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Georg Berrisch

Eve Jordan

Rocio Salvador Roldan

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E.U. Competition and Private Actions for Damages

*Georg Berrisch, Eve Jordan, and Rocio Salvador Roldan**

The right to reparation is the necessary corollary of the direct effect of the Community provision whose breach caused the damage sustained.¹

I. INTRODUCTION

Competition law, also known as antitrust law, can be enforced by public authorities or by private individuals. In the first case, a public authority conducts proceedings against a party or parties which it suspects have violated competition law. The procedure may be commenced by the authority upon its own initiative, following a referral from another authority, or because of a complaint by a private party. If a violation is found, the authority will typically order that the anti-competitive behavior be terminated and impose a fine. Private enforcement means that private parties sue other private parties, for example their competitors, customers, or suppliers, for alleged anti-competitive behavior. They may seek the termination of unlawful agreements, apply for an injunction in a national court, or seek reparation where they have suffered damages as a result of the anti-competitive conduct.

To date, private enforcement of competition remains rare in Europe. Instead, the enforcement of E.U. and Member State competition law has largely been left up to the competition authorities. In particular, according to various sources, there has not yet been a single case where a higher court of any Member State has awarded damages to a private party for a violation

* Georg Berrisch is a Partner, and Eve Jordan and Rocio Salvador Roldán are Associates, at Covington & Burling's Brussels office.

¹ Joined Cases C-46/93 and 48/93, *Brasserie du Pêcheur v. Bundesrepublik Deutschland* and *The Queen v. Secretary of State for Transport ex parte: Factortame*, 1996 E.C.R. I-1029, at para. 22.

of E.U. competition law.² The situation in the United States is the reverse: private enforcement of competition law, notably through actions for damages, is well established and indeed successful.³

There are numerous reasons why private enforcement of E.U. competition law remains underdeveloped in Europe. The main reason is perhaps that it is not regulated by E.U. law but by Member State law. This in itself creates legal uncertainty. Generally speaking, the Member State laws are also far less plaintiff-friendly than their equivalent in the United States. It is, however, widely accepted that private enforcement is important because, generally, public authorities lack sufficient resources to investigate and prosecute every single infringement of competition rules. A system that creates optimal conditions for individuals to challenge infringements of competition rules before national courts ensures a high level of compliance. It is therefore no surprise that the European Commission ("Commission") is keen to see the general use of private enforcement, and in particular of actions for damages, in Europe increase. It is anticipated that Regulation 1/2003,⁴ which will bring a major change in European procedural rules of competition law, will encourage private enforcement of E.U. competition law. Mario Monti, the head of the Commission's DG Competition (the E.U.'s antitrust authority) has publicly supported private enforcement of the Community rules in relation to competition, stating that:

The competition rules are there to ensure that consumers benefit from lower prices and better products as a result of effective competition in markets. Effective remedies must be available to stop infringements and to ensure that parties which suffer from a violation obtain compensation. Consumers should have more access to remedial action in the form of private enforcement in order to protect their rights and to obtain damages in compensation for losses suffered.⁵

Moreover, in October 2003, the Commission published an invitation to tender a study analyzing the conditions for damages claims in Member States,⁶ thereby confirming that private enforcement is of great interest and

² Gerald Mänsch, *Private Claims with Respect to Violations of the E.U. Cartel Prohibition—“Courage” and the Consequences*, 2003 EUROPARECHT 825, 829 (2003).

³ See *infra* Part III.

⁴ Council Regulation No. 1/2003 of 16 December 2002, Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1 [hereinafter Regulation 1/2003].

⁵ Mario Monti, Effective Private Enforcement of EC Antitrust Law, Address at the EU Competition Law and Policy Workshop (June 1-2, 2001), available at <http://europa.eu> (last visited February 14, 2004).

⁶ European Commission, Invitation to Tender for the Provision of a Study Regarding the

a priority on the Commission's agenda.

This paper focuses on one particular aspect of private enforcement of competition law in the European Union, namely actions for damages, and compares the situation in the European Union with that of the United States. The first part of this article describes, in more general terms, the legal frameworks in the United States and the European Union governing actions for reparation of damages caused by a violation of competition law. The second part identifies and analyzes five factors which are crucial for the success of the U.S. system. Finally, we draw some conclusions for the future development of European private enforcement.

II. THE RIGHT TO REPARATION FOR DAMAGES CAUSED BY ANTI-COMPETITIVE BEHAVIOR IN THE EUROPEAN UNION AND THE UNITED STATES

A. The European Union

1. *Member State Law Governs Actions for Damages*

In the European Union, competition law is regulated by Articles 81 and 82 of the EC Treaty.⁷ Article 81 prohibits anti-competitive practices and agreements that have an appreciable effect on intra-Community trade.⁸ Agreements that fall under the prohibition are automatically void and subject to sanctions, unless they can be individually exempted for providing pro-competitive benefits pursuant to the criteria set out in Article 81(3).⁹ Article 82 prohibits the abuse of a dominant position.¹⁰ There is no provision in the EC Treaty that provides for an action before an E.U. court by a private party against another private party for a violation of E.U. law; nor is there any provision in the EC Treaty that sets out under which conditions private parties can sue each other before national courts for a violation of E.U. law. Thus, such actions must be brought before the national Member States courts under the national procedural rules.

Competition law is no exemption. Neither Articles 81 or 82, nor any of the Regulations implementing those provisions, address the issue of private actions for damages for violations of E.U. competition law. The

Conditions of Claims for Damages in Case of Infringement of EC Competition Rules (2003), available at <http://europa.eu.int/comm/dgs/competition/proposals2/studytenderspecifications.pdf> (last visited February 14, 2004).

⁷ Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, as amended.

⁸ *Id.* at art. 81.

⁹ *Id.* at art. 81(2).

¹⁰ *Id.* at art. 82.

Notice on Cooperation between national courts and the Commission¹¹ merely states that infringements of Community competition rules must be sanctioned by national courts in the same way as equivalent infringements of domestic law.¹²

The new Council Regulation 1/2003 will not change this. There is only a very general reference to the issue of damages in its preamble, explaining that “national courts have an essential part to play in applying the Community competition rules,” and that “when deciding disputes between private individuals, they protect the subjective rights under Community law, for instance by awarding damages to the victims of infringements.”¹³ It is worth noting that in the discussions preceding the enactment of the new Regulation, both the Economic and Social Committee and the European Parliament had requested a more extensive harmonization of national procedures.¹⁴

The new Regulation will, however, eliminate one important bottleneck for private enforcement of E.U. competition law before national courts. At present, it is well-established that although Articles 81(1) and 81(2) of the EC Treaty have direct effect in the Member States and can be applied by national judges, the Commission has exclusive competence to apply Article 81(3). Thus, only the Commission can decide whether an agreement that falls foul of Article 81(1) can be exempted under Article 81(3). Defendants in an action before a national court, thus, can refer an agreement to the Commission and apply for an individual exemption pursuant to Article 81(3). This forces the national judges to stay their proceedings until the Commission has decided whether the agreement at issue may be exempted, typically a significantly lengthy process.¹⁵

Regulation 1/2003 will render Article 81(3) directly applicable by national courts and the Commission will thereby lose its monopoly to apply this provision.¹⁶ Thus, national judges will have the power to adjudicate on the lawfulness of agreements without having to wait for an Article 81(3) decision from the Commission. This should create a more favorable environment for the private enforcement of the competition rules throughout the European Union.¹⁷

¹¹ Notice on Cooperation between National Courts and the Commission in Applying Articles 85 and 86 of EEC Treaty, 1993 O.J. (C 39) 6, at para. 2.10.

¹² *Id.* at para. 11.

¹³ Regulation 1/2003, *supra* note 4, at para. 7.

¹⁴ Opinion of the Economic and Social Committee on a “Proposal for a Council Regulation on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty,” 2001 O.J. (C 155) 73, at para. 2.10.

¹⁵ It should be noted that this problem does not occur in relation to Article 82 infringements, as Article 82 is applicable in its entirety by national courts.

¹⁶ Regulation 1/2003, *supra* note 4, at para. 1(2).

¹⁷ This decentralization could, of course, result in the inconsistent application of

2. *The European Court of Justice Has Developed Minimum Requirements for the Private Enforcement of Community Law in National Courts*

Despite the EC Treaty's lack of reference to damages for infringements of E.U. law, the European Court of Justice ("ECJ") has developed a general principle of entitlement to damages for breaches of Community law by private parties and set minimum standards for the enforcement of Community law. In the early years of the European Economic Community, the ECJ held that the rights conferred by Community law can be relied upon in proceedings before national courts.¹⁸ It also established another fundamental principle of the Community legal order: the principle of supremacy of Community law over Member State law.¹⁹ When applying these two principles, national courts are required to interpret national law in light of the wording and purpose of Community law "in so far as it is given discretion to do so under national law"²⁰ and set aside any national rules that infringe Community law.²¹

As already mentioned above, the EC Treaty does not determine the conditions under which private parties may claim the rights they derive from E.U. law before national courts. The ECJ held that the procedural rules for the enforcement of Community law before Member State courts are governed by national law and that Community law does not intend to create new remedies in Member States.²²

However, the ECJ set two limits on the application of national procedural rules, known as the principles of equivalence and effectiveness.²³ The principle of equivalence states that the remedies available to enforce E.U. law must be equivalent to those available to enforce comparable national law provisions.²⁴ The principle of effectiveness requires that it may not be made impossible or excessively difficult for parties to exercise rights derived from E.U. law.²⁵ National

competition rules by national courts. However, recital 21 of Regulation 1/2003 requires consistent application of competition rules across the EU, and Article 15 of Regulation 1/2003 provides for cooperation between the Commission and national courts. Therefore, the Commission will retain the ability to act in cases involving novel issues and/or in cases where judicial efficiency so dictates (e.g., where multiple Member States are involved). In addition, the "Association of European Competition Law Judges" was established allowing judges from the European Community courts and national judges to discuss issues.

¹⁸ Case 26/62, *Van Gend en Loos v. Netherlands Inland Revenue Admin.*, 1963 E.C.R. 1.

¹⁹ Case 6/64, *Flamino Costa v. E.N.E.L.*, 1964 E.C.R. 585.

²⁰ Case 14/83, *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, 1984 E.C.R. 1891, at para. 28.

²¹ *See, e.g.*, Case 106/77, *Simmenthal*, 1978 E.C.R. 629, at para. 21.

²² Case 33/76, *Rewe v. Landwirtschaftskammer*, 1976 E.C.R. 1989, at para. 5.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

courts are obliged to interpret, to the greatest extent possible, national procedural rules in light of these principles and, if such interpretation is not possible, set aside national procedural rules that violate these principles.²⁶

Each of the cases discussed above arose in the context of disputes between private parties and public authorities. However, in 2001, the ECJ applied these general principles to competition litigation between two private parties. The *Courage* case²⁷ arose out of a dispute between a pub owner and a brewing company before the United Kingdom (“U.K.”) courts. The pub owner had argued that his contract with the brewing company violated Article 81(1) of the EC Treaty because it imposed anti-competitive restrictions and caused him to suffer damages as a result. The English High Court applied a U.K. rule of law which states that a party that participates in unlawful behavior cannot subsequently claim damages resulting from that behavior, thereby dismissing the *Courage* case. The U.K. court, during the course of the case, asked the ECJ to consider whether the U.K. rule was compatible with Community law. The ECJ first recalled that national courts are bound to ensure the effectiveness of Community law, and the direct effect of Articles 81(1) and 82.²⁸ It further recognized the importance of private enforcement to ensure the full effectiveness of the competition rules:

Indeed the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, action for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.²⁹

The ECJ concluded that a national rule preventing a co-contractor from suing the other party to the contract should be set aside if the plaintiff did not bear a “significant responsibility” in the unlawful dealings.³⁰ The ECJ then remanded the case back to the English High Court to decide, through application of this principle, whether the pub owner was entitled to damages.³¹

²⁶ See, e.g., Case C-213/89, *Factortame*, 1990 E.C.R. 2466, at para. 20.

²⁷ Case C-453/99, *Courage Ltd v. Bernard Crehan and Bernard Crehan v. Courage Ltd and Others*, 2001 E.C.R. I-6297.

²⁸ *Id.* at para. 23.

²⁹ *Id.* at para. 27.

³⁰ *Id.* at para. 36.

³¹ *Bernard Crehan v. Inntrpreneur Pub Company and Brewman Group Limited*, 2003 E.W.H.C 1510 (U.K.). The plaintiff in *Courage* was not ultimately compensated because the national court found that the underlying agreement was not unlawful.

Finally, in the ECJ's recent decision, *Muñoz*,³² concerning a dispute between two private parties, the court again stressed the importance of private enforcement to ensure the effectiveness of Community law, and even suggested that private enforcement is possible when the plaintiff does not derive a specific right from the rules that have been infringed.³³

B. The United States

In the United States, competition is regulated by federal and state law, and private actions for damages are an important part of the U.S. legal system. The Clayton Act provides a private cause of action for damages or injunctive relief for any infringement of antitrust laws and allows the recovery of treble damages, legal fees and interest.³⁴

III. A COMPARISON OF DAMAGES RECOVERY IN PRIVATE ACTIONS IN THE EUROPEAN UNION AND UNITED STATES

In the United States, over ninety percent of antitrust proceedings are initiated by private individuals and many of these proceedings are actions seeking damages.³⁵ Private actions for damages are popular in the United States due to the nature of the legal system: plaintiffs and their attorneys often obtain high financial rewards. For example, last year a jury awarded \$1.05 billion in treble damages against U.S. Tobacco Company for violations of the Sherman Act.³⁶ There are several factors responsible for the success of damages claims in the United States, including the availability of treble damages, the Supreme Court's rejection of the so-called pass-on defense, the availability of class actions, discovery rules, and

³² Case C-253/00, *Antonio Muñoz y Cia., Superior Fruiticola SA v. Frumar Ltd, Redbridge Produce Marketing Ltd*, 2002 E.C.R. I-7289. Two Spanish growers of grapes sought the application of a Community Regulation that regulated labeling requirements for grapes against their buyers, a company selling grapes in the U.K. The plaintiffs filed a complaint in the U.K. courts on grounds that the grapes were wrongly labeled, but their action was dismissed by the High Court of Justice on grounds that the Regulation did not grant producers the right to bring a civil action in case of non-compliance.

³³ *Id.* at paras. 31-32.

³⁴ See Clayton Act, 15 U.S.C. §§ 4, 15(a), 26 (2000). Section 15(a) of the Clayton Act provides an action for treble damages for "any person. . . injured in his business or property by reason of anything forbidden in the antitrust laws," and provides for attorney fees and interest to successful plaintiffs. Section 26 of the Clayton Act states that injunctive relief may be sought by "[a]ny person. . . threatened [with] loss or damage by a violation of the antitrust laws".

³⁵ See *Federal Judicial Caseload Statistics, Table C-2: U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During 12-Month Period Ending March 31, 2002*, available at <http://www.uscourts.gov/caseload2002/tables/c02mar02.pdf> (last visited Mar. 2, 2004).

³⁶ See *Conwood Company, L.P. v. U.S. Tobacco Co.*, 290 F.3d 769 (6th Cir. 2002). The Sixth Circuit upheld the verdict on appeal.

the fact that plaintiff's lawyers earn contingency fees on each case won. This part of the article will address each of these factors in more detail. It will describe the U.S. climate and then compare it to the situation found in the EU. It will also look at whether the general principles developed by the ECJ and discussed above would overcome some of the shortcomings of the state of play in the EU.

A. Treble Damages

1. *The United States*

As a general rule, a plaintiff must prove that the defendant committed a violation of competition law, which resulted in damage to the plaintiff. However, the treble damage remedy generously allows the plaintiff to recover three times the amount of damages actually suffered as a result of the anti-competitive behavior.

2. *The European Union*

As explained above, actions for damages, in principle, are governed by the national Member State rules on damages. A detailed discussion of these rules for each Member State would exceed the scope of this article. However, comparable to the situation in the United States, the plaintiff must generally be able to prove a violation of competition law, notably Articles 81(1) and 82 of the EC Treaty,³⁷ loss, and a causal link between the violation and the loss.

Currently, no Member State in the European Union permits treble damages. In fact, the vast majority of Member States allow only the recovery of damages actually suffered and do not even permit the recovery of exemplary damages,³⁸ such as damages that not only compensate the victim, but also punish the offender.

While the ECJ has stressed that damage actions are important to enforce the rights derived from Community law,³⁹ nothing in the case law suggests that this requires the introduction of remedies that allow a plaintiff to recover damages in excess of the losses actually suffered. Nevertheless,

³⁷ Case 127/73, *BRT v. SABAM*, 1974 E.C.R. 51 ("As the prohibition of Articles 85(1) and 86 [now Articles 81(1) and 82] tend by their very nature to produce direct effects in relations between individuals, these Articles create direct rights in respect of the individuals concerned which the national courts must safeguard"); see also *P. Guérin Automobiles v. Commission*, 1997 E.C.R. I-1503. Moreover, after the entry into force of Regulation 1/2003, Article 81 will have direct effect in its entirety.

³⁸ Exemplary damages are permitted in certain circumstances in countries, such as, England & Wales (however, only in extreme cases of abuse), Ireland, and the Netherlands.

³⁹ See *Brasserie du Pêcheur*, 1996 E.C.R. I-1029; see also *Factortame*, 1990 E.C.R. 2466.

well-established case law does exist according to which a Member State that violates E.U. law must pay compensation to private parties for damages caused.⁴⁰ In these cases, the ECJ held that the “reparation for loss or damage caused to individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained so as to ensure the effective protection of those rights.”⁴¹ In this respect, the principle of effectiveness requires that national judges take into account loss of profits:

Total exclusion of loss of profit as a head of damage for which reparation may be awarded in the case of a breach of Community law cannot be accepted. Especially in the context of economic or commercial litigation, such a total exclusion of loss or profit would be such as to make reparation of damage practically impossible.⁴²

Until now, the ECJ has never required damages to be paid in excess of this amount in order to punish a Member State; in fact, the ECJ has never discussed what is necessary to ensure effective enforcement of E.U. law. The ECJ, however, has made clear that national rules granting only symbolic compensation to the aggrieved party are contrary to the principle of effectiveness and should be disregarded.⁴³ Finally, it is important to recall the above-mentioned principle of equivalence. Although the ECJ has never debated this principle in the context of an action for damages for violations of E.U. competition rules, it seems clear that if a national rule provides for treble or exemplary damages due to the violation of national competition rules, then the same remedy would have to be available in that particular Member State for the violation of E.U. competition rules.

B. The Pass-On Defense

1. *The United States*

In a typical cartel case, the damages consist of an overcharge paid by the purchaser to the seller because the seller’s cartel resulted in higher prices. Under the pass-on defense, the purchasers are considered uninjured if they were able to pass on the overcharge to their customers. The U.S. Supreme Court has rejected the pass-on defense in anti-trust cases, on grounds that admitting such a defense would discourage actions on the part of direct purchasers, who would see their damages reduced by the amount

⁴⁰ Case C-6/90, *Francovich*, 1991 E.C.R. I-5357; Case C-9/90, *Brasserie du Pêcheur*, 1996 E.C.R. I-1029.

⁴¹ *Brasserie du Pêcheur*, 1996 E.C.R. I-1029; *Factortame*, 1990 E.C.R. 2466, at para. 90.

⁴² *Factortame*, 1990 E.C.R. 2466, at para. 87.

⁴³ *Sabine von Colson and Elisabeth Kamann*, 1984 E.C.R. 1891.

that was “passed on” to the next tier of buyers.⁴⁴

In addition, if buyers are subjected to the passing-on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to their customers. These ultimate consumers, in today’s case, the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no-one was available who would bring suit against them. Treble damages, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness.⁴⁵

By rejecting the pass-on defense, the Court made it possible for direct buyers, for example, retailers or distributors, to claim damages for the anticompetitive behavior of the action of their suppliers. However, a logical consequence of not admitting the pass-on defense is that indirect purchasers are not entitled to damages, thereby avoiding multiple liabilities for the defendant towards both direct, and indirect, purchasers.⁴⁶ However, some narrow exceptions apply. For instance, indirect purchasers may claim damages when they purchased from a party that had entered into a price-fixing agreement with its supplier, or if the seller is controlled by the supplier. Courts have also recognized the validity of state laws that permit indirect buyers claiming treble damages.⁴⁷

2. *The European Union*

As discussed above, the general principle in Member States is that claimants can only recover the damages they have actually suffered. For example, if, as a result of a cartel, retailers paid higher prices to their suppliers, they cannot recover the difference between prices as damages if they were able to pass on the higher price to their customers. We are not aware of any Member State court decision concerning a competition case where this rule has been set aside for policy reasons similar to those discussed by the U.S. Supreme Court in *Hanover Shoe*.

Also, the ECJ has never considered this issue in its case law on

⁴⁴ See *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); see also *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

⁴⁵ *Hanover Shoe*, 392 U.S. at 494.

⁴⁶ *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702 (D.Md. 2001). This case involved a class-action suit by consumers against Microsoft for overcharging them for the Windows operating system. The case was dismissed for lack of standing.

⁴⁷ See, e.g., *California v. ARC America Corp.*, 490 U.S. 93 (1989). In addition, indirect purchasers may seek injunctive relief.

damages. In fact, the ECJ's case law on unjust enrichment suggests that the ECJ will likely not object to the pass-on defense.⁴⁸ For example, the ECJ recently ruled on the question of whether an Austrian retailer could recover state taxes, which were collected in violation of E.U. law.⁴⁹ The Austrian authority argued that the retailer could not recover these taxes because it had passed them on to its customers. The ECJ accepted this defense in principle, but held that because of the possibility that the retailer lost business as a result of charging higher prices, the Austrian state should compensate him accordingly.⁵⁰

The ECJ has, however, condemned presumptions and rules of evidence intended to shift "upon the taxpayer the burden of establishing that the charges unduly paid have not been passed on to other persons of proof to the party that claims damages as these violate the principle of effectiveness."⁵¹ This would suggest that the ECJ would be unlikely to accept a national rule requiring buyers in competition cases to prove that they did not pass on the higher price to their customers; this burden of proof remains with the defendant.

C. Class Actions

1. *The United States*

Through a class action, an individual may sue as a representative of a group of injured persons. As the U.S. Supreme Court pointed out in *Hanover Shoe*, an individual consumer rarely has a sufficient interest in bringing a damages case because the individual's damage may be comparatively low.⁵² Although, as explained above, U.S. consumers cannot sue for damages if they are only indirect purchasers, there are numerous cases where consumers are also direct purchasers, such as cartels by retailers. In these cases, class actions are an option in the United States and courts generally respond favorably to class actions in antitrust cases. In fiscal year 2002, for example, private parties filed over 100 class action antitrust lawsuits in federal district courts.⁵³

⁴⁸ See, e.g., Case 199/82, *Amministrazione delle Finanze dello Stato v. Spa San Giorgio*, 1983 E.C.R. 3595, at para. 13.

⁴⁹ Case C-147/01, *Weber's Wine World Handels-GmbH v. Abgabenberufungskommission Wien*, (2003), at para. 119, available at <http://curia.eu.int> (last visited Feb. 14, 2004).

⁵⁰ *Id.*

⁵¹ *Amministrazione delle Finanze dello Stato*, 1983 E.C.R. 3595, at para. 14.

⁵² See *Hanover Shoe*, 392 U.S. at 481.

⁵³ See 2002 *Federal Court Statistics, Table 5: Antitrust*, 24 CLASS ACTION REP. 16 (2003).

2. *The European Union*

Class actions do not exist in most continental European legal systems.⁵⁴ However, most Member States' legal systems do not preclude several parties, who have suffered damages as a result of the same course of action, from jointly bringing an action to seek redress. Moreover, in some Member States, consumer associations are specifically entitled to bring actions in the interest of consumers.⁵⁵

The notable exception in the European Union is England,⁵⁶ where class actions can be brought before the civil courts.⁵⁷ Moreover, the Enterprise Act 2002 introduced an amendment to the Competition Act expressly granting the right of damages to include group consumer claims before the Competition Appeals Tribunal.⁵⁸ To date, it has never been argued before the Community courts that the non-recognition of class actions in a Member State prevents the effective enforcement of Community rights, nor have the Community courts mentioned that such remedies must be made available. Therefore, as a matter of Community law, Member States are not required to make class actions available for violations of Community law, unless they already exist for the violation of national competition rules.

D. Discovery Procedures

1. *The United States*

Pre-trial discovery in the United States is governed by the Federal Rules of Civil Procedure, which provide for the exchange of all relevant, non-privileged documents, as well as for oral depositions, interrogatories, and requests for admissions.⁵⁹ Under Federal Rule of Civil Procedure 26(b) (1), discovery can be obtained by the plaintiff with respect to "any matter, not privileged, that is relevant to the claim or defense of any party," including relevant information that would be inadmissible in a court of law. Thus, U.S. plaintiffs have powerful tools with which to seek evidence of alleged antitrust violations.

⁵⁴ Class actions are, however, permitted in Portugal and Sweden.

⁵⁵ Class actions for consumer groups are permitted in England, France, Italy, the Netherlands and Spain. Consumer group class actions are not usually filed seeking monetary damages but rather other remedies such as an injunctions.

⁵⁶ References to England include England and Wales. In Scotland and Northern Ireland, different procedural and substantive rules apply.

⁵⁷ Civil Procedure (Amendment) Rules 2000 (SI 2000/221).

⁵⁸ Competition Act of 1998 § 47B.

⁵⁹ FED. R. CIV. P. 26(a)(5).

2. *The European Union*

In most E.U. Member States, discovery is either non-existent or limited.⁶⁰ The main exception is England where discovery rules (called “disclosure”) are automatic and very broad. They include all relevant non-privileged documents by both parties, including documents which may adversely affect a party’s case.⁶¹ The principle of effectiveness of Community law does not seem to require that discovery proceedings be available to potential plaintiffs. So far, the ECJ has never discussed discovery rules, neither in its case law on actions for damages against Member States nor against the E.U. institutions.

However, in the case of important cartel cases, potential plaintiffs have a powerful tool at hand to compensate them for the lack of discovery rules—they can submit a complaint to the Commission. If the Commission investigates the case and finds an infringement, it will render a decision. Due to the doctrine of supremacy of Community law, such a decision is binding upon the national judge.⁶² Thus, the plaintiff would not have the enormous burden of proving that the infringement occurred, only that he suffered loss and causation. It should be noted that although a complaint to the Commission is an option available to the plaintiff, there is no obligation whatsoever on the side of the applicant to first seek a formal Commission decision before bringing an action for damages. On the contrary, such an obligation would impair the effectiveness of Article 81 and thus frustrate the very purpose of private enforcement.

IV. CONTINGENCY AND LEGAL FEES IN THE UNITED STATES AND THE EUROPEAN UNION

A. The United States

The U.S. legal system recognizes the use of contingency fees to pay for legal costs. Under a contingency fee arrangement, plaintiffs pay attorneys’ fees only in the event that their lawsuit is successful. The attorney collects a reasonable percentage of the settlement or judgment as payment. Therefore, plaintiffs effectively bring cases without bearing any

⁶⁰ Limited discovery is also available in Denmark, France, Ireland, Portugal, Spain and Sweden.

⁶¹ Civil Procedure Rules 1998, Part 31.6. See 37 Halsbury’s Laws of England 181 at para. 555 (2001).

⁶² See Case C-234/89, *Delimitis*, 1991 E.C.R. I-935; Case C-344/98, *Masterfoods*, 2000 E.C.R. I-11369. Both cases stand for the principle that national judges must abide by the decisions made by the Commission. This principle was the necessary consequence of the Commission’s monopoly to apply Article 81(3). It is unclear whether the same principle will continue to be valid after the entry into force of Regulation 1/2003, as the Regulation empowers national courts to apply Article 81 in its entirety.

financial risk.

Moreover, plaintiffs' lawyers can reduce the costs associated with litigating private antitrust actions and thus limit their possible exposure, because various statutes and doctrines permit private plaintiffs to "piggyback" on government enforcement actions. For example, Section 5 of the Clayton Act permits private plaintiffs to cite final judgments or decrees entered against a defendant in a government proceeding as "prima facie evidence against such defendant as to all matters respecting which said judgment or decree would be an estoppel as between the parties." Thus, private plaintiffs are not required to re-litigate issues that have already been decided in a civil or criminal judgment in favor of the government, including plea bargains. Such "piggy-back" private treble damage actions have become very common, especially in the cartel context.⁶³

B. The European Union

Contingency fees are not permitted in the E.U. Member States. However, in some Member States, such as England, France, Greece, Ireland, Portugal and Sweden, other types of percentage uplift fees or fees that otherwise take account of the outcome of the litigation are available. Nevertheless, in all jurisdictions, the plaintiff retains the financial risk to pay his lawyers' costs; should his action be ultimately unsuccessful, and in many jurisdictions he will also be required to pay attorney fees to the defendant in addition to court fees. While the issue of whether contingency fees should be permitted to ensure the effectiveness of Community rights has never been addressed by the ECJ, it seems safe to say that the ECJ would not endorse them. They are contrary to the legal tradition of the E.U. Member States, and although they would make it easier for plaintiffs to bring a case, they are also seen in Europe as encouraging frivolous or meritless litigation.

V. THE FUTURE OF PRIVATE ENFORCEMENT IN THE EUROPEAN UNION

As shown above, the European Union is far from becoming as plaintiff-friendly as the United States. While the ECJ has developed general principles that strengthen private enforcement of E.U. law, including E.U. competition law, the European Union will always be a far more difficult jurisdiction for plaintiffs than the United States. That, in itself, is not a problem. The legal traditions in the European Union and the United States differ in that the European Union is not as litigation-oriented as the United States. Although the U.S. system promotes enforcement of,

⁶³ See James Atwood and Christopher Oatway, *Antitrust Law—Foreign Market Claims*, NAT'L L.J., May 5, 2003, at B8.

and compliance with, antitrust law, the systems lends itself to abuse, marked by the filing of questionable lawsuits in an effort to extract settlement payments in the millions.

However, if after the entry into force of Regulation 1/2003, there is still no increase in private enforcement of E.U. competition law (either through damage actions or actions seeking injunctive relief or other court orders), the Commission may consider proposing legislation harmonizing national remedies or indeed introducing new remedies. The fact that the Commission has commissioned a study on the conditions for damages claims in Member States suggests that it is already thinking in this direction.

Fundamental change may also be brought by other developments. The U.S. Court of Appeals for the District of Columbia and the Second Circuit recently held that non-U.S. parties may in some cases bring treble damage claims before U.S. courts even if their injuries are wholly based on the effect of the defendant's conduct on foreign commerce. According to *Empagran S.A. v. F. Hoffman-LaRoche Ltd.* ("*Empagran*"),⁶⁴ foreign plaintiffs have cognizable claims under the U.S. antitrust laws for injuries sustained abroad as long as (i) the defendant's conduct has a direct, substantial and reasonably foreseeable effect on U.S. commerce and (ii) the defendant's conduct, in addition to giving rise to the foreign claims, also gives rise to a domestic antitrust claim (by some other party).⁶⁵ Unless the U.S. Supreme Court reverses these decisions in its pending review of *Empagran*, the door has been opened to massive new treble damage actions by foreign parties who are injured by international cartel activity or by other anticompetitive conduct that affects various markets.⁶⁶ Thus, at least with

⁶⁴ 315 F.3d 338 (D.C. Cir. 2003), *cert. granted*, No. 03-724, 2003 WL 2234815 (U.S. Dec. 15, 2003); *see also* *Kruman v. Christie's Int'l*, P.L.C., 284 F.3d 384 (2d Cir. 2002).

⁶⁵ *See* *Den Norske Stats Oljeselskap AS v. HeereMac VOF.*, 241 F.3d 420 (5th Cir. 2001). *Empagran* and *Kruman v. Christie's* created a circuit split with *Den Norske*, which held that an oil company claiming that it paid inflated prices for heavy-lift barge services in the North Sea could not recover damages in the U.S. courts. For a discussion of this issue, which involves the interpretation of the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a, *see Antitrust Law—Foreign Market Claims*, *supra* note 63.

⁶⁶ Interestingly, the U.S. Department of Justice ("DOJ"), which is responsible for enforcing the criminal antitrust laws, is opposed to permitting such foreign claims. In an Amicus brief opposing Supreme Court review of *Den Norske*, the DOJ and the Federal Trade Commission downplayed the utility of foreign plaintiff treble damage actions for deterring cartel behavior, indicating that the "marked growth in foreign antitrust statutes in the last decade counsels caution in extending the reach of United States antitrust laws. . ." Brief of the U.S. and the FTC as Amici Curiae, *on petition for cert. sub. nom. Statoil ASA v. HeereMac VOF.*, 241 F.3d 420 (5th Cir. 2001), at 16. In other words, if the antitrust policemen of the United States have their way, the U.S. treble damage remedy will not be available for foreign plaintiffs injured abroad because foreign antitrust enforcement—both public and private—is expected to fill this space.

respect to large international cartel cases, the question as to whether plaintiffs can seek damages in the European Union might become moot as plaintiffs will likely prefer to sue in the United States.

Moreover, there are signs of intra-E.U. competition on jurisdiction over cartel cases that could result in forum shopping. In *Provimi v Aventis*,⁶⁷ the English High Court asserted broad jurisdiction over claims finding that where it has jurisdiction over one of the English claimants in the action, it would also permit claims in the same action by foreign claimants, thereby avoiding separate claims in multiple jurisdictions.⁶⁸ Furthermore, taking into account that the English courts are generally considered to be more plaintiff-friendly than their continental counterparts, the result could be a shift of litigation towards the U.K., at least in the case of fairly important Community-wide cases. That could also force other jurisdictions to rethink their laws. In any event, it seems safe to say that significant developments are ahead in the European Union.

⁶⁷ The European Commission found that certain vitamin manufacturers had participated in a cartel. See Case COMP/E-1/37.512, *Vitamins*, 2001 O.J. (L 6) 1. This ruling by the English High Court permitted damages claims against two of the participants in the *Vitamins* cartel, Roche and Aventis, by not only English companies, but also a German company.

⁶⁸ The Court accepted that all the defendants were domiciled in a Member State of the European Union and as such the general jurisdictional rule is that a party should be sued in the courts of the Member State in which he is domiciled. However, it is also accepted that a defendant domiciled in one Member State, may be sued in another, in matters relating to tort. The Court also referred to EC Article 6(1) of Regulation 44/2001 which states that "the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."