Interaction Between Public and Private Enforcement

Introduction

Once very much the preserve of US antitrust agencies and courts, antitrust enforcement is now an important feature of the international legal landscape. While it has long been the case in the US that antitrust violations can lead to significant fines for corporations and individuals, prison sentences for individuals found guilty of participating in cartel activities and to "follow-on", private damage claims by injured third parties, the European Commission ("Commission") and other antitrust authorities around the world have only more recently adopted policies and accompanying legal rules which significantly increase the exposure to penalties of those involved in various antitrust violations.

These include powers to impose heavy fines, leniency programmes designed to flush out cartel activities and, depending on the European Union ("EU") national jurisdiction, exposure to criminal sanctions and even extradition to face trial elsewhere.

In addition, while private actions for damages in antitrust cases are still relatively rare in Europe, there is now wide-ranging discussion regarding the role of "private enforcement" in supporting and supplementing public enforcement of the competition rules in the EU. An increase in private enforcement through, for example, more actions for damages, would, in the view of the Commission, serve the purpose of more effective antitrust enforcement without placing greater strains on the public purse. Concerns have been expressed, however, that the facilitating of private litigation, in the current European enforcement context, may hinder rather than enhance the existing public enforcement regime.

This paper considers the underlying policy issues, briefly summarizes the main aspects of public enforcement in Europe (fines, criminal proceedings in a number of Member States, extradition and leniency programmes), reviews key elements of the debate surrounding the Commission's Green Paper on private antitrust damages and discusses whether the objective of increased private litigation in Europe is compatible with the Commission's (and EU Member States') overall enforcement goals.

Policy Issues

A first question is whether and, if so, in what circumstances it is appropriate to speak of private "enforcement" of the antitrust laws in Europe. For many commentators and specialists, enforcement is the preserve of public authorities; private litigation is a means of recovering compensation for losses suffered as a result of an antitrust infringement. The damages awarded in private litigation, it is argued, should compensate the successful claimant but not further penalise or punish the defendant.

This first question raises a fundamental policy issue. The Commission, national competition authorities ("NCAs") and the Member States support the principle of introducing measures and enhancing existing legal regimes in order to promote a competition culture in Europe to contribute to the attainment of the Lisbon Agenda objectives. The achievement of such goals could be served through an allocation of more public funds for antitrust enforcement: the resources available to the Commission and the NCAs could be increased so as to permit the public enforcers to pursue more cases. There appears, however, to be a general reluctance at the Member State level to increase significantly existing levels of public funding for antitrust enforcement. One reason, therefore, for the apparent attractiveness of more antitrust litigation in the pursuit of remedies and compensation in meritorious cases is that it increases the risks faced by companies which are inclined to participate (or continue existing participation) in antitrust infringements. In this way, private

litigation becomes an element (and, depending on the decisions ultimately taken in the policy debate surrounding proposals to facilitate private claims, a potentially important element) in the armoury available to those pursuing the Lisbon Agenda.

Accordingly, it is a policy issue whether and, if so, to what extent private damages litigation should be facilitated and encouraged to supplement public enforcement, both in terms of the objectives served and the efficacy of antitrust enforcement overall.

The policy makers in the US took clear decisions when adopting the relevant provisions of US antitrust law; e.g. in relation to the award of treble damages. This decision reflected an assessment of the risks faced by potential infringers of being sued and the need to factor this risk assessment into the calculation of the economic consequences for the infringer of a judgment awarding damages against it. In other words, the decision to award treble damages under the US system reflects policy considerations based on the need to supplement the deterrent effect of public sanctions.

It is therefore insufficient for those opposed, for example, to the prospect of multiple damages in Europe to rely on the compensatory principle; i.e. that the function of damages in civil litigation is to compensate the successful claimant for loss suffered (no more, no less). Reliance on this argument, whilst of course respectable, avoids the underlying policy issue: what should be the role of private litigation (if any) in promoting greater compliance with the antitrust rules through an increase in the aggregate deterrent effect of all legal means available to antitrust authorities, private litigants and the courts to pursue those committing antitrust infringements?

Whilst there are sound intellectual arguments to support the proposition that antitrust enforcement should be the preserve and responsibility of the public agencies, a consequence of a decision by the policy makers to accept such arguments is that greater public funding would be required to pursue the competition culture goals of the Lisbon Agenda.

A second question is, assuming that policy makers see a role for private litigation to support and supplement public enforcement, what criteria should guide the choice of measures which are designed to increase the incidence of private antitrust litigation? An initial consideration is what types of action for damages contribute to the achievement of the goal to supplement public enforcement. Modifications to the existing legal systems in Europe which facilitate only "follow-on" actions (i.e. actions which rely for the proof of infringement on a decision of the Commission or, where permitted under national procedural rules, of an NCA) will not lead to a significant increase in the number of antitrust infringements which are the subject of proceedings. This number will continue to be dictated by the resources available to the antitrust authorities.

On the other hand, it might be argued that, in certain circumstances, the increased risk of follow-on actions might reduce the incentives available to leniency applicants and therefore potentially reduce the efficacy of leniency programmes in bringing infringements to the attention of the antitrust authorities. Balancing the incentives to potential leniency applicants with the incentives to claimants in follow-on actions therefore becomes an important task.

In terms of "stand-alone" actions (i.e. actions which do not rely on a decision of the Commission or an NCA), there are a number of important issues which will influence the decisions of the policy makers. There is, first and foremost, a critical balance to be struck between the rights of claimants and the rights of the defence. Avoiding the introduction of measures which would encourage claimants to bring unmeritorious claims is clearly important. Equally, enabling claimants with meritorious claims to succeed and not be defeated by procedural rules which favour the defendant would contribute to the potential deterrent effect of private litigation. In this respect, the debate over the merits and demerits of the disclosure of documents by the parties (claimant and defendant) and possibly third parties rests to a greater extent on the differences between the civil law and common

law systems in Europe than on any concerns that changes in Europe would lead to a US-style discovery system which is regarded by a number of commentators (on both sides of the Atlantic) as contributing to the so-called "excesses" of the US system. Opposition to disclosure of documents is based, for example, on arguments which pray in aid the right against self-incrimination and the need to justify any procedural changes which would apply only to antitrust claims. If the policy makers do not consider it appropriate to introduce greater disclosure of documents into the civil law systems in Europe, a potential consequence is that, when a claimant has a choice, it is more likely that it will bring its claim in a jurisdiction which provides for disclosure. Such a result would itself be criticised by those who consider forum-shopping to be a bad thing (notwithstanding that it is an inherent part of civil litigation in Europe). This tension merely highlights the point that the policy makers, in arriving at choices, will be faced with competing interests and arguments and will need to be guided by clear policy objectives.

It is also relevant to bear in mind that changes to procedural rules would not, in-and-of-themselves, resolve all the issues faced by potential claimants in meritorious stand-alone actions. The burden of proving an antitrust infringement ultimately lies with the claimant (leaving aside for present purposes the suggestions that procedural systems might be changed so as to reverse the burden of proof once the claimant has, in the court's view, passed a particular threshold). Proof of an infringement before a national court will in part depend on the ability of the claimant to rely on clear precedents and on the interpretation of often complex, economic data. As is apparent from the House of Lords judgment in the long-running *Crehan*[1] case, the burden on Mr Crehan of proving the infringement would not have been alleviated in any way by the adoption of any of the options contained in the Commission's Green Paper. Moreover, the current trend towards a more economics-based analysis in competition cases, not least in Article 82 EC cases, will, more likely than not, increase the uncertainty of the outcome of a claim which involves an appreciation by the court of complex, economic factors. The recent UK Court of Appeal judgment in the *British Horseracing Board* case[2] (alleged excessive pricing) also demonstrates the important role which national courts will increasingly play in developing antitrust law as well as in its enforcement.

A third question is whether, in order to allocate their limited resources to priority cases, the Commission and NCAs will in future be even more rigorous in their determination to decline investigating complaints involving certain types of anti-competitive behaviour. There are clear indications, for example, that disputes involving contractual matters (e.g. distribution or licensing agreements to which the potential application of a relevant block exemption - and guidelines - will be a determining factor) will be left to the parties to resolve, if necessary, through recourse to the national courts. Equally, large companies with access to appropriate legal advice will be expected to resolve disputes with similarly-situated companies without the intervention of the Commission or NCAs at least where the antitrust issues do not raise novel or otherwise important issues meriting the devotion of public enforcement resources.

In the event that the Commission and the NCAs do take such a position (as seems likely, if not inevitable) claimants will, by definition, be bringing stand-alone actions. For this reason alone, measures designed solely or mainly to facilitate follow-on actions will not be sufficient to address the underlying policy objective (if adopted) of facilitating private litigation for claimants with meritorious claims as a means of supplementing public enforcement.

Lastly, the answer to the question why there should be changes to national legal systems to facilitate private antitrust litigation (and not, for example, in the field of environmental law), will itself depend on policy considerations. There is no fundamental reason why policy considerations should not give rise to legal regimes which incorporate special features in different areas of the law.

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

[2] Attheraces Limited v the British Horseracing Board, Court of Appeal, (EWCA civ 38), judgment of 2 February 2007.

How important is the achievement of the competition culture objectives of the Lisbon Agenda? How much are Member States prepared to allocate from the public purse in the pursuit of these objectives? Should private litigation supplement public enforcement and, if so, to what extent? At the end of the day, these are policy issues. Whilst the policy makers will draw on the experience and expertise of legal, economic and other specialists, and on experience in other jurisdictions, they will need to identify priorities and, in turn, make hard decisions.

Elements of Public Enforcement

Fines

In Europe, the imposition of fines is the principal means of penalising companies found to have engaged in anticompetitive behaviour in breach of the competition laws. In addition to penalising infringers, the aim of imposing fines is to deter others from engaging in similar activities. Having initially lagged behind the US in the level of fines imposed, the Commission now regularly imposes fines equal to, and even higher than, those imposed in the US. In the *Vitamins* cartel,[3] aggregate fines amounted to €855.2 million with Hoffman la Roche and BASF respectively receiving fines of €462 million and €296.16 million. The level of fines has continued to increase with record fines totalling nearly €2 billion being imposed by Commission last year. Already in 2007, following the imposition in January on Siemens of the highest individual fine until then for participation in a single cartel infringement (*Switchgear* cartel)[4], the Commission issued the highest individual fine and highest collective fines in the *Lifts* cartel in February.[5]

Significant Commission Cartel Fines, 2006/2007

Cartel	Aggregate Fines (rounded) €
Lifts	990,000
Switchgear	750,000
Synthetic Rubber	519,000
Hydrogen Peroxide	390,000
Acrylic Glass	345,000
Copper Fittings	315,000
Bitumen	267,000

The Commission has recently adopted new guidelines for setting fines,[6] replacing the 1998 guidelines.[7] Companies infringing Article 81 EC ("Article 81") may be fined up to 10% of their

[3] Case COMP/37.512 - *Vitamins*.

[4] Case COMP/38.899 - *Gas Insulated Switchgear*.

[5] IP/07/209.

[6] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003; OJ C 210, 1.9.2006.

preceding year's (group) turnover. Within this limit, the new guidelines contemplate a starting point for fines of up to 30% of a company's annual sales to which the infringing activity relates. The starting figure may be multiplied by the number of years during which the infringement took place with further increases (or reductions) for aggravating (or mitigating) circumstances. The Commission may also add a further so-called "entry fee" based on 15–25% of relevant yearly sales to deter cartel activity. The guidelines also provide for increased fines of up to 100% for "repeat offenders" taking into account previous Commission infringement decisions as well as any rendered by Member States. The new guidelines are generally expected to lead to a further increase in the level of fines.

Although Commission Guidelines do not apply to NCAs in their application of Article 81 (or their domestic equivalents), some NCAs may adopt fining guidelines that reflect similar principles.

Accordingly, the imposition of fines in Europe, in particular for cartel infringements, already represents a significant deterrent for companies operating in sectors in which the structural and economic characteristics increase the risk of unlawful, collective behaviour. It also acts as an incentive to companies which discover that they are, or have been, engaged in such activity to apply for leniency (see below). The combination of high fines and an effective leniency programme contributes significantly to the efficacy of public antitrust enforcement in Europe. This is one important factor to be taken into consideration when weighing the pros and cons of greater private antitrust litigation.

Criminal Sanctions

Criminal sanctions for cartel activity now exist in a number of jurisdictions around the world. Whilst the US continues to lead the way in terms of criminal sanctions for violations of the Sherman Act, the possibility that the authorities in other jurisdictions may also resort to criminal prosecutions in serious cases means that individuals (and not just the companies which employ them) are increasingly subject to the rigours of public enforcement.

EU antitrust enforcement is administrative (rather than criminal) in nature. The Commission is empowered to sanction "undertakings" but not individual corporate officers or employees. National laws in a number of Member States do provide for criminal sanctions where individuals participate in certain types of behaviour which amounts to an infringement of Article 81 or their domestic equivalents.[8]

In the UK, the Enterprise Act 2002 established the "cartel offence" under which individuals risk fines and custodial sentences for participating in certain hard-core infringements like price fixing and bid-rigging provided that certain further conditions are satisfied (for example that the individual must have acted "dishonestly"). Under English Law, directors responsible for the participation of their company in an infringement may also face disqualification.

In addition to the recently introduced cartel offence, violators may also be vulnerable in the UK to criminal prosecution for infringements committed before the cartel offence came into force (under the common law offence of conspiracy to defraud). For example, criminal prosecutions for conspiracy to defraud have been brought against a number of directors of generics drug companies accused of price-fixing to the detriment of the National Health Service.

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[7] Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty; OJ C 9, 14.01.1998.

[8] Last year, Ireland became the first European country to obtain a criminal conviction and prison sentence for a competition law offence. *The Director of Public Prosecutions v Michael Flanagan, and others.*

The possible application of the offence of conspiracy to defraud to price fixing has been tested recently in the highly publicized case of Mr. Ian Norris, the former CEO of Morgan Crucible, who in 2003 was indicted in the US on various charges including price-fixing contrary to Section 1 of the Sherman Act. The charges against Mr. Norris related to activities which took place before the introduction of the "cartel offence" under the Enterprise Act 2002. The US authorities seeking the gain extradition of Mr. Norris asserted that he was, in any event, criminally liable under the common law offence of conspiracy to defraud. The UK government and courts have so far accepted these arguments.[9] Mr. Norris, save for any successful appeal to the House of Lords, therefore faces extradition to the US to stand trial (see below).

Extradition

The power to extradite EU citizens rests exclusively with the Member States. In principle, a bi-lateral extradition arrangement requires dual criminality in, and reciprocity between, the participating states. The offence in question must be a crime in both the requesting and the requested state at the time at which the alleged offence took place. In addition, the requesting and the requested state should have broadly similar rights/obligations with regard to the procedures for making and assenting to an extradition request.

In the UK, commentators have argued that, as a result of recent changes in the law, it has become easier for states like the US to request the extradition of UK citizens (or UK-based individuals). Under the Extradition Act 2003, the US is one of the countries to which an individual may be extradited on the basis of a statement of facts accompanying the extradition request without the need to adduce evidence sufficient to support a *prima facie* case. The Extradition Act 2003 has therefore reduced the evidential burden normally required by a requesting state. It should also be noted that the US Senate has not ratified the underlying Extradition Agreement and the US itself still requires requesting countries to demonstrate a *prima facie* case against a US citizen before it will consider extradition.

If Mr. Norris is, in fact, extradited, it would mark the first time that a European country has extradited an individual to the US in order to face antitrust-related offences (although it should be noted that a number of European executives have voluntarily given themselves up to US authorities for their part in US antitrust infringements).

The *Norris* case also demonstrates that, even where there are no specific criminal sanctions for infringements of competition law (or where the activities pre-date the introduction of any such criminal measures), individuals may nevertheless be subject to prosecution under other relevant criminal laws. This may have implications for future extradition requests to other European states.

Leniency

Leniency programmes encourage companies which are, or have been, involved in cartel activities to approach competition authorities with evidence in exchange for full or partial immunity from the penalties to which the company would otherwise be exposed. In jurisdictions in which individuals also face criminal sanctions, a leniency application may result in protection for them against prosecution or a reduction in the penalty which they would otherwise suffer.

There is a broad consensus that the Commission's leniency programme has been a success insofar as it has helped destabilize cartels by creating a climate of uncertainty and distrust amongst participants as the potential benefits of a successful application trigger a race to the Commission's door.

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[9] Ian Norris v The Government of the United States of America and Others [2007] EWHC 71 (Admin).

In late 2006, the Commission introduced changes to its leniency programme.[10] The revised rules clarify the information which applicants must provide in order receive immunity or reduced fines, highlight the requirements of continuous cooperation and the procedure for making oral leniency applications, and introduce a "marker" system by which companies can reserve their place in the leniency "queue". Aside from clarifying matters for potential applicants, these changes should help ensure that the Commission receives actionable information thus allowing it to direct its efforts and resources even more effectively.

To be granted immunity from fines, the applicant must cooperate "*genuinely, fully, on a continuous basis and expeditiously*". Immunity from fines is only available to the first successful applicant. Thereafter, the level of the potential reduction of fines for information or evidence which is of "*significant added value*" diminishes with the order of (successful) application:

- second applicant – 30-50%;
- third applicant – 20-30%;
- subsequent applicants – up to 20%.

In defining "*significant added value*", the revised Notice explains that "*compelling evidence will be attributed a greater value than evidence such as statements which require corroboration if contested*". Where a company wishes to apply for immunity, but does not have sufficient information and evidence to meet the criteria laid down in the Notice, the Commission may grant a "marker" to protect the applicant's place while giving the applicant additional time to collect and provide the requisite evidence. The "marker" system is available only to immunity applicants; i.e. the first applicant. Finally, the Notice stipulates the procedures to protect corporate statements given in the course of leniency applications from disclosure to claimants pursuing civil damages.

Despite the Commission's clear intention to clarify the leniency procedures, the Notice does leave some questions open; for example, for how long a "marker" will be held while a company gathers sufficient information and what specifically the Commission would consider "*compelling evidence*" for applicants providing "*significant added value*" information in a bid for reduced fines. Moreover, the procedure set out in the Notice for oral corporate statements, which is aimed at shielding EU leniency applicants from discovery and disclosure rules in private litigation (and thus removing a potential disincentive for such applicants to make such information available to the Commission), still leaves some open questions; for example, the status of an oral corporate statement when reduced to writing by the Commission's Staff and subsequently corrected/approved by the applicant.

Accordingly, for these and other reasons, the new procedural rules in the Notice do not obviate the need for a careful consideration of a company's legal strategy in circumstances in which it faces potential public penalties and the risk of private damages claims. One issue to be considered by potential leniency applicants is the advisability of making concurrent applications to relevant NCAs since the Notice does not create a "one-stop-shop" for leniency applications in Europe. Similarly, a leniency application to any NCA does not have binding effect on any other national competition authority or the Commission. Changes to the scope and nature of private antitrust litigation will inevitably impact on the evaluation by a potential leniency applicant of the risks which it faces from public and private "enforcement" respectively and therefore influence the decisions which such applicants will take in choosing between alternative legal strategies.

[10] Commission Notice on Immunity from fines and reduction of fines in cartel cases; OJ C 298 /11, 8.12.2006.

Private Enforcement

As indicated above, there is a growing emphasis in Europe on private damages claims as a potential complement to the public enforcement of the competition laws. Damages for loss resulting from antitrust infringements are, in principle, available in all Member States. The Commission sees the facilitation – and even encouragement – of private damages actions as a complement to public enforcement by the Commission itself and the NCAs. The Commission argues that it and the NCAs do not have sufficient resources to pursue all antitrust infringements and that the Commission, in particular, should direct its resources to cases, like international cartels, that have a significant impact on the European economy.

With over 40 years of practical enforcement experience and a wealth of European court jurisprudence, the Commission believes that private litigants should be well placed to enforce their rights, including through actions for damages, and that the national courts will increasingly be in a position to hear and render consistent judgments in such cases. The Commission is emphatic in its insistence that it wishes to encourage a competition, rather than a litigation, culture as it is keenly aware of concerns that any proposed changes to the *status quo ante* in Europe might lead to what some have referred to as the "excesses" of the US system. Nevertheless, the highly developed US system represents one model for the Commission to consider critically in seeking to promote changes in Europe which would facilitate and encourage private litigation.

The Commission issued its Green Paper in December 2005 setting out the possible obstacles to successful private actions for damages in the EU and identifying a number of remedial options in relation to each obstacle for consultation.[11] The exercise was designed to explore potential modifications to existing substantive and procedural laws which may facilitate the pursuit of actions for damages in national courts in the EU. Some of the main areas for consideration (and the ones that have elicited the most lively debate) include:

- whether special rules on disclosure of documentary evidence should be introduced;
- how damages should be defined and calculated;
- who should be able to claim damages and whether the passing-on defence should be permitted;
- whether there should be special procedures for bringing collective damages actions; and
- how to ensure that any policy of facilitating damages actions does not detract from other important policy objectives of the Commission and the NCAs, including the encouragement of whistle-blowing through leniency programmes in cartel cases (as discussed above).

Feedback received during consultation highlighted that there are a number of widely-held concerns with respect to proposals to enhance private "enforcement" in Europe. In particular, the consultation process confirmed that the standing of claimants to bring actions for damages, the availability of punitive/multiple damages, and the status of the "passing-on defence" in antitrust damages actions are critical issues. Many respondents argued that the fundamental changes to civil law systems that proposals relating to these and other issues would entail are not justified, even if they would facilitate greater private "enforcement" within the EU. Overall, a large number of commentators considered that the enforcement of competition law within the EU can be achieved through existing public enforcement channels.

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

These issues highlight the fundamental question, namely whether increased private litigation is compatible with the existing public enforcement regime. In particular, there are concerns that measures, for example, to facilitate the increased disclosure of documents in private litigation might deter potential applicants from applying for leniency for fear of exposing themselves to an increased risk of civil damages claims. Indeed, some of the proposed changes would not only increase the likelihood of a leniency applicants being pursued for private damages (or provide additional evidence to existing claimants) but would also increase the quantum of any such claims (i.e. multiple damages).

Many commentators argue that there are no sound policy reasons why there should be rules of procedure and compensation which differentiate claims for damages in competition cases from claims in other areas of the law. In terms of the increased exposure to damages that such reforms would entail, many believe that financial sanctions should be a matter only for public authorities, that publicly-imposed sanctions are, in any event, already sufficient, that damages should be compensatory (not punitive), and that a multiple damages system will lend itself to potential misuse/abuse which will inevitably undermine the incentives to pursue leniency. For example, it is argued by some that potential amnesty applicants might well conclude that laying low and hoping their cartel involvement never comes to light is a better option than a voluntary leniency application. Thus, even though an application might avoid or reduce one's public liability, the increased risk of follow-on civil damages claims (ones that could, in the event of multiple damages, dwarf any financial penalties imposed by the authorities) might make any voluntary action less attractive. Accordingly, there is a clear tension between the goal of promoting (or offering incentives for) self-confession on the one hand and enhancing the incentives of private claimants to bring claims on the other.

Whilst procedures permitting disclosure of documents exist in the EU Member States, they are rarely used outside of the common law jurisdictions. The concept of disclosure of documents between the parties is not an integral part of the civil law system. It is therefore not surprising that the Commission's options for increasing disclosure have met with stiff criticism from a large number of civil law respondents. Such an approach would, they argue, be incompatible with some of the legal principles of their respective jurisdictions including, most notably, the fundamental protection against self-incrimination.[12] The Commission notes that there are other European and international initiatives aimed at enhancing the ability of claimants to obtain documentary evidence from defendants or third parties and that the prospect of greater disclosure of documents in antitrust' litigation is, therefore, neither radical nor particularly novel.[13]

Discovery and multiple damages are, of course, long-standing facts of life in the US but greater exposure to potential damages claims in Europe raises the spectre of a move towards more US-style litigation which, it is feared, would prove highly disruptive and costly and would undermine existing public enforcement achievements.

Where Next?

These are all issues which the Commission will weigh in the balance in drafting its White paper which is due to be published later this year.

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[12] See e.g. Vodafone Group's response in which it claims that there is "no compelling argument that a claimant in an antitrust claim is necessarily in any worse position regarding evidence than a claimant in other types of claim". Vodafone's comments and other stakeholders' responses to consultation can be found:
http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/gp_contributions.html

[13] In particular, the Commission refers to Directive 2004/48 on the enforcement of intellectual property rights, the European Code of Civil Procedure and the ALI/UNIDROIT Principles of Trans-national Civil Procedure).

It is an established principle of EU law that a private litigant has the right to pursue actions for damages before national courts for infringement of EC competition law. The Commission's objective in publishing, and seeking responses to, the Green Paper was to explore options to facilitate the *exercise* of this right. This issue goes to the heart of the Commission's initiative: public resources are not sufficient to pursue all of the cases in which public intervention is necessary to create a sufficient deterrent effect against infringing activity. The relatively small number of cases proceeding to judgment in national courts suggests that there are either *obstacles* to private litigation or *insufficient incentives* to bring private claims.

Limitations in the civil jurisdictions on a claimant's legal ability to require defendants and/or third parties to disclose relevant evidence in their possession is viewed as one such major obstacle. Indeed, a significant increase in private litigation in civil law jurisdiction is not likely if claimants are in practice compelled to rely almost exclusively on prior decisions of the competition authorities to prove an infringement.

In terms of incentives, while the Commission is clear that it wants to create a competition rather than a litigation culture, the achievement of its objective (supplementing public enforcement by private enforcement) necessarily requires more litigation and, therefore, greater incentives to pursue claims. The availability of multiple damages, for example, would provide potential litigants with a very powerful incentive and has been one of the main features encouraging private litigants to pursue civil damage claims in the US. The Commission acknowledges the impact multiple damages might have on the efficacy of leniency programmes in Europe but believes that the two can be reconciled. In particular, the Commission suggests an approach whereby a successful leniency applicant might remain at risk only for single damages. This would mirror the legislative changes in the US where successful amnesty applicants are liable, in private litigation, only for single (as opposed to treble) damages and are no longer jointly and severally liable with their co-conspirators.

Conclusion

It is clear that the Commission and Member State governments need to balance the policy objective of greater antitrust enforcement, which would in principle contribute to the creation of a competition culture in Europe, with sensitivities (some better founded than others) over the introduction of significant modifications to existing legal and judicial systems. These systems reflect cultural roots which are part of Europe's diversity, a heritage which Europe's political leaders are anxious to preserve. The reconciliation of these different stances is not going to be easy but that is the role of the policy maker. In the final analysis, the relevant decisions in Europe (as earlier in the US and elsewhere) will be left to policy makers who will need to choose between conflicting priorities and interests.

Whatever the policy makers eventually decide, it is a fact that the European and national courts are confronted, on an increasingly regular basis, with legal questions directly relevant to the policy issues in this debate. It is likely that Europe will continue to see an increase in the number of cases in which competition law is pleaded, whether those cases settle or come to judgment, and the number of cases in which damages for antitrust infringements are claimed and awarded. The open question is whether, at the end of the current policy debate, a decision will be taken to facilitate and encourage such actions by the introduction of procedural changes to national legal and judicial systems which make the enforcement of antitrust law in Europe a special case. This will only happen if European policymakers can be convinced that there is a demonstrable and pressing need for public enforcement to be complemented and supplemented by private enforcement and that the changes introduced to facilitate private antitrust litigation would not have detrimental effects for the efficacy of public enforcement.