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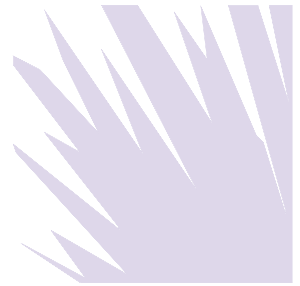

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LEGISLATING FOR LITIGATION: REFORMS TO INTERNATIONAL ANTITRUST LITIGATION GATHER PACE

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For some time, the European Union and a number of its Member States have tried to encourage private litigation of antitrust claims. This has culminated in significant proposed legislation, and related policy recommendations, squarely aimed at a manageable expansion in litigation. The proposed EU legislation marks a decisive step in a continuing move away from a purely administrative model of antitrust law towards a more mixed system involving greater private enforcement, a trend arguably at its clearest in England and Wales. In that jurisdiction the government has published draft legislation to establish an opt-out scheme for collective redress, i.e., something akin to a U.S. class action. How close the American parallel will be remains to be seen, but it is clear that the administrative model of antitrust enforcement with which Europe is so associated will not escape unscathed, with significant implications for all those active in European markets. Indeed, the Competition Appeal Tribunal ("CAT"), the specialist court for UK competition law claims, recently awarded punitive damages for the first time,[2] although the scope for punitive damages following pending reforms remains to be seen.[3]

This article will consider the recent proposals to reform antitrust litigation, the context of EU and national attempts to reform private actions, and their relation of increased private litigation to existing public enforcement mechanisms. It will also consider potential international issues posed by the reforms, notably jurisdictional aspects and tensions that may be emerging between national and European reforms.

I. REFORMS TO EUROPEAN ANTITRUST LITIGATION

The European model of antitrust enforcement is distinguished by a considerable role for administrative discretion and enforcement. Broadly speaking, the EU system first set up by Regulation 17,[4] and since broadly copied, empowers antitrust agencies to take action to protect and promote competition through potentially far reaching prohibitions on anticompetitive conduct. Since 2004, however, the European Commission has shared

1 Respectively Partners and Associate, Sidley Austin LLP, Brussels and New York. All views expressed in this article are exclusively those of the authors and do not necessarily reflect those of Sidley Austin LLP or its clients. This article has been prepared for informational purposes only and does not constitute legal advice.
2 *2 Travel Group PLC (in liquidation) v Cardiff City Transport Services Limited* [2012] CAT 1.
3 *Albion Water Ltd. v Dwr Cymru Cyfyngedig* [2013] CAT 6 cited the punitive damages analysis in *Cardiff's* case, but did not award punitive damages on the particular facts before it.
4 Regulation (EEC) No 17/62.

increasing authority with the National Competition Authorities ("NCAs") on the one hand, and national courts in Member States on the other.[5] At the same time, the EU courts have upheld a free-standing right to claim damages for a competition law infringement, and required Member State courts to ensure that redress is available in such cases on at least as favorable a basis as it is for similar domestic claims.[6]

The original institutional set up continues to cast a long shadow over the pattern that this litigation tends to take. The significant advantages of public enforcers in terms of resources and legal empowerments creates a strong incentive to bring follow-on damages actions, which rely on findings of facts established in administrative decisions, rather than to bring a stand-alone action in which the infringement must be proven. Thus the standard model of a European competition law claim tends to involve waiting for the agency to take an adverse decision, and then filing a claim that the facts and infringement thereby established caused a loss to the relevant undertaking.[7]

Commission Proposals

The EU has taken an active role in encouraging such follow-on claims. For several years, the Directorate General for Competition (DG Competition) has commissioned research and authored studies to increase the role of the limited amount of antitrust litigation that has occurred.[8] Strange as it may seem to those working in jurisdictions arguably defined by an excess of litigation, the European Commission has thereby sought to encourage the role of private litigation, not least to provide an element of redress to individual consumers (rather than a fine paid into the general coffers of the EU) and perhaps also to decrease the burden on public enforcers.

The stated overarching aim of the Commission is "to create an effective system of private enforcement by means of damages actions that complements, but does not replace or jeopardize, public enforcement."[9] In other words, the Commission seeks to encourage litigation alongside public enforcement, rather than as a substitute to it. This approach was echoed by Joaquin Almunia, the EU's Commissioner for Competition, who stated in September 2011:

> *Our legislative action must make possible that every victim of the companies that breach competition law should exercise their right to be compensated for damages regardless of where they are in the EU and regardless of whether they bring individual or collective actions.*[10]

5 Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ 2003 L/1/1.

6 Case C-453/99, *Courage v Crehan* [2001] ECR I-6297; Joined Cases C-295/04 to C-298/04, *Manfredi* [2006] ECR I-6619.

7 For a summary of recent research into the typical litigation pattern, *see* M. Danov and S. Dnes, "Cross-Border EU Competition Litigation: New Evidence from England and Wales" in M. Danov, F. Becker and P. Beaumont eds., *Cross-Border EU Competition Law Actions* (Oxford: Hart, 2013).

8 Key consultations include DG Competition, "White Paper on Damages Actions for Breach of the EC antitrust rules," COM(2008) 165, 2.4.2008; "Green Paper - Damages actions for breach of the EC antitrust rules" COM(2005) 672, 19.12.2005; and Oxera Consulting, "Quantifying antitrust damages: Towards non-binding guidance for courts," Study prepared for the European Commission. The move towards more private litigation has led to the comment that EU and U.S. litigation models are converging, at least in terms of evaluating damages: see C. Korenblit, "Quantifying Antitrust Damages – Convergence of Methods Recognized by U.S. Courts and the European Commission," [2012] *CPI Antitrust Chronicle* 1.

9 European Commission, *White Paper on Damages*, op. cit., final paragraph.

10 Joaquin Almunia, "Public enforcement and private damages actions in antitrust," Speech to the Economic Committee of the European Parliament, Brussels, 22 September 2011.

The Commission thus expressed the intention to take action on the procedural issues that seemed to stand in the way of the competition law claims it seeks to encourage, notably issues surrounding access to evidence, the effect of private litigation on the leniency program, and the scope for delays in follow-on litigation to time bar follow-on damages claims.

In June 2013, the European Commission tabled the draft EU legislation that was the product of this lengthy process, as well as a policy Recommendation on collective redress. Both seek to encourage private antitrust litigation. Briefly, the proposed legislation requires Member States to ensure that certain stumbling blocks for the would-be litigant are removed, subject to certain safeguards.[11] If the legislation passes, key features will require Member States to:

- ensure minimum standards so as to allow document disclosure, subject to protections designed to prevent disclosure of sensitive documents such as leniency applications and settlement documents;
- require cartel liability to be joint and several, except in the case of a leniency recipient;
- set down minimum limitation periods and provisions on how these are to run;
- follow a uniform approach to the "passing on" defense where a cartel overcharge affects numerous parties in a distribution chain;
- enact a rebuttable presumption that cartels cause overcharges, and
- enable courts to grant a stay of proceedings while discussions on consensual resolutions take place.

Alongside the Directive, the Commission has also released a Recommendation on class actions that, although not binding, puts the Member States on notice to comply with its aims (on pain of possible future legislation should they fail to do so).[12] The Commission therefore now officially recommends that Member States should adopt collective redress mechanisms, although notably it recommends an "opt-in," rather than "opt-out," model, and that collective actions may be taken by pre-authorized representative entities meeting certain criteria. To prevent the perceived scope for abuse, however, the Commission recommends against punitive damages and contingency fees in representative actions. It also advocates ensuring that third party litigation funding is carefully reviewed, and calls for restrictions on the standing of parties who can bring representative actions so as to exclude profit-making entities.

11 *See* European Commission, "Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union," COM(2013) 404 final. A Directive is binding as to its aims but leaves Member States free to decide the means by which they will fulfil those aims.

12 *See* European Commission, "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Towards a European Horizontal Framework for Collective Redress," COM (2013) 401/2; *see also* "Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law" C(2013) 3539/3.

On the same day, the Commission also released official guidance on the methods that can be used by courts to estimate damages in competition law cases. As with the collective actions Recommendation, the guidance is not binding, but is likely to be highly influential.[13]

The legislative proposal and the Recommendation represent a compromise between a number of stakeholders. The Directorate General for Health and Consumers has an interest in the potential impact of these reforms on consumers, and the Directorate General for Justice has a stake in the outcome of any reform to civil justice measures as part of its brief to ensure the smooth functioning of cross-border legal issues between Member States. Indeed, any move to expand the role of litigation is highly controversial in many quarters. The legislative proposal was significantly overdue, having been expected in draft form for several months, and previous attempts to adopt a legislative proposal failed.

For its part, the European Parliament has also been extremely vocal and active in this area, and has at times sought to limit the scope for reforms aimed at encouraging litigation, for example in its response to a consultation by DG Justice on the future of collective redress in Europe.[14] Although the Parliament has recently softened its stance on an increased role for class actions, the choice of a Recommendation on class actions (which the Commission can adopt on its own), rather than legislation (which would require Parliament's agreement), may be interpreted as an attempt to bypass the European Parliament.

Member State reforms to litigation

The Commission reform process drew wide attention, especially with Member State governments, not least because of the increased profile of competition law and policy as a means to achieve growth during a period of global stagnation. The lead taken by the European Commission may have been instrumental in encouraging these steps.

The day after the European Commission published the proposed legislation and Recommendation, the UK government published a draft Consumer Rights Bill ("the Bill") that proposes amendments to UK competition law designed to assist litigants.[15] The Bill represents the latest step in a controversial consultation process[16] and provides an insight into the form that national steps designed to encourage litigation might take.

Drawing on the results of the consultation, the Bill proposes to expand the scope for litigation in several ways:

- **Stand alone court access:** The Bill expands the jurisdiction of the specialist Competition Appeal Tribunal ("CAT") to be able to hear stand-alone damages claims, i.e., removing the requirement for there to be a prior regulatory finding of infringement before litigation can be brought at the CAT. The CAT will also be able to grant injunctions and a fast-track procedure to assist plaintiffs would be made available.

13 Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union.
14 European Parliament Committee on Legal Affairs, "Draft Report on 'Towards a Coherent European Approach to Collective Redress'," 15.7.2011.
15 UK Department for Business, Innovation and Skills, Draft Consumer Rights Bill, June 2013 (TSO: Cm 8657).
16 UK Department for Business, Innovation and Skills, "Private Actions in Competition Law: A Consultation on Options for Reform," available at http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/p/12-742-private-actions-in-competition-law-consultation.pdf.

- **Class actions:** the Bill would allow "collective proceedings" to be brought at the CAT on an opt-out basis, subject to significant discretion on the part of the CAT whether to allow the collective action to proceed.

- **Collective settlements:** Where such a "collective proceedings order" has been made, the Bill provides for means for collective settlement of the action. However, the Bill would not permit punitive damages to be awarded in collective actions.

- The Bill also provides for **voluntary redress schemes** to be entered into before the regulator takes an infringement decision, i.e. through administrative negotiations, perhaps in an attempt to balance the controversial proposals on collective actions contained in the Bill.

The Bill and the draft EU legislation, if both pass in their present forms, may not be fully consistent as they differ on several important points. By way of example, the EU legislation requires a presumption of overcharge, whereas the Bill dropped exactly this requirement even though it was present in earlier stages of the consultation that led to the Bill. There are also inconsistencies between the Bill and the stated policy preferences of the European Commission in its Recommendation, most glaringly where the Bill provides for opt-out procedures contrary to the Commission's stated preference for opt-in.

Differences between the Bill and the Recommendation may not be as immediately pressing as differences with any directive that emerges, the Recommendation not being immediately binding, but should the opt-out procedure attract litigants the Commission may be prompted to legislate when it next reviews the development of private litigation. So although the policy position of the EU, for the next few years at least, appears to have been articulated, there seems to be substantial scope for continuing disagreements on this perennially controversial topic and the scope for collective redress of the claims will fluctuate for some time to come.

Indeed, this result seems likely as the English courts are already an attractive venue for private antitrust litigation, not least because of their permissive discovery rules compared with the practice (if not always the letter of the law) in civilian jurisdictions, and a relatively expansive approach to jurisdiction.[17] For some years, the English courts have been moving slowly but steadily in the direction of a more American model of enforcement, in which courts would play a greater enforcement role, and the provisions on class actions would seem to accelerate that trend.[18]

The Bill fits into a wider picture of reform to the institutional framework of the UK antitrust agencies, and can be seen as part of a wider rebalancing of competition enforcement in the UK.[19] A wholesale shift towards an American model in which agencies would be required to litigate remains unlikely; indeed, a prominent commentator has noted that:

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17 *See e.g. Toshiba Carrier UK Ltd v. KME Yorkshire Ltd* [2012] EWCA Civ 1190 (allowing use of "anchor defendants" for jurisdictional purposes), discussed further below.

18 For a comparative approach to institutional aspects of antitrust enforcement, please see D. Crane, *The Institutional Structure of Antitrust Enforcement* (Oxford: OUP, 2011).

19 The Lawyer, "Merger of Competition Commission and OFT meets with muted response," 16.3.2011.

It is inconceivable that a European system would totally privatize all enforcement on an American model or that the existing regulatory or punishment functions of public authorities would be removed or restricted.[20]

Yet if a wholesale shift away from administrative enforcement seems relatively unlikely, the preference for rebalancing towards greater litigation is apparent in several jurisdictions. Some of the most prominent plaintiff-friendly reforms in a civil law jurisdiction have come from the Netherlands, where it is possible for a representative body to enter into collective settlements on behalf of consumers, much as the UK Bill would allow.[21] Indeed, the plaintiff-friendly approach adopted by certain jurisdictions arguably involves the removal of safeguards in an attempt to attract litigants. It is an open question whether the emerging differences represent a rent-seeking race to the bottom, or merely healthy regulatory competition, but it is certainly the case that some jurisdictions have made it significantly easier to fund a case. For example, collective settlement representatives in the Netherlands can be funded by third party litigation funders, or law firms, and although the UK Bill stops short of allowing damage-based agreements and restricts third party funding of class actions, the UK did consider whether to remove these safeguards at the consultation stage.[22]

As these changes continue to gather pace, the shifting balance towards private enforcement across Europe will markedly impact the appropriate strategy in antitrust counseling and litigation with a European element. A clear pattern encouraging private litigation can be seen from the EU reforms, filtering down to Member State reforms, albeit with some variation in focus and scope.

II. IMPLICATIONS FOR INTERNATIONAL LITIGANTS

Tensions between national and EU approaches

The contrast between the UK Bill and the EU proposals and Recommendations demonstrates the potential for increasing tension between litigation in Member State courts and the more unified approach to reform now actively sought at the EU level. There may even be incentives for some Member States to take a plaintiff-friendly approach in order to attract, and export, litigation, especially because there is a significant jurisdictional overlap between Member State jurisdictions in competition law claims. Although the EU has now articulated its policy position for the coming years, tensions between this position and divergent national approaches seem very likely.

The potential tension is particularly noticeable in some follow-on litigation in the UK that took place as the reform process gathered pace. In *Cardiff Bus*, the UK's specialist Competition Appeal Tribunal ("CAT") went so far as to make its first ever award of punitive damages on the basis that the incumbent operator in the case willingly disregarded a new entrant's rights under competition law not to be impeded by the abuse of dominance established by an earlier administrative decision. The scope for future awards of punitive damages remains to be seen (they may not be available in follow on cases where there has

20 C. Hodges, "European Competition Enforcement Policy: Integrating Restitution and Behaviour Control," 34 *W. Comp* 3

21 See, for example, Stichting Investor Claims Against Fortis, which is funded by a consortium of law firms representing investors for whom it seeks to obtain compensation (*see* http://www.investorclaimsagainstfortis.com/frequently_question.php).

22 BIS Consultation, op. cit., q. 23.

been a fine,[23] and legislation may block them in class actions). Yet the case has been followed in more recent litigation,[24] suggesting that litigants may well come to seek punitive damages, at least in stand alone actions or follow on cases in which no fine has been applied. The result is surprising because punitive damages awards fly squarely in the face of the Commission's stated policy preferences, squarely underlining the scope for continuing tension between national litigation and attempts at reform, whether at the national or European level.

Jurisdictional considerations

The international tensions that result are particularly pressing because of the jurisdictional rules that apply to these cases. Consider, for example, the expansive approach to jurisdiction taken by the English courts as recently confirmed by the Court of Appeal in *Toshiba Carrier UK Ltd v. KME Yorkshire Ltd.*[25] There, the Court upheld its jurisdiction in a follow-on claim against several defendants even though none of the infringing parties named in the fining decision itself was domiciled in the UK: it sufficed that one of the defendants was a subsidiary of one of the named parties in the fining decision. As this subsidiary was involved in the implementation of the conduct, it provided the necessary "anchor defendant" to bring the case in the UK against all five defendants.

This expansive approach to jurisdiction at the national level, which is by no means unique to England and Wales, is mirrored at the EU level in the private international law framework governing European litigation, which creates significant scope for overlaps in jurisdiction where parties are based in several countries. Specifically, the European legislation governing the private international law to be applied between Member States of the European Union, the Brussels Regulation, contains scope for defendants and claimants to assert jurisdiction in several locations.[26] Contrary to expectations in some quarters, the draft Directive and Recommendation did not carve out a special jurisdictional rule for cross-border collective actions, meaning that this overlapping jurisdiction will persist and with it strong incentives to make the best possible use of divergences between procedural rules such as those apparent from comparing the UK Bill and the EU Recommendation and draft Directive.

III . CONCLUSION

Competition litigation in Europe will continue to be in a state of flux for some time as the precise scope of reforms is finalized, and ultimately their implications realized. The decisions of the CAT referred to above, although for the time being confined to follow-on litigation under somewhat unusual circumstances, provide practical examples how future litigation might develop. Increased tensions between litigation and administrative enforcement may simply be the logical result of the recent moves to increase the role for litigation through sweeping reforms, without a commensurate decrease in the role for administrative enforcement as a quid pro quo.

23 *Devenish Nutrition Ltd. v. Sanofi-Aventis and others* [2008] EWCA (Civ) 1086. The decision has already been criticised by two leading commentators: See O. Odudu and G. Virgo, "Inadequacy of Compensatory Damages," 17 *Restitution Law Review* 117 (2009).

24 *Albion Water*, op cit.

25 [2012] EWCA Civ 1190. *See e.g.* Sidley Austin LLP, "Court of Appeal Judgment May Encourage Cartel Damages Claimants to Drop Anchor in England and Wales" for further details, available at http://www.sidley.com/Court-of-Appeal-Judgment-May-Encourage-Cartel-Damages-Claimants-To-Drop-Anchor-in-England – Wales-10-10-2012/.

26 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 12, 16.1.2001, as amended. See more: Danov, *Jurisdictions and Judgments*, op. cit.

The role of litigation in the reforming European model of antitrust enforcement remains to be seen, and European antitrust litigation is still very much finding its feet. It is, however, predictable that recent reforms will pile further pressure onto fault lines already identified in the interplay between administrative and judicial enforcement to the extent that they do not perfectly reconcile the two, which lofty goal seems relatively unlikely. Jurisdictional issues with the Brussels Regulation, the relative roles of damages and fines, and issues in choosing a settlement and leniency strategy will all become more pressing as the incentives to litigate increase. The pace of developments in European antitrust litigation therefore looks set to increase, and will continue to require careful monitoring by all those who must consider the appropriate strategy in international cartel and abuse cases.