdictions and has, in any event, proven to be "hugely costly and disruptive" in the United States. In terms of public bodies, the German Federal Ministry of Economics and Technology and the Federal Cartel Office (Bundeskartellamt) do not accept any of the proposals made by the Commission in this area, believing it should be left to the national legislature to decide.

[9] For a fairly representative business view, see for example the response of the CBI (UK), in which it sets out its opposition to damages based on the recovery of an illegal gain as this would have a "punitive/windfall element." Instead, it confirms its support for the normal standard applied in civil proceedings by which the claimant is restored to the position in which it would have been had the tort not been committed. The reactions of the German Federal Ministry of Economics and Technology and the Federal Cartel Office are notably severe, stating that the "introduction of multiple damages should be rejected in all forms"; while the responses of the UK Department of Trade and the Danish Ministry for Economic and Business Affairs are instructive, but nevertheless skeptical and on balance opposed to any such move.

[10] The Pharmaceutical Research and Manufacturers of America (PhRMA) and the European Federation of Pharmaceutical Industries and Associations (EFPIA) make such a claim, pointing to the American experience to support their thesis.

[11] For example, see the comments of the International Chamber of Commerce in which it speaks of the "chilling effect" such an approach would have on leniency applications.

[12] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

[13] Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481 (1968).

[14] Case C-453/99, Courage v. Crehan, 2001 E.C.R I-6297.

[15] Manfredi v. Lloyd Adriatico Assicurazioni SpA, C-295/04, 2006 ECJ CELEX LEXIS 348.

[16] UK Competition Act, 1998, S. 47B.

[17] Commission's Proposal for a Regulation of the European Parliament and of the Council Establishing a European Small Claims Procedure, COM (2005) 87 (Mar. 15, 2005).

[18] Case C-195/98, Österreichischer Gewerkschaftsbund v. Austria, 2000 E.C.R. I-10497, 47.

[19] Crehan v. Inntrepreneur Pub Co., [2003] All E.R. (D) 354 (Jun); [2004] EWCA (civ) 637, [2006] UKHL 38.

[20] Commission Decision 1999/230, Case IV/35.079/F3, Whitbread, 1999 O.J. (L 88) 26; Commission Decision 1999/473, Case IV/36.081/F3, Bass, 1999 O.J. (L 186) 1; Commission Decision 1999/474, Case IV/35.992/F3, Scottish and Newcastle, 1999 O.J. (L 186) 28.

[21] *See supra* note 15.

[22] Case C-233/89, Delimitis v. Henniger Bräu, 1991 E.C.R. I-935.

[23] DG Competition Discussion Paper on the Application of Article 82 to Exclusionary Abuses, European Commission (Dec. 13, 2005), *available at* http://europa.eu/comm/competition/antitrust/others/discpaper2005.pdf.

[24] *See, e.g.*, Case T-203/01, Michelin v. Commission, 2003 E.C.R. II-4071.

[25] *See supra* note 15.

Janet D. Steiger Fellowship Project Enters Third Year

THE ABA ANTITRUST SECTION COUNCIL has expanded the number of Steiger Fellows eligible to be placed in state offices during the summer of 2007 to twenty-one. It has been the goal of the Section to do something substantial to assist the states in their vital consumer protection mission, while providing a valuable educational experience to law students who, in some cases, may not otherwise be able to avail themselves of public service. At the same time, we also seek to honor the memory of the late Janet Steiger. This expansion is a very important signal to the states and to every law school and student in this country of the unwavering commitment of the leadership of the ABA Section of Antitrust Law to the Janet D. Steiger Fellowship Project.

Participating states include Alaska, Arkansas, Delaware, Georgia, Illinois, Iowa, Mississippi, Montana, Nevada, New York, Ohio, Oregon, Pennsylvania, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia and Wisconsin. Law student applications must be received by Deborah Douglas at the ABA by January 19, 2007. Further information about the Project is available at:

http://www.abanet.org/antitrust/at-law-student/at-js-project.shtml