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Private Actions in EC Competition Law

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The paper considers the case for reform of the system of private actions in the European Union. In doing so, it seeks to identify the central changes which would need to be made if private actions are to play a more significant role in the competition regime. Contrary to recent statements made by the European Commission, the paper argues that any changes made must recognize that private actions perform a dual function in EC competition law: they not only compensate those who have been harmed by anticompetitive behavior but also contribute to the overall level of deterrence generated by the competition regime. Going further, it argues that whilst increased deterrence and compensation almost always go hand in hand, the primary objective of private actions is to support effective competition enforcement.

Building on this, the paper identifies and examines the main pillars of any effective reform program in Europe: enhancing the role of collective actions, clarifying the issues surrounding indirect purchasers' standing and passing-on, and ensuring, as far as possible, that public and private enforcement operate in harmony—where they clash, the paper argues that the former must take precedence over the latter.

In light of this discussion, the paper goes on to assess the proposals made by the European Commission (“Commission”) and the U.K. Office of Fair Trading (“OFT”) for reform of the system. It concludes that the proposals made, if implemented, would appreciably increase the incentives of businesses to comply with

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the EC competition rules while at the same time achieving higher levels of compensation. In addition the reformed system would retain significant safeguards to guard against the risk of unmeritorious or speculative claims. However both sets of proposals are cautious in particular in relation to the availability of opt-out collective actions. This is an issue which policymakers in Europe may need to return to in the future.

I. Introduction

Over the last 10 years competition law enforcement by the Commission has been transformed from both a substantive and procedural perspective. Though not perfect, public enforcement is now far more effective than it was just a decade ago. The same cannot be said for private actions brought in the courts: a study prepared for the Commission in 2004 described the system as being in a state of “total underdevelopment”.¹ A later study² for the Commission found that between 2004 and 2007 there were less than 100 antitrust damages actions across the EU; significantly, almost all were concentrated in a few sectors in 17 of the 27 Member states. The authors of the report estimated that “at most” 10 percent of antitrust cases in Europe are initiated by a private claim before a national court; this compares with 95 percent in the United States.³ National competition authorities (“NCAs”) have made similar findings. For example, research carried out by the OFT shows that companies and their advisers view private actions as the least effective aspect of the competition regime in the United Kingdom;⁴ indeed the OFT reported in 2007⁵ that consumers in the United Kingdom had never recovered damages for breach of the competition rules.

In response, the Commission and a number of European NCAs (in particular the OFT) have, over the last 3 years, sought to identify the main obstacles to a more effective system of damages claims and set out different options to improve the regime. These initiatives culminated in the publication by the OFT in

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1. Ashurst, *STUDY ON THE CONDITIONS OF CLAIMS FOR DAMAGES IN CASE OF INFRINGEMENT OF EC COMPETITION RULES*, Brussels (2004).
 2. *MAKING ANTITRUST DAMAGES ACTIONS MORE EFFECTIVE IN THE EU*, joint report submitted to the European Commission by the Centre for European Policy Studies, Erasmus University Rotterdam (EUR) and Luiss Guido Carli (December 2007) [hereinafter Joint Report].
 3. H. J. HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 38 (2006) [hereinafter HOVENKAMP].
 4. *THE DETERRENT EFFECT OF COMPETITION ENFORCEMENT BY THE OFT*, OFT962 and OFT963 (November 2007), available at http://www.of.gov.uk/advice_and_resources/resource_base/consultations/deterrent.
 5. *PRIVATE ACTIONS IN COMPETITION LAW: EFFECTIVE REDRESS FOR CONSUMERS AND BUSINESS - RECOMMENDATIONS FROM THE OFFICE OF FAIR TRADING*, OFT916resp (November 2007) [hereinafter Recommendations] available at http://www.of.gov.uk/shared_of/reports/comp_policy/of916resp.pdf.

November 2007 of Recommendations to Her Majesty's Government for reform of the U.K. system⁶ and by the Commission in April 2008 of a White Paper.⁷

However, despite the “total underdevelopment” of the private actions system and the strenuous efforts made by many competition authorities, reform of the system remains a controversial subject. Challenges have been made both to the principle of a greater role for private actions in the European regime⁸ and to many of the ideas for change put forward by the OFT and the Commission.

The aim of this paper is to consider the case for reforming the European system of private actions. In doing so, we will identify the central changes which would need to be made if private actions are to play a more significant role in the competition regime. The paper will also assess the proposals made by the Commission and the OFT.

II. The Case for Private Enforcement

In essence, competition *enforcement*⁹ has two main functions:¹⁰ first to ensure that the prohibitions in the law are not violated (the “deterrent” effect); and second to provide corrective justice through compensation to victims (the “compensation” effect). In the United States, private actions clearly perform both functions.¹¹

However, according to the White Paper,¹² the Commission's primary objective in reforming the private actions regime in the EU is “to improve the legal conditions for victims to exercise their right under the Treaty to reparation of all

6. *Id.*

7. COMMISSION WHITE PAPER ON DAMAGES ACTIONS FOR BREACH OF THE EC ANTITRUST RULES, Brussels, 2.4.2008 COM(2008) 165 final [hereinafter White Paper on Damages Actions], COMMISSION STAFF WORKING PAPER ACCOMPANYING THE WHITE PAPER ON DAMAGES ACTIONS FOR BREACH OF THE EC ANTITRUST RULES, Brussels, 2.4.2008 SEC(2008) 404 [hereinafter Staff Working Paper on Damages Actions], and COMMISSION STAFF WORKING DOCUMENT—ACCOMPANYING DOCUMENT TO THE WHITE PAPER ON DAMAGES ACTIONS FOR BREACH OF THE EC ANTITRUST RULES: IMPACT ASSESSMENT, Brussels, 2.4.2008 SEC(2008) 405 [hereinafter “Impact Assessment accompanying the White Paper on Damages actions”].

8. See, for example, W. P. J Wils, *Should private enforcement be encouraged in Europe?*, WORLD COMPETITION 478 (2003).

9. For the purposes of this paper we draw a distinction between the *objectives* of competition law (for example, consumer welfare, SME protection, etc.) and the function of enforcement (which is essentially about *how* the objectives are achieved).

10. See, generally, W. P. J WILS, THE PRINCIPLES OF EUROPEAN ANTITRUST ENFORCEMENT (2005) [hereinafter Wils].

11. See, generally, C. A. JONES, PRIVATE ENFORCEMENT OF ANTITRUST LAW (1999); see also HOVENKAMP, *supra* note 3 at chapter 3.

12. White Paper on Damages Actions *supra* note 7 at 3.

damage suffered as a result of a breach of the EC antitrust rules.” Increased deterrence is mentioned almost in passing and appears to be viewed as no more than a useful by-product: “[i]mproving compensatory justice would therefore inherently also produce beneficial effects in terms of deterrence.”

The position taken in the White Paper on Damages actions runs contrary to the views set out by the Commission in its 2005 *Green Paper on Damages Actions for Breach of the EC Antitrust Rules*¹³ where it expressly stated that public enforcement and private actions “are part of a common enforcement system and serve the same aims: to deter anticompetitive practices forbidden by antitrust law and to protect firms and consumers from these practices and any damages caused by them.”¹⁴ More importantly, the weight placed on compensation appears to run counter to two recent judgments from the European Court of Justice (“ECJ”). In these cases the ECJ explicitly underlined the dual function of private actions, emphasizing in particular their deterrent effect.¹⁵ In its 2001 judgment *Courage and Crehan*¹⁶ the Court held that the “full effectiveness” of Article 81 and, in particular, the practical effect of the prohibition laid down in Article 81(1) would be put at risk if it were not open to any individual to claim damages for losses caused to him by a contract or by conduct liable to restrict or distort competition. The Court went on to explain that the existence of such a right strengthens the working of the Community competition rules and “discourages agreements or practices, frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community” (emphasis added). Five years later in 2006, the ECJ repeated, almost verbatim, paragraphs 26 and 27 of *Courage and Crehan* in its judgment *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni*.¹⁷

13. COMMISSION GREEN PAPER ON DAMAGES ACTIONS FOR BREACH OF THE EC ANTITRUST RULES, Brussels, 19.12.2005 COM(2005) 672 final [hereinafter Green Paper on Damages actions] and the COMMISSION STAFF WORKING PAPER ANNEX TO THE GREEN PAPER, Brussels, 19.12.2005, SEC(2005) 1732 [hereinafter Staff Working Paper Annex to the Green Paper].

14. *Id.*

15. Commentators are divided as to which of the deterrence and compensation functions would, as a matter of law, take precedence should there be a conflict between the two. In the authors' view the judgments in *Courage and Crehan*, Case C-453/99 [2001] ECR I-6314 and Joined Cases *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni*, C-295/04 to C-298/04 [2006] ECR I-6619 clearly indicate that the former would take precedence in case of a conflict. For a detailed exposition of this view see R Nazzini, in *Potency and Act of the Principle of Effectiveness: The Development of Competition Law Remedies in EC Law*, THE OUTER LIMITS OF EU LAW (C. Barnard & O. Odudu eds., forthcoming 2008). For an alternative view see P. Nebbia, *Damages Actions for the Infringement of EC Competition Law: Compensation or deterrence?*, 33(1) E.L. REV. 23-43 (2008).

16. See *supra* note 15 at para. 26, 27.

17. *Id.*

In our view the case for reforming the private actions system rests not only on the need to ensure the victims are properly compensated but also on the increased deterrent effects created by payments of compensation. Compensation and deterrence are distinct but interrelated. Further the payment of compensation adds a third potential benefit: enabling victims to recover losses more easily

IN OUR VIEW THE CASE FOR REFORMING THE PRIVATE ACTIONS SYSTEM RESTS NOT ONLY ON THE NEED TO ENSURE THE VICTIMS ARE PROPERLY COMPENSATED BUT ALSO ON THE INCREASED DETERRENT EFFECTS CREATED BY PAYMENTS OF COMPENSATION.

could help promote the benefits of competition law to the wider public, thereby increasing support for the regime (and the market economy) as a whole.

III. The “Deterrence” Case for Private Enforcement

Private actions can increase the deterrent effect of antitrust rules in at least three ways: first by increasing the resources available for prosecution of cases; second by improving the detection and conviction rate of the regime; and third by increasing the financial consequences of detection/conviction.

A. ENHANCING DETERRENCE BY INCREASING RESOURCES AVAILABLE FOR PROSECUTION OF CASES

The first clear benefit of private actions in terms of deterrence is that they increase the resources available for the prosecution of competition law infringements. As Philip Collins, Chairman of the OFT, has explained, “competition authorities cannot, and should not, take on every case. Our work has to be prioritized, limited taxpayers’ resources allocated accordingly, and the progress of cases speeded up.”¹⁸ The authors’ own anecdotal observations suggest that the OFT fully investigates less than 20 percent of all cases in which it has a reasonable suspicion that the competition rules have been breached.

The Commission has expressed a similar view on several occasions. For example, in the Staff Working Paper¹⁹ annexed to the Green Paper,²⁰ the Commission noted that “[p]rivate litigation can in particular deal with cases which the public authorities will not deal with, in particular due to resource constraints and other prioritization needs.” It is worth noting in this regard that the Commission typically takes five to ten infringement decisions a year. For an economy the size

18. Philip Collins, *Public and private enforcement challenges and opportunities*, 15, (Jun 6, 2006), available at http://www.of.gov.uk/shared_of/speeches/0306.pdf.

19. Staff Working Paper Annex to the Green Paper *supra* note 13.

20. Green Paper on Damages actions *supra* note 13.

of the EU, this seems unlikely to be the optimal level of enforcement even taking into account the cartels prosecuted by NCAs.

In the United States, by contrast, for every case brought by agencies, a further nine are brought in the courts. While it is unlikely that the same ratio between private and public enforcement could be achieved in the EU in the foreseeable future, reform of the private actions system should result in an increase in the number of well-founded private actions being brought. Research suggests that current detection rates in Europe are likely to be between 10 percent and 30 percent.²¹ As such, reform of the private actions system could bring significant additional resources into the competition enforcement regime in Europe as cases which are “prioritized out” or not detected by agencies are litigated in the courts.

Resource constraints, and the prioritization process it necessarily implies, not only mean that few infringement decisions are taken by competition authorities but also that they may be less likely to deal with certain types of cases. Competition agencies tend to put most of their enforcement resources into prosecuting a relatively small range of violations; what Hovenkamp²² has called the “antitrust core.” Today, this means the detection and prosecution of cartels and other “hardcore” restrictions. Even in the EU, which is widely regarded as significantly more interventionist than the United States in vertical and unilateral effect cases, infringement decisions in non-hardcore areas are rare.

This “enforcement gap” can be filled by private actions; indeed to a limited extent it is already happening. A recent review of private actions cases in Europe shows that between 2004 and 2008 over 60 percent related to vertical restraints while just under 25 percent involved abuses of dominance; less than 15 percent of cases concerned “hardcore” horizontal agreements.²³ Given the focus of public enforcement on the “antitrust core”, this data suggests that private actions can not only increase the resources available for the prosecution of infringements in general but also address competition concerns in areas not prioritized by public enforcers.

B. ENHANCING DETERRENCE BY INCREASING THE LIKELIHOOD OF DETECTION

As noted below, competition authorities often cannot impose optimal fines from a deterrence perspective. However, an increase in the detection rate can compensate for the inability of agencies to levy sufficiently high fines. Private actions

21. Joint Report *supra* note 2. See also the discussion in section VIII *infra*.

22. HOVENKAMP *supra* note 3 at 60.

23. *Supra* note 2.

can help because in many instances private parties are better placed than agencies to detect anticompetitive conduct and bring successful prosecutions. For example, in a study analyzing a group of 29 recent successful large-scale private antitrust cases in the United States, Lande and Davies found that more than 70 percent of the total damages recovered came from cases, 12 in total, that did not follow federal, state, or EU government enforcement actions. Of the 17 cases involving the government, the scope of the courts' findings was broader than the agencies' enforcement actions in nine cases. For example, in the vitamins price fixing cartel, the private plaintiffs were able to establish both that the conspiracy had lasted considerably longer than the U.S. Department of Justice ("DOJ") pleas had indicated and that it covered a far larger range of products. Similarly in the *Automotive Refinishing Paint* case, the government's investigation yielded no indictments, whereas private cases led to a recovery of \$67 million. In *Linerboard* the action by the Federal Trade Commission ("FTC") was against one firm for unilateral conduct while the private case involved a conspiracy. In *Polypropylene Carpet*, private plaintiffs obtained greater monetary recovery and prosecuted larger numbers of defendants than did the government. In *Relafen*, there was no federal case; the state governments intervened only after settlement of the private case. In *Specialty Steel*, private action led to a finding of an infringement of longer duration than did the public action.²⁴

The Lande and Davies data suggests that private claimants may be able successfully to prosecute cases that the public enforcers do not, or cannot, pursue. This view is supported by a joint report, drawing on the latest research and an almost-exhaustive survey of the literature, by the Centre for European Policy Studies, the Erasmus University Rotterdam, and Luiss Guido Carli.²⁵ This result, which some may find almost surprising, is easily explained if one considers that the right to damages gives rise to a private incentive to prosecute competition law violations. This, combined with the information about market behavior that potential claimants are likely to possess, can substantially increase the likelihood of detection and successful prosecution of infringements provided that the right to damages can be effectively enforced.

C. CONSEQUENCES OF DETECTION/CONVICTION

Another way in which private enforcement can increase deterrence is by increasing the cost of non-compliance to infringing undertakings.

In the United States and Canada, damages—as opposed to fines—represent the lion's share of the financial implications for undertakings that breach the

24. Lande & Davis, AN EVALUATION OF PRIVATE ANTITRUST ENFORCEMENT: 29 CASE STUDIES, interim report, Aug. 11, 2006, available at <http://www.antitrustinstitute.org/archives/files/550b.pdf>.

25. *Supra* note 2.

competition rules.²⁶ Given the relatively low numbers of cases in Europe, this suggests that private actions can make a significant contribution to increasing deterrence.

Competition authorities have acknowledged the impact of private action in this regard. For example, the OFT argued that “a more effective private actions system would increase the incentives of businesses to comply with competition law, since the potential incidence and magnitude of any financial liability to a competition authority and/or a claimant will increase. As these financial risks increase, so does (or should) the interest of those ultimately responsible for the governance of the business (especially supervisory boards and non-executive directors) or for supporting the business (including, for example, financiers and investor groups). In this way public enforcement and private actions are complementary.”²⁷

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However, the fact that private damages can have this effect does not mean that it is the optimal way to achieve deterrence. In this respect, it is frequently suggested in Europe that it would be better to enhance deterrence by increasing the level of fines imposed by competition authorities than to promote private actions.²⁸

The data we have reviewed suggests there may indeed be scope to increase fines in Europe. According to a recent study of cartel cases by Connor and Helmers (2006),²⁹ between 1990 and 2005 EU fines averaged less than 10 percent of the overcharges imposed by cartels. Other commentators have found that EU fines were in the 23 percent to 79 percent range.³⁰

In our view, increasing fines by the multiples required to optimize deterrence is not a realistic option for Europe. While fines in many jurisdictions are too low (the Commission implicitly accepted this when it amended its policy in this area in 2006³¹), for policy reasons they are unlikely ever to reach the levels required for optimal deterrence. For example, as Her Majesty’s Government indicated,

26. See Connor & Helmers, *Statistics on Modern Private International Cartels, 1990-2005*, (2007). Available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103610. [hereinafter Connor & Helmers].

27. PRIVATE ACTIONS IN COMPETITION LAW: EFFECTIVE REDRESS FOR CONSUMERS AND BUSINESS – DISCUSSION PAPER (OFT916, April 2007), available at http://www.of.gov.uk/shared_of/reports/comp_policy/of916.pdf.

28. See Wils *supra* note 10.

29. See Connor & Helmers *supra* note 26.

30. See Joint Report *supra* note 2.

31. GUIDELINES ON THE METHOD OF SETTING FINES IMPOSED PURSUANT TO ARTICLE 23(2) (A) OF REGULATION No 1/2003, OJ C 210/2 (2006).

“one option [to enhance deterrence] would be to increase the maximum level of fines significantly—perhaps six to ten times the existing maximum fines. The Government does not believe that fines at this level would be proportionate. A U.S. study indicates that more than half of firms convicted of price-fixing would go into liquidation if required to pay the optimal fine. This would not be fair. In many cases, the cartel will only have covered one aspect of the firm’s business.... Very large fines would damage innocent employees, shareholders, and creditors who have done nothing to harm consumers or break the law.”³²

The (understandable) political reluctance to impose fines at optimal deterrence levels finds expression in the caps imposed on the amount authorities can levy: in both the EC and the U.K. fines cannot exceed 10 percent of the convicted firm’s global turnover.³³ It is worth noting in this regard that the reluctance to impose high fines is not limited to Europe: the 1987 U.S. Sentencing Guidelines for criminal price fixing impose an upper limit of 80 percent of the guilty firm’s U.S. affected sales. Similarly Connor and Helmers report that median penalties worldwide were less than 21 percent of actual overcharges; in the United States and Canada median average fine ratios were in the range of 15 percent to 18 percent.³⁴

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As stated in the joint report by the Centre for European Policy Studies, the Erasmus University Rotterdam, and Luiss Guido Carli, damages awards in private actions can act as a complement to public enforcement in a second-best context, when the optimal solution is impossible to achieve. This is because damages, if they are not multiplied, are no more than

reparation of harm that is unlawfully caused. In addition, they are paid to those who have suffered harm rather than disappearing into State coffers. As such, they are likely to have greater legitimacy and political support. It is important in this regard, however, that any reforms to the private actions system are made in such a way as to ensure that unwarranted actions are minimized. How this is to be achieved is discussed below.

32. A WORLD CLASS COMPETITION REGIME, White Paper Cm 5233, (July 2001).

33. Under section 36(8) of the Competition Act 1998, '[n]o penalty fixed by the [OFT] under this section may exceed 10 percent of the turnover of the undertaking (determined in accordance with such provisions as may be specified in an order made by the Secretary of State.' See also COMPETITION ACT 1998 (DETERMINATION OF TURNOVER FOR PENALTIES) ORDER, 2000SI 2000/309. Under Article 23(2) of Regulation 1/2003, '[f]or each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10 percent of its total turnover in the preceding business year. Where the infringement of an association relates to the activities of its members, the fine shall not exceed 10 percent of the sum of the total turnover of each member active on the market affected by the infringement of the association.' See also Article 23(4).

34. See Connor & Helmers *supra* note 26.

IV. The “Compensation” Case for Private Enforcement

A. INFRINGEMENTS OF COMPETITION LAW CAUSE SIGNIFICANT HARM

The harm arising from infringements of competition law is significant.³⁵ It has been estimated recently that the total overcharge from EU-wide cartels could be between EUR 30 billion and EUR 138.7 billion.

Staggeringly, the above figures reflect only a portion of the cartels operating in Europe. According to a report by Connor (2005), penalties imposed by EU countries on 72 cartels in the period from 1990 to 2005 totaled \$1.9 billion in real 2005 dollars. Of the 72 cases in question, 67 were brought in Western European countries (totaling \$1.86 billion in real 2005 dollars) and five in Eastern EU Member States (totaling \$43 million). Against this background, the penalties imposed by the Commission in the same period in respect of 86 cartels were \$2.15 billion in real 2005 dollars (\$961.2 million for EU-wide cartels, plus EUR 1.188 billion for global cartels also sanctioned by the Commission). This means that, for the period from 1990 to 2005, penalties imposed at the Member State level were 88.4 percent of penalties imposed at EU level. If the assumptions on the detection rate and the ratio between penalties and overcharges used to calculate the figures in the above paragraph are applied to national cartels, the annual impact of national cartels would range from EUR 7.88 billion to EUR 122.55 billion.

It is clear, therefore, that even under conservative assumptions cartels can result in massive unlawful transfers from buyers to sellers. This is unjust. In addition, as a matter of law³⁶ European businesses and consumers have the right to recover compensation for the harm caused to them. In our view, the regime in Europe must be reformed to ensure that those who have been harmed by antitrust infringements can effectively exercise their right to recover damages.

B. PRIVATE ACTIONS AS THE MEANS OF OBTAINING COMPENSATION

Some commentators have argued that competition authorities are best placed to obtain compensation for victims.³⁷ We do not share this view. As EC Competition Commissioner Neelie Kroes has explained

35. This section relies heavily on the data in Joint Report *supra* note 2. Uncited data in this section are drawn from this report.

36. See the discussion at section II above.

37. See, for example, Wils *supra* note 10.

“... no matter how closely public intervention mirrors the concerns of consumers, no matter how effectively the fines that we impose punish and deter unlawful behaviour, the victims of illegal behaviour will still not be compensated for their losses. Public enforcement is simply not there to serve this goal. It is there to punish and deter illegal behaviour. It cannot make amends for the damage and suffering caused to consumers. Therefore, consumers should be empowered to enforce their rights themselves.”³⁸

This reflects the view that public enforcement, by its nature, is not designed to provide full compensatory redress to consumers either individually or collectively, whereas the civil justice system is designed for this purpose: “[u]nlike courts, which address and enforce the rights of individuals, the authorities act in the general interest.”³⁹

In 2006, Richard Macrory, a barrister and professor of economics, was asked by Her Majesty’s Government to look at regulatory regimes in the United Kingdom. He concluded⁴⁰ that the primary function of these regimes is to ensure compliance with statutory and other regulatory norms through punitive sanctions and deterrence; the aim of these regimes is not to compensate victims.

There are a number of reasons why we share the views of Kroes and Macrory. First, the standard of proof imposed on competition authorities may be higher than that imposed on claimants in the civil courts. Indeed, in the Regulatory Enforcement and Sanctions Act 2008, the UK Parliament made it more difficult for regulators (which include competition authorities for these purposes) to obtain compensatory awards than in the past—the regulator must now be satisfied that the criminal standard of proof is met before taking such action.⁴¹

38. MAKING CONSUMERS’ RIGHT TO DAMAGES A REALITY: THE CASE FOR COLLECTIVE REDRESS MECHANISMS IN ANTITRUST CLAIMS, at 3, (Sept. 11, 2007) available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/698&format=HTML&aged=0&language=EN&guiLanguage=en>.

39. ENHANCING ACTIONS FOR DAMAGES FOR BREACH OF COMPETITION RULES IN EUROPE at 2 (Sept. 22, 2005) available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/533&format=HTML&aged=0&language=EN&guiLanguage=en>.

40. Macrory, REGULATORY JUSTICE: MAKING SANCTIONS EFFECTIVE, (Final Report) (November 2006). Macrory’s six penalties principles are as follows: “A sanction should: 1. Aim to change the behavior of the offender; 2. Aim to eliminate any financial gain or benefit from noncompliance; 3. Be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction; 4. Be proportionate to the nature of the offense and the harm caused; 5. Aim to restore the harm caused by regulatory non-compliance, where appropriate; and 6. Aim to deter future non-compliance.”

41. REGULATORY ENFORCEMENT AND SANCTIONS ACT, Section 42(2) (2008).

Second, even if competition authorities were able to require compensation to be paid, obtaining such awards is likely to be a secondary consideration in the context of the regime. This is likely to be particularly acute in cartel cases where authorities in Europe are only required to prove that the “object” of the parties to the cartel was anticompetitive. To obtain redress, however, requires extensive analysis of the cartel’s effect. Gathering and assessing the relevant data is highly resource intensive and would likely add to the complexity and duration of the investigations; it is also likely to increase the litigation burden on authorities since such findings are likely to be challenged. In this situation obtaining redress—in other words, acting to protect private interests—could easily conflict with the competition authority’s main role of acting in the public interest. Unsurprisingly, the public interest is likely to be given priority.

Finally, and perhaps most importantly (as noted above), authorities simply do not have the resources to take on all cases which raise competition issues. As Commissioner Kroes has noted “[a]nyone harmed by unlawful action should not have to wait for a public body to intervene.”⁴²

This is not to suggest that authorities can never or should never seek redress for victims. It is conceivable, in certain cases, that compensation to those who have been harmed could be secured in the context of public enforcement—as part of a settlement, as an additional element of the leniency program, or as a spontaneous initiative by the perpetrator (who may then plead that the payment compensated for the harm, thereby mitigating any financial penalties).

However, public and private enforcement should be kept distinct. Public enforcement must focus its resources on the infringements which need the deterrent effect of public sanctions. This may be the case for secret cartels where the likelihood of detection would be lower in the absence of public enforcement or for cases establishing a new principle or modifying existing legal doctrine. Those who have been harmed by an alleged antitrust infringement must be free to pursue their claim in the courts regardless of whether a competition authority has taken action in the same matter. To the extent there are barriers to effective redress through the courts, these barriers must be removed or alleviated as far as possible. The answer is not to erect an additional barrier by limiting the right to damages for competition law infringements to redress that can be obtained in public enforcement proceedings.

C. BRINGING COMPETITION POLICY CLOSER TO CONSUMERS

Competition rules help maximize the welfare of society; benefits include lower prices, larger output, and increased productivity. However, these benefits are often

42. MORE PRIVATE ANTITRUST ENFORCEMENT THROUGH BETTER ACCESS TO DAMAGES: AN INVITATION FOR AN OPEN DEBATE, 3, (Mar. 9, 2006) available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/158&format=HTML&aged=0&language=EN&guiLanguage=en>.

MORE EFFECTIVE REDRESS FOR BUSINESSES AND CONSUMERS IS LIKELY TO BRING HOME TO THE GENERAL PUBLIC THE PURPOSE OF COMPETITION LAW AND THE BENEFITS THAT ITS EFFECTIVE ENFORCEMENT PRODUCES.

not ascribed by the general public to competition law and its enforcement. Too often, competition law and enforcement are seen as the preserve of a closed group of specialists operating in an esoteric area which is detached from everyday life. More effective redress for businesses and consumers is likely to bring home to the

general public the purpose of competition law and the benefits that its effective enforcement produces. This awareness may provide stronger legitimacy to the competition regime, which could result in enhanced effectiveness if support for robust enforcement action increases on the part of those who ultimately benefit.

The rest of this paper seeks to identify the central changes that are needed if private actions are to play a more significant role in the competition regime in the future and then assesses the proposals for reform put forward by the Commission and the OFT.

V. Basic Structure of Optimal Private Actions Regime

As discussed above, private actions are underdeveloped in Europe. However, both as a matter of law and as a matter of policy, they have an important dual role to play, first to increase the deterrence and effectiveness of the regime and second to secure compensation to those who have been harmed as a result of infringements. Increased deterrence and compensation almost always go hand in hand. However, when these two objectives conflict, both as a matter of law⁴³ and as a matter of policy, the objective of increasing deterrence and ensuring the effectiveness of the regime should prevail.

We believe that a well-functioning private actions regime should rest on the robust structuring and fine tuning of three main pillars: a clear and sound legal framework for collective actions, a European-wide solution to the problems of indirect purchasers' standing and passing-on, and coordination between public and private enforcement, ensuring the centrality of the former. This paper will focus on these three areas. The Commission White Paper and the OFT Recommendations put forward a number of other proposals regarding disclosure, the requirement to prove fault, and costs. However, a number of these proposals, while important, are less fundamental than our pillars. As regards costs, the European Union has a number of restrictions on funding legal services that constitute a major barrier to effective redress, particularly in those Member States where legal costs are very high.

43. *Supra* note 15.

However, it is likely that, if the three pillars of an effective private actions system mentioned above are in place, the market may be able to deliver adequate solutions to the current funding problems. A summary of the proposals put forward by the Commission and the OFT can be read in the Annex.

A. COLLECTIVE ACTIONS

1. Need for Opt-out Collective Action

The first pillar of an effective private actions regime is a robust legal framework for collective actions. Collective actions are procedural mechanisms bundling a number of individual claims in one set of proceedings.⁴⁴ They may be of two types. Opt-in collective actions (“opt-in actions”) are based on the principle that an action may only be brought on behalf of persons who have expressly consented to be represented in the proceedings. Opt-out collective actions (“opt-out actions”) are based on the principle that the action may be brought on behalf of an appropriately defined class of affected persons who will be bound by the outcome of the litigation unless, having been adequately informed of the proceedings, they state their intention not to be represented.

Generally, systems of civil procedure envisage mechanisms whereby two or more individual claims can be brought together so that common issues may be decided, once, in a way that binds all the claimants. Principles of judicial economy and avoidance of conflicting judgments make the availability of such a procedure highly desirable—if not necessary—in any legal system. More recently, however, collective actions have played an additional role in modern societies: ensuring access to justice and the effective enforcement of the law.⁴⁵

Competition infringements may harm a significant number of persons. An individual loss may be relatively small but the aggregate loss to all potential claimants may be large. Both of the national cases that gave rise to the references to the ECJ on the right to damages for breach of Article 81(1) are instances in which an infringement of competition law affected a significant number of businesses or consumers in a similar way. In the *Courage and Crehan* case, the issues related to the anticompetitive effects of a “beer tie” agreement.⁴⁶ A significant number of publicans were in the same position as Mr. Crehan as they had been lessees of tied houses during the relevant period and claimed to have suffered loss as a result. In the *Manfredi* case, a policy holder claimed damages against the

44. On collective actions, see C. HODGES, *MULTI-PARTY ACTIONS* (2001) and R. MULHERON, *THE CLASS ACTION IN COMMON LAW LEGAL SYSTEMS: A COMPARATIVE PERSPECTIVE* (2004) [hereinafter MULHERON].

45. MULHERON *supra* note 44 at 63 – 66.

46. A beer tie agreement is a clause in a contract between the tenant of a public house and its landlord that obliges the former to purchase almost all of its beer supply from either the landlord or a company nominated by it at the list price in force.

insurers alleging that the insurance premiums of compulsory civil liability insurance relating to accidents caused by motor vehicles had been artificially increased as a result of a cartel among the insurers.⁴⁷ A large number of motor vehicle owners in Italy were similarly affected. In cases such as these, given the

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size of each individual claim relative to the costs of bringing the claim, individual claimants may be effectively deterred from bringing proceedings even if they have a well-founded case. The result may be that—in the absence of an effective collective redress mechanism—when

the perpetrator of an infringement harms a great number of individuals but the individual loss is not sufficiently large to justify the costs and risks of bringing an individual claim, the perpetrator will escape liability for the loss it caused and those harmed will not be compensated.

In our view, the answer to this problem is the availability, within an appropriately designed legal framework, of an opt-out action. A system of collective redress relying exclusively on opt-in actions is inherently ineffective.⁴⁸ In the United Kingdom, where only opt-in representative actions are allowed, only one such action has been brought since the relevant provisions of the Competition Act 1998, as amended by the Enterprise Act 2002, entered into force on June 20, 2003. The level of take-up by consumers was low compared to the scale of the infringement. In the end, about 600 consumers joined the action, with aggregated damages only in the thousands of pounds. In that case, a follow-on action from the decision of the OFT in *Replica Football Kits*, the OFT estimated that the unlawful arrangements would have cost the consumer over 50 million pounds had the arrangements not been brought to an end.⁴⁹

Evidence from other jurisdictions points in the same direction. In France, an action brought by UFC-Que Choisir? on behalf of mobile phone users allegedly harmed by a cartel among mobile phone operators had a take-up of around 12,000 consumers. It would appear, however, that around 20 million consumers had been affected by the infringement.⁵⁰

47. The Autorità Garante della Concorrenza e del Mercato had established the infringement in its decision No 8546 (I377) of 28 July 2000, BOLLETTINO 30/2000 (2000).

48. See, for instance, R. Mulheron, REFORM OF COLLECTIVE REDRESS IN ENGLAND AND WALES: A PERSPECTIVE OF NEED, Civil Justice Council of England and Wales' research paper submitted 2008, available at <http://www.civiljusticecouncil.gov.uk>. at the website of the Civil Justice Council of England and Wales [hereinafter Mulheron Reform].

49. U.K. OFFICE OF FAIR TRADING, PRIVATE ACTIONS IN COMPETITION LAW: EFFECTIVE REDRESS FOR CONSUMERS AND BUSINESS (OFT Discussion Paper, No. 916resp, Nov. 2007).

50. Transcript of the OFT's public hearing on private actions (Sept. 24, 2007). For more information about the UFC-Que Choisir? action see www.cartelmobile.com.

One can generalize from these facts that, with opt-in collective action models, the perpetrator of a competition law infringement is not at risk of having to compensate for the full harm it caused. Minimizing this risk not only impairs the right to damages from acting as a deterrent against engaging in anticompetitive conduct, but also fails to deliver compensation to those who have been harmed by the conduct in question.

An opt-out action, on the other hand, has clear benefits both in terms of achieving deterrence and in terms of securing compensation. Because opt-out levels are relatively low, opt-out collective actions optimize litigation economies of scale, avoid (to a significant extent) duplicative litigation, and minimize the risk of inconsistent judgments. Therefore, if properly designed and managed, opt-out collective actions can deliver significant benefits to society in terms of deterring anticompetitive behavior, thus promoting consumer welfare and productivity at the lowest possible cost. The counterfactual to an opt-out collective action is that the perpetrators of the infringement are generally not at risk of the entire loss they caused. As a consequence, deterrence is low. The other possible, but unlikely, counterfactual is that all claimants sue and are compensated in individual or opt-in actions. In such a scenario, the deterrent effect is achieved but at a higher cost to society because the aggregate cost of individual actions or opt-in collective actions is likely to be higher than the cost of an opt-out action. In terms of compensation, it must be recognized that, if the individual loss is small but the total harm is large and the issues to be litigated are complex, the most likely counterfactual to an opt-out action may be that private actions (whether on an individual basis or as opt-in collective actions) are either not brought at all or are brought by or on behalf of a small minority of those who have been harmed. In these cases, opt-out actions are necessary to ensure that those who have been harmed as a result of competition law infringements obtain the compensation they are entitled to.

2. Possible Objections to Opt-out Collective Actions

Notwithstanding the clear benefits of opt-out collective actions, there have been a number of objections to this model. Broadly, they fall under the following categories: a) opt-out collective actions do not achieve compensation since compensation always presupposes that the claimant opts-in at some point; b) opt-out collective actions give rise to a disproportionate risk of abuse because, given the potentially very significant damages at stake, the defendants are under pressure to settle even unmeritorious cases; c) opt-out collective actions may raise problems under Article 6 of the European Convention of Human Rights and under the constitutional provisions of some Member States; and d) opt-out collective actions are not consistent with the legal traditions of the Member States.

We will briefly deal with these objections in turn.

Compensation. The argument that an opt-out collective action is not of a compensatory nature is largely fallacious. Often, the only viable vehicle to pursue a significant number of small claims raising complex issues of law and fact is to aggregate them so that a critical mass is achieved making the action worthwhile in terms of attracting the necessary funding. Because of the low take-up levels of opt-in collective actions, the only mechanism to achieve this objective in certain cases is an opt-out collective action. The counterfactual to the availability of an opt-out collective action is often no compensation at all. An opt-out collective action plays a fundamental role in ensuring access to justice in this category of cases. Furthermore, even if the class members who ultimately claim under a settlement or judgment are only a percentage of all the class members, compensation in an opt-out collective action would still be superior for those who do claim under the settlement or judgment if the claims in question would not have been viable as individual actions or opt-in

OPT-OUT ACTIONS PROMOTE BOTH PRIVATE ACTION FUNCTIONS. THEY DELIVER COMPENSATION IN CASES WHEN, IN THE ABSENCE OF AN OPT-OUT ACTION, NO CLAIM WOULD BE BROUGHT. AT THE SAME TIME, THEY INCREASE DETERRENCE BY PLACING THE PERPETRATORS OF COMPETITION LAW INFRINGEMENTS AT RISK OF HAVING TO COMPENSATE THE FULL HARM CAUSED.

collective actions. Compensation is also achieved when any unclaimed funds are applied to the benefit of the category of consumers or businesses harmed by the infringement in question under the so-called *cy pres* distribution. While, by their own choice, some members of the class do not recover damages, the society sector which had to bear the brunt of the infringement receives tangible benefits.

In any event, arguments about the allegedly non-compensatory nature of opt-out actions become otiose when one considers that private actions have a dual function: not only to compensate those who have been harmed but also to deter anti-competitive behavior, thus enhancing long-term social welfare and productivity for the benefit of the society as a whole. In terms of deterrence, if the choice is between making the perpetrators pay for the full harm caused or letting them benefit from the barriers faced by claimants in aggregating claims in an opt-in collective action or bringing them on an individual basis, in our view the former must be preferred. In this way, opt-out actions promote both private action functions. They deliver compensation in cases when, in the absence of an opt-out action, no claim would be brought. At the same time, they increase deterrence by placing the perpetrators of competition law infringements at risk of having to compensate the full harm caused.

Risk of Abuse. It is often claimed that an opt-out collective action is open to abuse. The argument is as follows: Because an opt-out collective action can potentially produce a substantial level of damages, defendants will often find it preferable to settle even unmeritorious cases rather than running the risk of going to trial. The argument might have some force in the United States, where the claimant not only has an automatic right to treble damages but also the con-

stitutional right to a jury trial. In a trial by jury, the verdict might be less predictable and, in some cases, possibly, biased against the defendant. The argument, even if it were true in the United States, has much less force if the trial is by judge alone. In fact, in England and Wales the evidence would suggest that the chances of a claimant succeeding on the merits are not high. In the vast majority of English and Welsh competition cases tried on their merits, the claimants failed, including where cases were clearly not speculative or unmeritorious. Awards of damages have been very rare.

Furthermore, it is possible to design a system which has appropriate safeguards against any risk of abuse. For instance, a preliminary stage may be designed in which a number of threshold requirements must be fulfilled before an opt-out collective action is allowed to proceed.⁵¹ It is important, however, that such safeguards do not unduly restrict the availability of opt-out collective actions or disproportionately raise their costs.

ECHR, Article 6 and National Constitutional Fair Trial Provisions. It is sometimes argued that an opt-out collective action may raise issues under Article 6 of the European Convention on Human Rights (“ECHR”) and may be incompatible with national constitutional fair trial provisions. The analysis focuses on Article 6 of the ECHR but it is submitted that it should be possible to arrive at the same conclusion in respect of the relevant national constitutional fair trial provisions.

The problem appears to be that those who do not opt-out of the action in the prescribed way are bound by the outcome of the litigation. This—it is argued—may be in conflict with the right to access to a court (a right enshrined in Article 6 of the ECHR) because those who did not explicitly express their consent to participate in the action are nevertheless bound by any settlement or judgment, preventing them from bringing an individual claim if and when they wish. This argument is misconceived. Those who do not exercise their right to opt-out of the action have full access to a court. By not opting-out, they choose to participate in the action with all the resultant consequences in terms of both the binding effect of any judgment or settlement and the inability to bring further proceedings on the same or, in certain circumstances, related cause of action. To the extent that the need to opt-out of an action brought by another person may be seen as a lim-

51. These may include a certain minimum threshold relating to the allegations and evidence provided at pleading stage and need not be specific to opt-out actions: see, in the U.S., *Bell Atlantic v. Twombly*, 127 S Ct 1955, 1964 (2007) and, in England and Wales, CPR, 3.4 (on the court’s power to strike out a statement of case that discloses no reasonable grounds for bringing or defending the claim) and 24.2 (on the grounds for summary judgment if the claimant has no reasonable prospect of succeeding on the claim or issue). See also the White Paper on Damages actions *supra* note 4 at 5, which proposes that the conditions for a disclosure order should include that “the claimant has **presented all the facts and means of evidence** that are **reasonably available** to him, provided that these show PLAUSIBLE GROUNDS to suspect that he suffered harm as a result of an infringement of competition rules by the defendant.” (emphasis in the original).

itation of an unfettered right to court access, it need only be stressed that such a right is never unqualified. Under Article 6 of the ECHR, not all access restrictions to a court are an infringement of the right to a fair trial.⁵² The compatibility of opt-out collective actions with Article 6 of the ECHR depends on how the system is designed and the effectiveness of the publicity requirements supervised or

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mandated by the court. There is nothing in the basic features of an opt-out collective action which makes it incompatible with Article 6 of the ECHR.

Legal Traditions of the Member States.

Some argue that opt-out collective actions are not embedded in the legal traditions of the Member States.⁵³ This argument rests on a strong path-dependence assumption, essentially denying the possibility of any legal reform which is not an incremental change to the existing legal framework. Even conceding that this is the only scope for legal reform in the European Union, it must be stressed that a number of Member States have adopted opt-out collective redress systems, including Denmark,⁵⁴ Portugal,⁵⁵ Spain,⁵⁶ the Netherlands,⁵⁷ and Norway.⁵⁸ In England and Wales, the representative party action has long been recognized⁵⁹ and the Civil

52. *Golder v. United Kingdom* EHRR 524 (1975) and *Ashingdane v. United Kingdom* 7 EHRR 528 (1985).

53. For a judicial *dictum* see *Campos v. Kentucky & Indiana Terminal Railroad Co.*, 2 Lloyd's Rep 459 (1962).

54. Lov nr 181 28.2.2007 (Act no 181 of Feb. 28, 2007).

55. See RIGHT OF PROCEEDING, PARTICIPATION AND POPULAR ACTION, Law No 83/95 of 31st August, and ESTABLISHING THE LEGAL SYSTEM APPLICABLE TO CONSUMER PROTECTION, Law No 24/96 of 31st July, discussed in Mulheron Reform *supra* note 48 at 97 – 101.

56. Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil (BOE núm 7, de 8 de enero del 2000, pp 575-728. Corrección de errores BOE núm 90, de 14-04-2000, p 15278 y BOE núm 180, de 28-07-2001, p 27746) (LEC). See, in particular, LEC, Libro I, Título I, Capítulo 1, Artículo 6 Capacidad para ser parte: Podrán ser parte en los procesos ante los tribunales civiles: ... 7.º Los grupos de consumidores o usuarios afectados por un hecho dañoso cuando los individuos que lo compongan estén determinados o sean fácilmente determinables. Para demandar en juicio será necesario que el grupo se constituya con la mayoría de los afectados.

57. Wet van 23 juni 2005 tot wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de collectieve afwikkeling van massaschades te vergemakkelijken (Wet collectieve afwikkeling massaschade), Staatsblad 2005, 340.

58. ACT RELATING TO THE LITIGATION PROCEDURE IN CIVIL DISPUTES (THE DISPUTE ACT), no 6, LOV-1915-08-13-6, (August 13, 1915). See C. Bernt-Hamre, CLASS ACTIONS, GROUP LITIGATION AND OTHER FORMS OF COLLECTIVE LITIGATION IN THE NORWEGIAN COURTS (National Report prepared for the conference 'The Globalisation of Class Actions', Oxford, (Dec.12-14, 2007), available at http://www.law.stanford.edu/display/images/dynamic/events_media/Norway_National_Report.pdf).

59. CPR, r 19.6.

Procedure Rules (“CPR”) provide for group litigation orders.⁶⁰ As these examples demonstrate, it is clearly possible to design an opt-out collective action model which is compatible with the legal systems of the Member States.

B. INDIRECT PURCHASERS’ STANDING AND PASSING-ON DEFENSE

The extent to which there should be any limitation on indirect purchasers’ standing and the availability of the passing-on defense is one of the most controversial issues in relation to private actions in competition law.

In the United States, the question is far from settled. There has been a considerable backlash against the ruling of a majority of the U.S. Supreme Court in *Illinois Brick Co v Illinois*,⁶¹ pursuant to which claims by indirect purchasers were precluded under federal law. A majority of U.S. states have now enacted ‘*Illinois Brick Repealer*’ statutes to preserve indirect purchasers’ rights to sue in state courts. In many of those states, the Supreme Court’s earlier majority ruling in *Hanover Shoe v United Shoe Mach*,⁶² pursuant to which the passing-on defense was excluded, has also been overturned. The Antitrust Modernization Commission recommended that Congress overrule the Supreme Court’s decisions to the extent necessary to allow both direct and indirect purchasers to recover.⁶³

The argument for disallowing the passing-on defense and excluding the indirect purchaser’s standing rests entirely upon a deterrence rationale. This rationale argues that direct purchasers, as compared to indirect purchasers, are the best placed to sue because of their knowledge of the market, access to evidence, and relative ease of proving the overcharge. However, if direct purchasers have to litigate the issue of whether they passed on any overcharge, in full or in part, to purchasers further down the supply line, this would deter them from suing in the first place. Since they are the best placed to sue and, in most circumstances, indirect purchasers will not bring an action, allowing the passing-on defense undermines the effectiveness of the regime. If the passing-on defense is disallowed, a necessary corollary would appear to be the exclusion of the standing of indirect purchasers in order to avoid multiple recoveries in respect of the same harm.

WHILE THE DETERRENCE-BASED ARGUMENTS FOR DISALLOWING THE PASSING-ON DEFENSE AND EXCLUDING THE STANDING OF INDIRECT PURCHASERS ARE UNDOUBTEDLY POWERFUL, IT IS UNCLEAR WHETHER THESE MEASURES WOULD ACHIEVE ANY OF THE INTENDED BENEFITS.

60. CPR, rr 19.10 – 19.15. Rule 19.12 envisages circumstances in which a judgment or order may bind the parties to a claim which is entered on the group register after the order or judgment was made.

61. *Illinois Brick Co. v. Illinois*, 431 US 720 (1977).

62. *Hanover Shoe v. United Shoe Mach.*, 392 US 481 (1968).

63. See ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS, April 2007, available on www.amc.gov/report_recommendation/toc.htm.

While the deterrence-based arguments for disallowing the passing-on defense and excluding the standing of indirect purchasers are undoubtedly powerful, it is unclear whether these measures would achieve any of the intended benefits. Direct purchasers may, for example, share with their suppliers the benefits of an overcharge or may attach a greater importance to maintaining good commercial relations with their suppliers. These considerations would be less likely to apply to indirect purchasers. The threat of action by indirect purchasers, therefore, may well be crucial in terms of achieving deterrence. Nor should one underestimate the deterrent effect of the threat of private actions by a wider group of claimants, including both direct and indirect purchasers. Finally, the *Courage and Crehan* and *Manfredi* cases suggest that EC law itself requires that, in order to ensure the effective enforcement of the EC competition rules, all persons harmed by an infringement of Articles 81 and 82 should be able to recover their loss provided that the other requirements to obtain compensation are met.⁶⁴ Last but not least, excluding indirect purchasers would run counter to the compensatory function of private actions. For all of these reasons, until further research is done, any limitation on the standing of consumers and other end users would not be appropriate at this stage.

It is, however, important that ‘passing-on’ does not become a powerful shield for defendants to escape liability and, as a result, a disincentive for direct or indirect purchasers to bring an action. To the extent this can be achieved by reforming the procedural and evidential rules while at the same time preserving both the standing of indirect purchasers and the possibility for defendants to prove that the claimant passed on the overcharge to its customers this would appear to be preferable to reforming the substantive rules on liability.

C. INTERACTION BETWEEN PUBLIC AND PRIVATE ENFORCEMENT: LENIENCY

As discussed above, private actions have a dual function: to increase deterrence and deliver compensation. While these two functions almost always go hand in hand, there may be cases in which they conflict. In such cases, our view is that the function of increasing deterrence should prevail both as a matter of law and as a matter of policy. This means that the right to damages may have to be limited whenever its compensatory function conflicts with its deterrent function. One such area is the interaction between public and private enforcement. Such an interaction may occur in different ways. In this paper, we focus on the interaction between leniency programs and private actions.

Leniency programs are designed to reward, with either immunity from fines or reduced fines, undertakings that reveal to the competition authorities the existence

64. *Courage Ltd v. Bernard Crehan*, Case C-453/99 ECR I-6297, paragraphs 26 - 28 (2001) and *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA*, Case C-295/04 ECR I-6619, paragraphs 59 – 61 (2006). At the same time, national courts can take steps to ensure that claimants are not unjustly enriched: *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA*, paragraph 94.

of a cartel or provide useful evidence in the course of an investigation.⁶⁵ Leniency programs are generally seen as an essential tool in the fight against cartels.⁶⁶

The decision of an undertaking to apply for leniency is a complex one. The likelihood of detection and the likely amount of any adverse financial consequences are the main factors taken into account. As the incentives for individuals who may be personally liable are not aligned with the incentives of the undertaking, the threat of personal sanctions, either of a criminal⁶⁷ or civil law nature,⁶⁸ increases the undertaking's uncertainty as to whether the cartel will be uncovered. On the other hand, from the undertaking's point of view, the sanction is not only the fine that may be imposed by a competition authority but also any damages that may be recoverable by those who have been harmed by the infringement. As the latter increase, the relative benefits of any reduction or immunity from public law fines decrease. Furthermore, an undertaking in receipt of leniency is at risk of being the primary, and perhaps the sole, target of a private action. The reasons are largely practical. First, a claimant would generally assume that the leniency applicant is likely to have important or even crucial evidence in his possession that may be obtained through disclosure or, in civil law systems, through a court order relating to specific documents. Second, it is tactically very difficult for a leniency applicant to dispute its liability in court even if the relevant competition authority has not yet made an infringement decision or, technically, the decision of the competition authority would not bind the court. Finally, if the relevant competition authority has not yet made a decision, the claimant will assume that the leniency applicant is likely to be an addressee of any infringement decision while there may be some uncertainty as regards other parties being investigated. If the leniency applicant is jointly and severally liable with the other cartellists, there is a strong incentive for the claimant to sue the leniency applicant and, possibly, only the leniency applicant⁶⁹ for the entire loss.

65. For an overview of the leniency policy see *FIGHTING HARDCORE CARTELS: HARM, EFFECTIVE SANCTIONS, AND LENIENCY PROGRAMMES* OECD (2002).

66. See the *COMMISSION NOTICE ON IMMUNITY FROM FINES AND REDUCTION OF FINES IN CARTEL CASES*, OJ C 298/11, at paragraphs 1 – 5 (2006). As of July 1, 2007, competition authorities in 24 Member States operated a leniency program. The U.S. Department of Justice, Antitrust Division, operates a Corporate Leniency Policy and a Leniency Policy for Individuals. For an overview of the U.S. system see R. NAZZINI, *CONCURRENT PROCEEDINGS IN COMPETITION LAW: PROCEDURE, EVIDENCE AND REMEDIES* 415-417 (2004) [hereinafter NAZZINI].

67. See, in the U.K. Enterprise Act 2002, ss 188 and 189.

68. In the U.K., the disqualification of company's directors under the Company Directors Disqualification Act 1986.

69. If the leniency applicant is solvent and able to satisfy the entire claim, the claimant would not have an incentive to sue the other cartellists as he would be exposed to adverse costs orders in relation to more than one defendant. The costs of the litigation are also likely to be higher the more defendants are jointly sued in the same action.

While the increased likelihood of private litigation and the increased magnitude of damages at stake, especially in opt-out actions, may appear at first sight to lower the incentives to apply for leniency, a leniency application can remain very attractive even if the undertaking in question factors in potential damages. Private actions and the threat of personal sanctions increase the likelihood of detecting the cartel. If the cartel is uncovered and the undertaking has not made a timely application for leniency, the potential liability would include the entire amount of the fine plus any liability in damages.

In our view, the theoretical arguments and the anecdotal evidence suggest that an effective private actions regime per se is not likely to have a negative impact of the effectiveness of the leniency programs. However, there may be specific aspects of the civil litigation system that conflict with specific aspects of the leniency regime. Experience has shown that tension may arise when public enforcement proceedings are conducted in parallel with private actions. The

ANY REFORMS AIMED AT PROMOTING PRIVATE ENFORCEMENT, ESPECIALLY IF OPT-OUT ACTIONS ARE INTRODUCED, SHOULD ADEQUATELY ADDRESS ANY NEGATIVE IMPACT ON THE EFFECTIVENESS OF THE LENIENCY REGIME. IN OUR VIEW, THIS IS AN AREA IN WHICH THE DETERRENT FUNCTION OF PRIVATE ACTIONS PREVAILS OVER THE COMPENSATORY FUNCTIONS.

claimant may be entitled to disclosure from the defendant. Such disclosure may extend to documents submitted by a leniency applicant to a competition authority. Another tension may arise if the leniency applicant, and, in particular, the first applicant that qualifies for full immunity (“immunity recipient”), is jointly and severally liable with the other cartelists and likely to be the primary or sole target of private actions. In light of these two areas of potential tension between the private actions regime and the leniency program, any reforms aimed at promoting private enforcement, especially if opt-out actions are introduced, should adequately address any negative impact on the effective-

ness of the leniency regime. In our view, this is an area in which the deterrent function of private actions prevails over the compensatory functions, in that precedence should be given to the protection of the integrity of the public enforcement process.

The following sections analyze the OFT’s and the Commission’s proposals against the benchmark of the principles and models set out in this section.

VI. Proposals Relating to Representative Actions

This section examines the representative actions proposals put forward by the Commission and the OFT against the benchmark of the dual function of private actions, namely to increase deterrence and secure compensation.

The Commission and OFT proposals both recommend an opt-out representative action. There is an emphasis on appropriate safeguards, one of which is the adoption of an ‘ideological claimant’ model designed to act as a filter to avoid speculative litigation.

The Commission proposes to allow “representative actions, which are brought by qualified entities, such as consumer associations, state bodies, or trade associations, on behalf of identified or, in rather restricted cases, identifiable victims”.⁷⁰ Under the Commission’s “ideological claimant” model, only “qualified entities” (rather than a class member) have standing to bring an action on behalf of those who have been harmed. Such “qualified entities” could be designated, according to the Commission, either on a permanent basis or on an ad hoc basis. Entities designated on a permanent basis are those representing “legitimate and defined interests” which meet criteria to ensure that abusive litigation is avoided.⁷¹ Such entities would be able to bring actions on behalf of identified or identifiable persons, even if not their members.⁷²

Ad hoc designated entities are entities “whose primary task is to protect the defined interests of their members, other than by pursuing damages claims (e.g. a trade association in a given industry) and which give sufficient assurance that abusive litigation is avoided”.⁷³ Under the Commission’s proposals, ad hoc designated entities would be able to bring actions only on behalf of their members.

Actions on behalf of identified victims could be brought on an opt-out basis, i.e. the victim is represented in the action unless he states his intention not to be bound by the outcome of the litigation. Actions on behalf of identifiable victims can only be brought as opt-out collective actions. If the victims are not identified, by definition they cannot have given their express consent to be bound by the outcome of the litigation.

In its 2007 Recommendations to HM Government, the OFT recommended that representative bodies should be able to bring actions on behalf of either named consumers or businesses or consumers or businesses at large. The OFT does not define the ‘representative body’ but, like the Commission, proposes that ‘representative bodies’ could be either designated in advance on a permanent basis or by the court on an ad hoc basis.

Unlike the Commission, the OFT does not recommend that only representative bodies designated in advance on a permanent basis should be able to bring

70. White Paper on Damages actions *supra* note 7 at 2.1.

71. Staff Working Paper on Damages actions *supra* note 7 at para. 52.

72. White Paper on Damages actions *supra* note 7 at 4.

73. Staff Working Paper on Damages actions *supra* note 7 at para. 53.

opt-out actions on behalf of identifiable victims. Nor does the OFT limit ad hoc representative bodies to representing their members. Therefore, under the OFT's proposals, any representative body could bring an opt-out action if designated in advance or given permission to bring the action on an ad hoc basis.

In the OFT's Recommendations, the emphasis is on judicial discretion and case management. In particular, the OFT recommended that it should be open to the judge to decide, in the circumstances of each case but on the basis of appropriately defined criteria and filters, whether given claims should be brought as a representative action on behalf of consumers/businesses at large, as a representative action on behalf of named consumers/businesses, or as individual actions.⁷⁴

Comparing the Commission's proposals with the OFT's recommendations, it appears that under the Commission's proposals, the availability of opt-out actions may be unduly restricted. This would be the case, for instance, if an action could only be brought on behalf of identifiable victims. If there is no representative body designated on a permanent basis willing to bring the action, the perpetrators of the infringement will not be at risk of having to compensate the full harm they caused. No other body would be able to bring an action. Furthermore, under the 'ideological claimant' model, no individual person has standing to bring an action on behalf of a class of similarly affected persons. The result may well be that no action is brought at all, which would impair both the deterrent and the compensatory function of private actions and, ultimately, the effectiveness of the EC competition rules.

Under the OFT's proposals, representative bodies which have not been designated on a permanent basis are not automatically prevented from bringing such an action. They would still be able to seek the court's permission to bring an opt-out action. However, while not defining the criteria for designation or permission,

IN VIEW OF THE POTENTIAL LIMITATIONS OF THE "IDEOLOGICAL CLAIMANT" MODEL, IT CAN BE ARGUED THAT THE CLASS ACTION MODEL IS BETTER SUITED TO ACHIEVING BOTH OBJECTIVES OF PRIVATE ACTIONS, NAMELY COMPENSATION AND DETERRENCE.

it is clear by the adoption of the "representative body" terminology that the OFT also recommends an "ideological claimant" model. Therefore, there is still a risk in individual cases that no representative body may be prepared to bring an action. Unlike under the class action model, an individual person would not have the standing to bring a class opt-out action.

In view of the potential limitations of the "ideological claimant" model, it can be argued that the class action model is better suited to achieving both objectives of private actions, namely compensation and deterrence. To the extent that the "ideological claimant" model is adopted as a safeguard against abusive litigation, it can be further argued that, if a permission stage

74. Recommendations *supra* note 5 at para. 7.33.

is to be part of any opt-out action, this should act as a sufficiently robust filter and render any further limitation on standing superfluous. However, it must be recognized that opt-out actions are still controversial in the EU Member States and there is still significant opposition to their introduction. The “ideological claimant” model would appear to be a reasonable compromise given the current political climate and the current level of experience in the EU with collective redress mechanisms. It is clear, however, that limiting standing to ideological claimants may restrict the availability of opt-out actions in some meritorious cases. There does not appear to be a need for an even more restrictive approach which would limit the ability to bring an action on behalf of identifiable victims or non-members only to representative bodies designated in advance and on a permanent basis. In this respect, the OFT’s recommendations are more suited to furthering both the deterrent and the compensatory function of private actions.

It can also be noted that proposals on collective redress are now emanating from a number of sources.⁷⁵ In the long term, it may be that a consensus builds that the optimal model is an opt-out action with unrestricted standing of any member of a class of similarly affected persons. Provided that the sufficiency of robust judicial control to act as an effective safeguard against speculative claims at the permission stage is borne out by experience, this model appears to be the most suited to achieving the effective enforcement objective of private actions in EC competition law. The adoption of such a mechanism in the short to medium term is, however, unlikely.

VII. Proposals Relating to Indirect Purchasers’ Standing and Passing-On Defense

In its Recommendations, the OFT stated that the issues of the passing-on defense and the standing of indirect purchasers would be best dealt with at the EC level. In particular, inconsistent treatment of the passing-on issue at the Member State level would undermine the effectiveness of damages actions regimes throughout the EU.

The White Paper makes two main proposals:

- The passing-on defense should be available to defendants to enable them to resist an overcharge compensation claim where the claimant passed on that overcharge to a subsequent purchaser. This would prevent the unjust enrichment of purchasers who passed on the overcharge and would avoid multiple compensations by the defendant. The burden of proof should be imposed on the defen-

75. In August 2008, the Civil Justice Council of England and Wales recommended the introduction of a general opt-out collective action: IMPROVING ACCESS TO JUSTICE THROUGH COLLECTIVE ACTIONS’ : A SERIES OF RECOMMENDATIONS TO THE LORD CHANCELLOR, available on www.civiljusticecouncil.gov.uk/.

dant and the standard of proof should not be less than the standard imposed on the claimant to prove the loss.

- Indirect purchasers should be entitled to rely on a rebuttable presumption that the illegal overcharge was passed on to them in its entirety.

The Commission's proposals accord with the dual objective of increasing deterrence and ensuring compensation. Indirect purchasers would be entitled to rely on a presumption of passing-on that would both facilitate their claims and add to the deterrent effect of indirect purchasers' actions. The defendants' ability to rely on the passing-on defense is consistent with the principle that effective deterrence is achieved through full compensation and not multiple damages. However, giving the defendants the burden of proving passing-on should address, at least in part, concerns that allowing the passing-on defense may weaken the deterrent effect of private actions for breach of Articles 81 or 82.

Under the Commission's proposals, in the absence of a pan-European consolidation mechanism of private actions by direct and indirect purchasers, the risk of inconsistent judgments and multiple recovery of the same harm cannot be excluded. It is conceivable that, in an action brought by direct purchasers, the defendant is unable to prove that the overcharge has been passed-on to indirect purchasers. In a separate action, possibly in another Member State, indirect purchasers may rely on the presumption that the overcharge has been passed on to them. If the defendant is unable to rebut such a presumption, he may have to compensate the indirect purchasers for the same overcharge which had been already compensated in the former action. In terms of deterrence, this may be a risk worth taking if the counterfactual of placing on the direct purchasers the burden of proving a lack of passing-on or placing on indirect purchasers the burden of proving the actual passing-on of the overcharge from their sellers would undermine the deterrent effect of private actions in EC competition law.

The White Paper recognizes the limitations resulting from the lack of a European-wide consolidation mechanism, stating that

“in the case of joint, parallel or consecutive actions brought by purchasers at different points in the distribution chain, national courts are encouraged to make full use of all mechanisms at their disposal under national, Community and international law in order to avoid under- and over-compensation of the harm caused by an infringement of competition law.”⁷⁶

76. White Paper on Damages Actions, *supra* note 7 at 2.6.

If there were an effective and widely-available method of consolidating cases, so that a defendant is likely to be facing only one action from both direct and indirect purchasers rather than multiple actions, there would be no need for the burden of proof and presumption of passing-on proposals. Once the overcharge had been proven, the defendant would be liable for damages arising out of that overcharge, but determining how much of the overcharge was passed on to various levels in the distribution chain would be for the various claimants to resolve in apportioning the damages. Concerns relating to multiple compensation claims would not arise. However, at this stage, the solutions put forward by the Commission in relation to indirect purchasers' standing and passing-on appear reasonable, given that:

- There is no evidence that allowing the passing-on defense and giving standing to indirect purchasers impair the deterrent effect of private actions. If there were such evidence, the issue should be reconsidered in light of the dual function of the right to damages under Article 81 or 82, which is not only to secure compensation but also to increase deterrence and ensure compliance, thus promoting social welfare and productivity in the long term;
- It seems unlikely that, in the short term, a pan-European mechanism for consolidation of cases brought by direct and indirect purchasers and apportionment of damages among direct and indirect purchasers can be introduced.

On both these issues, further research and work are needed before definitive answers to the complex questions of passing-on and indirect purchasers' standing can be given.

VIII. Proposals Relating to Leniency

Both the Commission⁷⁷ and the OFT⁷⁸ moved to safeguard the effectiveness of leniency programs from increased private litigation by proposing to exclude using leniency documents in civil litigation. This prevents the leniency applicant from being worse-off in civil litigation than a non-leniency applicant merely as a result of the leniency process⁷⁹ that requires the leniency applicant to produce written corporate statements and witness statements explaining in detail the functioning of the cartel and admitting its participation in the anti-competitive arrangements.

77. White Paper on Damages Actions, *supra* note 7 and Staff Working Paper on Damages *supra* note 7 at para. 287 – 302. This option was put forward in the Green Paper on Damages actions *supra* note 13, option 28.

78. Recommendations *supra* note 5 at para. 9.5.

79. NAZZINI *supra* note 66 at Ch. 13.

Another set of proposals relates to the removal of joint and several liability for the leniency applicant (probably limited to the undertaking that receives full immunity) so that it is only liable for the harm caused to the direct and indirect purchasers of its own goods or services.⁸⁰ These proposals are intended to preserve the incentive to apply for leniency and to encourage a first leniency application by providing further benefits for the first applicant.

A. USE OF LENIENCY DOCUMENTS IN LITIGATION

The discoverability of leniency documents may increase the claimant's incentive to sue the leniency applicant as the primary or only target and place the leniency applicant at a disadvantage compared to the other cartelists. Such a disadvantage would not have occurred but for the leniency application and may leave a negative effect on the incentive to apply for leniency and the quality of the application. The obvious solution would be to exclude these documents from use in civil litigation without the consent of the leniency applicant.⁸¹

In order to assess this option in light of the dual function of actions for damages under EC law, the key question is whether this is a necessary and adequate measure to preserve the effectiveness of the leniency program and is in line with the principle of full effectiveness of Community law. This assessment requires a trade-off between the objective of increasing the deterrent effect of the EC competition rules and the compensatory dimension of the individual's right to damages. The trade-off is akin to a proportionality test. In our view, the objective of increasing deterrence should prevail but any interference with the protection of individual rights should be limited to what is necessary to achieve the prevailing objective. If leniency documents are defined as documents that would not have come into existence but for the leniency application, all other evidence and, in particular, any contemporaneous documentary evidence of the cartel remains available. Therefore, the unavailability of leniency documents for use in civil proceedings does not disproportionately restrict the individual right to damages and does not make its exercise impossible or excessively difficult.⁸²

80. Green Paper on Damages actions *supra* note 13, options 29 – 30; Recommendations, *supra* note 5 at para. 9.9 – 9.10. In the United States, see the ANTITRUST CRIMINAL PENALTY ENHANCEMENT AND REFORM ACT OF 2004 15 USCA § 1 note.

81. White Paper on Damages actions *supra* note 7 at 10 and Staff Working Paper on Damages actions *supra* note 7 at para. 287 - 302; Private actions *supra* note 78 at para. 9.5.

82. Restrictions on the admissibility of evidence may raise a question of compatibility with Art 6 of the European Convention on Human Rights. As in relation to the right to access to court more generally, restrictions on disclosure or admissibility of evidence may be justified if necessary in the public interest provided that the party's right to a fair trial is not denied (see, for instance, *Rowe and Davis v. United Kingdom*, 30 EHRR 1 (2000)). In civil proceedings, it is unlikely that the inadmissibility of leniency documents, narrowly defined as those documents which would not exist but for the leniency application, might deny the claimant the right to a fair trial.

B. REMOVAL OF JOINT AND SEVERAL LIABILITY OF THE IMMUNITY RECIPIENT

As regards the removal of the immunity recipient's joint and several liability in damages, the Commission has been more cautious than the OFT. In the White Paper, the Commission does not propose this measure but simply puts it forward for further consideration. The OFT, on the other hand, recommended that the U.K. Government should consult on the option. The proposal aims at addressing the potential disincentive to a leniency application that the leniency applicant may be the only target of any damages action. If jointly and severally liable, the applicant would have to compensate the whole harm caused by the cartel. Depending on the applicable law, it may be able to recover from other cartelists their shares in contribution. By limiting the immunity recipient's liability only to the harm caused to those who directly or indirectly purchased goods or services from him, this disincentive would be removed. Furthermore, such a measure could further incentivize applications for leniency and, particularly if limited to the immunity recipient as the Commission and the OFT suggest, could incentivize the first application, thus increasing the destabilizing effect of leniency programs on the cartel.

The major objection to this proposal is that public enforcement objectives are limiting the rights of third parties. This is perceived as being 'unfair' or contrary to the compensatory function of private actions. However, this argument fades away if one recalls that, while private actions have a dual function under EC law, in the case of conflict the objective of increasing deterrence and ensuring the effective enforcement of the EC competition rules should prevail. Any limitations on the exercise of the right to damages that are necessary to achieve this objective are fully justified and consistent with the primary rationale for a right to damages: to increase deterrence and ensure compliance, thus increasing social welfare and productivity in the long term. It must be added, in line with the proportionality approach outlined above and consistent with the concurrent compensatory function of private actions, that third parties are not deprived of their private rights. Only joint and several liability is removed. Any party will be able to sue all cartelists jointly and severally except for the immunity recipient, who can only be sued by its direct and indirect purchasers. The measure in question only imposes limitations on the exercise of private rights to the extent that they are necessary to achieve the primary objective of increasing deterrence and enhancing the effectiveness of the regime as a whole.

IX. Conclusions

Private actions currently play a marginal role in competition enforcement in the European Union. This is particularly true of actions by consumers or small businesses. However, the ECJ has recognized that private actions can make a significant contribution to the effective enforcement of the EC competition rules. We

have argued that they can do so in three ways. First, they can increase the resources available for the enforcement of competition law. Second, they can increase the detection rate of anti-competitive behavior. Finally, they can increase the magnitude of the financial consequences of an infringement. Private

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actions also have an important role to play in ensuring that those who have been harmed by competition law infringements are compensated. Increased deterrence and compensation almost always go hand in hand but the primary objective of private actions remains to contribute to effective competition enforcement, thus increasing social welfare and productivity in the long term.

A well-functioning private actions regime should rest on the robust structuring and fine-tuning of three main pillars: collective actions, indirect purchasers' standing and passing-on, and the relationship between public and private enforcement. Both the Commission and the OFT have made proposals in these three areas.

In light of the dual role of private actions, which is to increase deterrence and ensure compensation, it may be argued that the collective actions proposals are unduly timid. The adoption of the ideological claimant model, in which only a "qualified entity" or "representative body" but not any member of an affected class, can bring an action on an opt-in or opt-out basis may lead to some meritorious cases not being brought. However, in the current political climate in Europe, still adverse to more effective collective redress, this model may be a realistic way forward. In our view, this model can work provided that two conditions are met. First, the criteria for the designation or authorization of the "qualified entity" or "representative body" should not be unduly restrictive. Second, any "qualified entity" or "representative body" should be given standing to bring a collective action on an opt-out basis, including by applying to the court for permission without any need for previous designation. Furthermore, it must be emphasized that the ideological claimant model is a significant safeguard against abusive litigation. This would justify a lighter-touch approach to any additional safeguards that the court may be required to apply or consider when permission to bring the action is sought.

The proposals relating to the standing of indirect purchasers and passing-on reflect the still incomplete understanding of this topic on both sides of the Atlantic. Given the lack of evidence that indirect purchasers' standing has a negative impact on the effective enforcement of the EC competition rules, it would be inappropriate at this stage to exclude or limit such standing. As a consequence, it also seems appropriate to allow the defendant to plead the 'passing-on' of overcharges as a defense (for which it carries the burden of proof). At the

same time, it is appropriate to allow indirect purchasers to rely on a presumption of passing-on in order to facilitate their actions. Further thought, however, needs to be given to procedural mechanisms providing for the coordination or consolidation of direct and indirect purchasers' actions on an EU wide basis, although it must be recognized that such an EU wide procedural device may be very difficult to achieve in the short to medium term.

The proposals relating to leniency are fully consistent with the central role played by deterrence in the enforcement of EC competition law. The leniency program is of fundamental importance in the detection and prosecution of cartels. If the evidence shows that certain reforms of the private actions regime are likely to have a negative impact on the leniency program, the right to damages and its exercise may have to be limited to safeguard the effectiveness of the public enforcement process. In this regard, concerns relating to the disclosure of leniency documents may be addressed by excluding their use in civil litigation without the consent of the leniency applicant. It is also worth considering limiting the liability of the immunity recipient to the harm caused to the direct and indirect purchasers of its products or services.

In conclusion, the proposals currently on the table in the EU can be described as a cautious step in the right direction. Even if all these proposals were implemented in their most ambitious version, we would be unlikely to see the role of private enforcement develop to the levels experienced in the United States in terms of the number of cases, size of damages awarded, or settlements. However, reforms at the European and national levels are much needed. The current underdevelopment of private actions detracts from the achievable level of deterrence and compliance and is leaving uncompensated substantial unlawful transfers (in the order of several billions of Euros per year) from buyers to sellers. It is hoped that the Commission and the Member States will proceed swiftly to implement reform packages addressing the areas of collective actions, indirect purchasers' standing and passing-on,⁸³ and coordination between public and private enforcement in the ways explained above.

83. It is an open question whether the clarification which is needed in the area of indirect purchasers' standing and passing-on should come through a legislative intervention or be left to the jurisprudence of the courts. We recognize strong arguments both ways and, while a legislative solution would probably be superior in terms of achieving legal certainty and uniformity throughout the EU, there may be merit in observing case law developments in the Member States and, possibly, in the ECJ on a reference for a preliminary ruling, before any legislative reforms.

IX. Annex: Summary of the White Paper Proposals and the OFT's Recommendations to Her Majesty's Government

A. THE WHITE PAPER PROPOSALS

In 2008, more than two years after the publication of a Green Paper on Damages for breach of the EC antitrust rules, the Commission published a White Paper on the same subject.

The White paper proposals may be summarized in the following way:

- **Standing.** The Commission notes the need to foster collective actions and suggests that both “representative actions” and “opt-in collective actions” be made available to any individual who has suffered harm caused by an infringement of EC antitrust laws. The Commission proposes that only entities designated on a standing basis should be able to bring an action on behalf of identifiable victims. Entities designated on an ad hoc basis, that is, for the purpose of a given action only, should only be able to bring an action on behalf of their members or some of their members.
- **Disclosure.** The Commission proposes that across the EU a minimum level of disclosure of evidence should be ensured, suggesting that, inter alia, national courts should have powers to order parties and third parties to disclose ‘precise categories of relevant evidence’, subject to certain conditions to avoid overly broad and burdensome disclosure obligations. The Commission also proposes that national courts should have the power to impose sanctions for either destruction of relevant evidence or refusal to disclose such evidence.
- **Binding effect of decisions.** Final decisions by NCAs finding a breach of Articles 81 or 82 should be binding on national courts. Private parties may rely on them as a basis for a follow-on action. Currently, only decisions of the Commission are binding under Community law. In the United Kingdom, decisions of the OFT and the concurrent regulators are binding on the courts under the Competition Act 1998.
- **Fault requirement.** Member States’ laws differ as to whether, in addition to establishing a breach of the competition laws, fault must be separately established to sustain a damage claim. The Commission proposes that, in Member States that require fault to be proven, once the victim has shown a breach of Article 81 or 82, the infringer should be liable for damages caused unless he demonstrates that the infringement was the result of a genuinely excusable error. This would not appear to change the position in England

and Wales, where tortious liability for breach of statutory duty does not require the claimant to prove the defendant's fault.

- **Damages.** The Commission suggests full compensation but not multiple damages.
- **Passing-on overcharges.** The Commission proposes that defendants should be entitled to raise the passing-on defense against a claim for compensation of the overcharge. The burden of proof should be on the defendant. The standard of proof should be the same as that which the claimant must meet. The Commission further suggests that indirect purchasers should be able to rely on a rebuttable presumption that the illegal overcharge was passed on to them in its entirety. Consolidation mechanisms are encouraged.
- **Limitation periods.** The Commission suggests that the limitation period should not start to run before the day on which the infringement ceases (for continuous or repeated infringements) and/or before the victim of the infringement can reasonably be expected to have knowledge of the infringement and of the harm it caused him. The Commission further suggests that at least two years be allowed for the commencement of a private action after the infringement decision on which the claimant relies has become final (i.e., after all court appeals of agency decisions have been exhausted). This is consistent with the current position under the U.K. Competition Act 1998.
- **Costs of damages actions.** The Commission faces a variety of cost allocation rules among the Member States, most of whom apply the “loser pays” principle. It would appear that the Commission is not proposing any binding Community measure in this area (the language used in the White Paper is: “... it would be useful for Member States to reflect on their cost rules ...”). However, the Commission suggests that Member States adopt measures to foster settlements, set court fees so that they do not become a disproportionate disincentive to competition damage claims, and allow courts to issue cost allocation orders that derogate from the normal cost rules, that is, from the “loser pays principle.”
- **Interaction between leniency programs and private actions.** The Commission proposes that corporate statements submitted by a leniency applicant should be protected against disclosure regardless of whether the leniency application is accepted, rejected, or leads to no decision by an agency. The Commission puts forward for further consideration the possibility of limiting the civil liability of the immunity recipient to claims by his direct and indirect contractual partners.

B. OFT'S RECOMMENDATIONS TO HER MAJESTY'S GOVERNMENT

In November 2007, the OFT published a set of Recommendations to Her Majesty's Government on Private Actions in Competition Law: Effective Redress for Consumers and Businesses. Following a public consultation, the OFT recommended:

- Allowing representative bodies to bring stand-alone and follow-on representative actions for damages and applications for injunctions on behalf of named consumers and businesses or on behalf of consumers and businesses at large.
- Introducing conditional fee agreements in representative actions which allow for an increase of greater than 100 percent on lawyers' fees.
- Codifying courts' discretion to cap parties' costs liabilities and to provide for the courts' discretion to give the claimant cost-protection in appropriate cases.
- Establishing a merits-based litigation fund.
- Requiring U.K. courts and tribunals to "have regard" to U.K. NCAs' decisions and guidance.
- Conferring a power on the Secretary of State to exclude leniency documents, appropriately defined, from use in litigation without the consent of the leniency applicant,
- Conferring a power on the Secretary of State to remove joint and several liability for immunity recipients in private actions in competition law so that they are only liable for the harm they caused (or not liable at all in exceptional circumstances). ▼