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A Trip Around the Cartel Victims Remedy Buffet

Kent Bernard
Fordham Univ. School of Law

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I. INTRODUCTION

The debate about whether the European Union should adopt a community-wide system to compensate victims of illegal cartel activity[2] has generated a lot of heat, but perhaps less enlightenment, over the past years. Some people are arguing for grafting a U.S. style class action litigation system onto the EU structure, somehow modifying that U.S. graft to avoid the costs of the U.S. system while all the while preserving and reflecting European cultures and traditions.[3]

Almost no one suggests that we should be encouraging the formation or longevity of cartels. And it is certainly a legitimate question to see how better to provide a way for the victims of illegal cartel behavior to be made whole. But while cartels are bad, they are not the only bad things out there. Do we need to be looking at a remedy that has a wider application? Or is there no need for any new remedy at all?

There is a respectable argument that, in the time since this flirtation with the U.S. litigation structure for cartel damages began in 2005, market forces and the availability of actions in the national courts have begun to fill the perceived gap and that the best approach here would be to let that process continue. [4] Others point out that areas such as alternate dispute resolution remain underexplored.[5] And there may be something else out there that deserves consideration.

II. THE BUFFET TABLE OFFERINGS

We have three dishes on the table at the moment, ranging from the ascetic to the voluptuous:

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[1] Adjunct Professor, Fordham University School of Law, JD 1975 University of Pennsylvania; BA 1972 Colgate University.

[2] On December 19, 2005 the European Commission published for public consultation a Green Paper on *Damages Actions for Breach of EC Antitrust Rules* ("the Green Paper"); COM(2005) 672 final, 19.12.2005. The stated aim was to design a more efficient system for bringing private damages actions for infringement of EC antitrust law. A relatively concise history of the process, along with some interesting commentary, may be found at Pinotti & Stepina, *Antitrust Class Actions in the European Union: Latest Developments and the Need for a Uniform Regime*, 2(1) J. EUR. COMPETITION L. & PRACTICE, 24-33 (2011).

[3] *See* Speech by Commissioner Kroes of March 8, 2007 at the Commission/IBA Joint Conference on EC Competition Policy, Brussels, entitled *Reinforcing the fight against cartels and developing private antitrust damage actions: two tools for a more competitive Europe*, *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/128&format=HTML&aged=1&language=EN&guiLanguage=en; Written statement of Joaquin Almunia to the European Parliament, December 22, 2009 *available at* http://www.europarl.europa.eu/hearings/static/commissioners/answers/almunia_replies_en.pdf .

[4] *See*, e.g., Forrester & Powell, *Market Forces And Private Enforcement: A Start But Some Way Still To Go*, article prepared for the XVIth Annual Workshop on EU Competition Law and Policy, June 17-18, 2011, Florence.

[5] On the potential use of Alternate Dispute Resolution mechanisms, *see* the various papers put out by the European Justice Forum; specifically, *Response to DG Competition Draft Guidance Paper on Quantifying Damages for Breaches of Competition Rules* (September 25, 2011*), available at* http://europeanjusticeforum.org/.

A. The Zen Platter

Don't just do something; sit there. The first option is to consider doing…nothing. This does not mean that cartels aren't bad, or that victims don't deserve compensation. It does mean that maybe the problem is being solved already at the national level, and that there is no need for community-wide changes.

This approach, that there now is in fact a competitive market place for resolving disputes, has been eloquently argued by Ian Forrester & Mark Powell, who point out that in England and Wales litigants have a choice between the Competition Appeal Tribunal ("CAT") and the High Court. "Follow-on" claims, brought in reliance on a previous infringement decision by the European Commission or the national competition authority, may be brought before the CAT, while both "follow-on" and "stand-alone" claims may be brought before the non-specialist High Court.[6] As Forrester & Powell point out, there is no longer any inhibition on making competition claims on national courts in Europe. Public companies no longer refrain from making competition claims against other companies.

This could be called the "trust evolution" approach. Things are being fixed even as we continue to debate other ways fix them.

B. The Foie Gras-Stuffed Creampuff (or the U.S. Style Litigation Extravaganza)

This approach is simple to describe, but would be something of a mess to implement. It advocates taking the whole rich, artery-clogging U.S. litigation structure into Europe, and stuffing it into the European system. For example, lawyers from Constantine/Cannon LLP, a U.S. firm, urge adoption of an opt-out class action system, immunity for plaintiffs from any "loser pays" legal fee system, adoption of contingency fees for plaintiff counsel, treble damages, and an expanded system of discovery.[7] Further, they would not allow representative organizations to have an exclusive, or even active, role in the litigation.[8]

So we are not talking about incremental change at this station of the buffet, but rather of tearing up all the rules and substituting a new set, and doing it (at least for now) just for competition law offenses. In the European Union, competition law is created, developed, and enforced by the Government, which is assumed to weigh the public interest in determining which cases to bring and what theories to assert. In the United States, competition law has developed primarily through private litigation,[9] and each party is presumed to be acting only in its own self-interest.[10] Layering U.S. procedure on top of EU substance is a very radical approach.

This might be described as the "trust me, I'm a (U.S.) lawyer" approach.

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[6] Forrester & Powell, *supra* note 4, at 5.

[7] Constantine/Cannon LLP, *Response to Public Consultation on Collective Redress*, pp. 5-7 (April 26, 2011), *available at* http://ec.europa.eu/competition/consultations/2011_collective_redress/constantine_cannon_llp_es.pdf .

[8] *Id.* at 4.

[9] *See* McAfee, Mialon, & Mialon, *Private vs. Public Antitrust Enforcement: A Strategic Analysis*, 92(10) J. PUBLIC ECON. 92(10), 1863-1875 (Oct. 2008), *available at* http://userwww.service.emory.edu/~hmialon/StrategicPrivatePublicAntitrustEnforcement.pdf .

[10] *Id* at 3.

C. The Alternate Dispute Resolution ("ADR") Health Food Box

This approach is championed by bodies such as the European Justice Forum, who make the plausible case that the European Union has really not come up with a way to control the potential abuses inherent in the U.S. litigation system and that, further, any remedy system should be capable of being applied to the whole range of harms—not just competition law.[11] We consider ADR to be the health food of the remedy world. It lets the parties design their own plan, and tried to get the maximum compensatory nutrition with the minimum of legal fat.

The main objection to ADR, and not just in this context, is that it is fine for two big players as a way to resolve their disputes, but with a big player on one side (such as a cartel) and a lot of little people on the other (victimized buyers of the products affected), the little people are going to get run over rather than compensated. After all, courts were the original alternative dispute resolution mechanism, taking the place of battle and ordeal. Still, the flexibility and potential simplicity of ADR are attractive, and deserve consideration.

This might be described as the "trust yourself and you will find a way" approach.

III. ANOTHER POSSIBLE ALTERNATIVE?

But is there nothing on our buffet table for those who may not believe that things will take care of themselves quickly enough for them to adopt the Zen option, and who are afraid that leaving things to ADR will be fine for the big players but leave the little people out of the remedy? Is there no other choice except going full bore into the U.S. system with all of the collateral damage that may cause?

There is another possible approach, which has received very little attention. This one takes as a starting point that some community-wide remedy structure is desirable. And while any remedy structure should have broad application, the focus right now is on competition law violations. It represents an approach that is more than waiting, more than allowing a thousand ADR flowers to grow, but less than the total organ transplant of adopting the U.S. litigation system.

I suggest that the Commission consider a system of government-controlled restitution. By keeping the system under government control, the Commission would assure that it: (1) could meet the goal of maintaining European culture and traditions expressed by several Commissioners, and (2) could minimize collateral damage to other important EU policies, such as the leniency doctrine.[12] By adopting a system of restitution, the Commission would be choosing the simplest, most direct way to make cartel victims whole, and one that causes minimal harm to other important values.

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[11] *Response of European Justice Forum to the Commission Staff Working Document Public Consultation: Towards a Coherent European Approach to Collective Redress* ("the CR Consultation Paper") (29 April 2011); *available at* http://europeanjusticeforum.org/storage/11.%20EJF%20Response%20to%20EC%20Consultation%20on%20CR.pdf

[12] *See* general discussion of the 2006 Leniency Doctrine at http://ec.europa.eu/competition/cartels/leniency/leniency.html. The efficacy of leniency programs in destabilizing cartels is generally accepted; *see*, e.g., Clark, *Using Leniency to Fight Hard Core Cartels*; OECD Paper *available at* http://www.oecd.org/document/3/0,3746,en_2649_34489_1890435_1_1_1_1,00.html .

The details of the legal foundations and practical application of a restitution system are for another day.[13] But for now, it is definitely a dish that belongs on our remedy buffet table. It gives our hungry diner most of the benefits that he or she wants, at a minimum of costs in terms of collateral damage and other values. We could call it the "Power Bar" at the end of the buffet table. It should not be overlooked.

[13] *See* Kent Bernard, *Making Victims Whole - A Restitution Approach to Cartel Damages* (forthcoming).