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GENERATING EXTRA WIND IN THE SAILS OF THE EU ANTITRUST ENFORCEMENT BOAT

Corinne Bergen*

INTRODUCTION

With 90% of its antitrust law enforcement generated by private rights of action, the United States provides a great opportunity for aggrieved consumers to right the wrongs that have been done to them, while concurrently, maximizing its avenues of antitrust enforcement. Consumers assist the Department of Justice (DOJ) and the Federal Trade Commission (FTC) with the enforcement of the U.S. antitrust law by asserting the right granted to them under the Clayton Act to bring private actions. Unlike the U.S. system for antitrust enforcement, the European Union ("EU") does not expressly provide its citizens with a private right of action with which to secure compensation for violations. Currently however, the EU is working on creating an environment where the private right of action can thrive and succeed in compensating consumers, as well as, increasing the enforcement of its antitrust law.

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With the growth of transnational business dealings comes the responsibility of the EU to consider adopting a system for private enforcement that will not only work productively throughout Europe, as well as, with the U.S. system, but also work to promote competition while maintaining consumer protection. There are key features of the U.S. private enforcement system that work collectively to provide an incentive for individuals to take on the roles of "private attorneys general" and the adoption of these key features, or a variation thereof, is necessary to a successful application of the private right of action in the EU.

The recent actions taken by the EU with regard to private enforcement lay the first bricks on a path to effective and protective competition law enforcement in the EU, however, in order for the EU to establish a valuable private right of action it is necessary to look to the US system and examine how its different aspects work to provide a private right of action. This Note studies the current state of antitrust regulation in the U.S. and EU and examines the possible structures for a successful private right of action in the EU.

Part I contains a discussion of the state of antitrust law as it exists in the U.S. Part II discusses the current state of antitrust or competition law in the EU and the recent actions taken by the EU that will open the doors to the inception of a successful private right of action for its citizens. Part III provides an overview of how the encouragement in the U.S. to pursue a private right of action, not only stems from the ability of the plaintiff to recover treble damages, as well as attorneys' fees, but also from broad discovery which makes it feasible for plaintiffs to obtain a significant amount of evidence, thereby increasing their chances of proving a violation of the law. Also discussed in this section is how the availability of contingency fee arrangements and class actions in the US system allow those with minor claims to come together and bring suit against those violators who may have otherwise gone unpunished for their offences. While incorporating a version of the aspects of the U.S. antitrust law into the EU system may encourage individuals to assert their private right of action,

Jan. 14, 2006) ("Green papers are discussion papers published by the [European] Commission on a specific policy area. Primarily they are documents addressed to interested parties - organizations and individuals - who are invited to participate in a process of consultation and debate. In some cases they provide an impetus for subsequent legislation").


8 Id.
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there are other aspects of the U.S. construct, such as standing and the indirect purchaser exclusion, that are relevant to the issue of private antitrust litigation. And finally, part IV points to the EU’s recently published Green Paper on “Damages actions for breach of the EC antitrust rules,” and addresses the issues raised by the structural suggestions for EU competition law contained therein.

UNITED STATES ANTITRUST LAW

A. U.S. Statutory Antitrust Law and Its Enforcers

In the U.S., consumer protection against “business practices that unreasonably deprive customers of the benefits of competition, resulting in higher prices for inferior products and services,” is set forth in two basic antitrust laws, the Sherman Act and the Clayton Act. In addition to these two laws, the Federal Trade Commission Act (FTCA) is also utilized to prevent the deprivation of the benefits of competition for the benefit of the consumer.

i. The Sherman Act of 1890

In 1890, Congress utilized the authority granted to it under the U.S. Constitution, to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes,” to ratify the Sherman Act. The

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9 Id.
14 See CRS Report for Congress, 95-116: General Overview of United States Antitrust Law (1995) [hereinafter CRS Report] (Stating that these laws do not constitute the entirety of antitrust law in the United States, but rather they are those which are most often utilized. “There are also some statutes directed to specific industries or types of transactions which indicate the likely antitrust consequences for economic conduct in those areas,” such as the Export Trading Company Act, 15 U.S.C. §§ 4001-21, and the Soft Drink Interbrand Competition Act, 15 U.S.C. §§ 3591-03.), available at http://www.cnie.org/nle/crsreports/risk/rsk-63.cfm (last visited April 16, 2006).
15 U.S. CONST. art. I, § 8, cl. 3.
Sherman Act consists of seven sections laying out the foundations of illegality with regard to business practices. Of these seven sections, Sections 1 and 2 are of the greatest importance. Section 1 declares felonious, "every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." Under Section 2 felony status is granted for "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." Violations under the Sherman Act are punishable civilly, as well as, criminally.

The mission of the Antitrust Division of the United States Department of Justice is to "promote and protect the competitive process - and the American economy - through the enforcement of the antitrust laws." The DOJ is the only source of antitrust enforcement that is able to bring both civil and criminal enforcement actions pertaining to the antitrust laws. The DOJ may "prosecute serious and willful violations of the antitrust laws by filing criminal suits that can lead to large fines and jail sentences." Where criminal enforcement actions are not suitable, the DOJ will bring civil actions "seeking court orders forbidding future violation of the law and requiring steps to remedy the anti-competitive effects of past violations." Punishment for violations can reach up to $100,000,000 for corporations, $1,000,000 for any person, or imprisonment up to 10 years, or a combination of fines and imprisonment.

ii. The Clayton Act of 1914

The Clayton Act, enacted in 1914, is comprised of Sections 12 to 27 of Title 15, which seek to fill in the gaps left open by the Sherman Act. These
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sections punish such illegal practices as price-fixing, bid rigging, and tying arrangements. The importance of this act cannot be underestimated because, not only does it add to the reach of the Sherman Act by establishing the right to prevent activity "in its incipiency which may tend to restrain trade," but it also grants the right of "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws [to] sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy." In addition to providing the much needed private right of action the Clayton Act allows those seeking a private right of action to collect treble damages, court costs and attorney's fees.

iii. The Federal Trade Commission Act

The Federal Trade Commission Act, along with the Clayton Act, was enacted in 1914, supplements the Sherman and Clayton Acts and provides for the Federal Trade Commission. The FTC is "empowered and directed to prevent persons, partnerships, or corporations... from using unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices

27 See 15 U.S.C. § 13 (2000) (Stating that it is illegal for any person to "discriminate in price between different purchasers of commodities of like grade and quality... where the effects of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them").

28 Tying arrangements exist where entities conspire to sell their product in connection with another product so that if the consumer wants "X" he must also purchase "Y".

29 See Congressional Research Service Report for Congress, supra note 14. The Sherman act provides protection against concerted activity which actually restrains trade, while the Clayton Act allows for protection against concerted activity which may tend to restrain trade, but which has not yet done so. An example of the use of these laws would be the prevention of a merger between two entities which if permitted to go forth would restrain trade.


31 Treble damages consist of three times the actual damages sustained.

32 See Congressional Research Service Report for Congress, supra note 14. (In 1982 the provision for damages was amended to restrict foreign states from recovering more than actual damages, court costs, and reasonable attorney's fees. (15 U.S.C. § 15(b)). In addition, until 1990 the United States was unable to collect treble damages in the event that it sustained monetary injury, but fortunately this limitation was removed by Congress after "hearing testimony to the effect that the damage limitation made the federal government the 'antitrust victim of choice'.")

33 See Federal Trade Commission Act [hereinafter FTCA], 15 U.S. C. § 44. (Defining "commerce" as "commerce among the several States or with foreign nations, or in any Territory of the United States or District of Columbia, or between any such Territory and another, or between any such Territory and any State or Territory or foreign nation").

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The Bureau of Competition, the antitrust arm of the FTC, carries out its mission to “allow for unfettered competition in the marketplace” by investigating alleged antitrust violations and alerting the FTC to when it is necessary to take formal action against such violators.35

As both the DOJ and the FTC are given the responsibility of enforcing the antitrust laws, it is necessary for these two entities to work in concert so that they may aid one another in the continued protection of the competitive process of the American economy, while preventing a duplication of effort on their parts.36 These entities engage in frequent consultation with one another by following a “clearance procedure” as each case arises, so that it may be determined “which agency would be the more appropriate one to handle the matter.”37 While the DOJ and the FTC play essential roles in the enforcement of the U.S. antitrust law, it is the private enforcement granted under the Clayton Act which plays a pivotal role consisting of about 90% of the total U.S. antitrust enforcement.38

B. The United States Private Right of Action

When private individuals assert the right granted to them under the Clayton Act they may do so in one of two forms.39 The first is the pure statutory form, and the second is the contract form.40 In the pure statutory form, the private litigant assumes the role of “private attorney general” by seeking compensation for a wrong that may have been done to him, while at the same time acting in a capacity that defends the public interest.41 Under this form, the litigant alleges that he or she has suffered damages, generally, not as a result of some contractual relationship between the parties, but rather, as a result of another’s violation(s) of the U.S. antitrust law.42

36 Id.
38 See Holmes, supra note 1.
39 See Buxbaum, supra note 5, at 224 (“examin[ing] the growing inconsistencies in judicial evaluation of the public interest at stake in regulatory disputes”).
40 Id.
41 Id. at 222.
42 Id. at 224. (In such instances a contracting party may claim that the forum selection clause should be vacated because violations of United States antitrust laws are present, so that the private litigant may have the advantage of litigating in a more favorable forum).
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Unlike the pure statutory form, under the contract form the individual's claims are most often raised in situations where some type of contractual relationship$^{43}$ exists between the two parties. A plaintiff may seek the protection of the U.S. antitrust law in an offensive way, for example, in a situation where there is "a licensee who believes that a breach of contract by its licensor involves violations of U.S. antitrust law."$^{44}$ However, more commonly, the U.S. antitrust law is utilized under the contract form in a defensive way, where a defendant seeks to avoid contract terms which may include forum selection clauses and the like.$^{45}$ Differing from cases brought in the pure statutory form, cases of the contractual nature "reveal a focus on private-law values rather than on the strength or character of the public interest asserted."$^{46}$

Of the two forms, it is the pure statutory form in which enforcement of the antitrust law or compensation for the violation of antitrust law is the main objective, while under the contractual form the claimant is most likely utilizing the antitrust law as leverage to further their own private interests. These actions may be brought by individuals, but they are most often brought by a class consisting of consumers who have been aggrieved by another's violation of the law or by states$^{47}$ acting on behalf of their citizens.$^{48}$

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$^{43}$ Id. at 237. (These contractual relationships are generally international relationships as the conflict arises as a result of the enforcement of forum-selection and choice-of-law clauses in international agreements).

$^{44}$ Id. at 226.

$^{45}$ Id.

$^{46}$ Id. at 236. (As there is a "judicial unwillingness to insist on the application of domestic regulatory law in the face of private contractual arrangements...contract cases have marginalized the private attorney general by sharply restricting the circumstances in which private attorneys general can assert U.S. laws abroad").

$^{47}$ See 15 U.S.C. 15(c) (2000) (granting "any attorney general of a State" the right to "bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State...for injury sustained by such natural persons to their property by reason of any violation" of the Sherman Act).

PRESENT STATE OF EU ANTITRUST LAW

A. EU Antitrust Law and Its Enforcers

Presently in the EU, antitrust enforcement generally lies in the public sector, as there is an absence of a guaranteed right to its citizens to bring private actions against violators of its antitrust law. The EU's antitrust law, or competition law as termed from the European perspective, is set forth in Articles 81 and 82 of the Treaty Establishing a European Community ("EEC Treaty").

Article 81 (1) of the treaty prohibits "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market." More or less analogous to Section 1 of the Sherman Act, it can be said that a violation of Article 81 calls for "at least two companies, involved in restraining trade, as opposed to unilateral action by one business."

In addition to listing particular "undertakings," which are prohibited, such as price-fixing and bid-rigging, Article 81 (3) declares Article 81 (1) to be inapplicable if any such undertaking "contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit".

Congruent to Section 2 of the U.S. Sherman Act, which prohibits monopolization or attempted monopolization, Article 82 prohibits "any abuse by one or more undertakings of a dominant position with the common market or

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49 EC Treaty art. 81-82.
50 EC Treaty art. 81 (1).
52 EC Treaty art. 81 (3); 15 U.S.C. § 1-7 (2000) (While the Sherman Act does not specifically provide for an exception such as is present in Art 81(3) of the EU antitrust law, it does state that when presiding over antitrust claims the court has discretion when it comes to punishment for such violations. As this is the case, it may be possible that a court would be less likely to harshly punish those violators whose acts have contributed to the production of goods or promote technology, while creating a benefit for the consumer).
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in a substantial part of it...insofar as it may affect trade between Member States."\(^{54}\) Though similar in context, it has been argued that the U.S. antitrust scheme is geared more toward consumer protection, while the EU scheme is primarily focused on protecting competition.\(^{55}\)

Unlike the U.S. antitrust laws which are enforced by public as well as private entities, Article 85 of the EEC Treaty, entrusts the duty of enforcing the competition laws to the European Commission ("the Commission"), stating that it shall "ensure the application of the principles laid down in Articles 81 and 82."\(^{56}\) Also, under Article 82, the Commission is ordered to work "on its own initiative, and in cooperation with the competent authorities in the Member States" when investigating possible violations of the competition law.\(^{57}\) In the event that such a violation is present, the Commission has the duty of proposing appropriate measures to bring it to an end or alternatively to record such violations and authorize the Member States to remedy the situation according to its orders.\(^{58}\) In assigning punishment, the Commission and respective Member States subject companies to heavy monetary fines, "which may be as large as 10 percent of the companies’ worldwide annual revenue," however the EU does not issue criminal penalties for competition law violations.\(^{59}\)

i. Member States

As the states in the U.S. each have their own set of local antitrust laws, the Member States in the EU each have their own diverse governments and versions of competition law. Some Member States provide for the private enforcement of their competition laws,\(^{60}\) however the lack of a set rule governing private enforcement under the EU competition law leaves plaintiffs "with little or no legal guidance in many jurisdictions."\(^{61}\) As a result of the variation that exists from one Member State to the next in terms of substantive as well as procedural aspects of their competition law, there is the "possibility of inconsistent verdicts and forum shopping."\(^{62}\)

\(^{54}\) EC Treaty art. 82.
\(^{55}\) See Bumgardner, supra note 51.
\(^{56}\) EC Treaty art. 85.
\(^{57}\) EC Treaty art. 82.
\(^{58}\) EC Treaty art. 85.
\(^{59}\) See Bumgardner, supra note 51.
\(^{60}\) See McDavid, supra note 7 (stating that only 12 out of the 25 member states appear to expressly provide for a private right of action to seek damages resulting from violations of their competition laws).
\(^{61}\) Id.
\(^{62}\) Id.
B. Paving the Way for a Private Right of Action

The private right of action is neither explicitly forbidden by EU competition law, nor specifically granted. As a result, it was unclear whether such a right existed until the 1999 European Court of Justice ("ECJ") decision of *Courage v. Crehan*. In that case the ECJ held that the usefulness of the competition law and "the practical effect of the prohibition laid down in Article 81(1)" would be put at risk if it were not open to an individual to claim damages for loss caused by conduct liable to restrict or distort competition. As a result of this notion and the explicit grant of power over enforcement of the competition law laying solely in the hands of the Commission under the EEC Treaty, the ECJ went on to conclude that "actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community."

i. The Birth of National Enforcement of Community Competition Law

Following the ECJ decision in *Courage v Crehan*, the EU adopted Regulation 1/2003 (the "Regulation"), in December of 2002, which established the foundation for a new and more productive enforcement of Articles 81 and 82. Taking effect in May 2004 an important part of the Regulation called for bringing together national competition authorities with the Commission to form a network termed the European Competition Network ("ECN"). According to

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64 EC Treaty art. 83.
66 EC Treaty art. 81.
67 Id.
68 Id.
69 See Woods, supra note 6 (expanding the author's presentation given at the Institute for Consumer Antitrust Studies, Loyola University Chicago examining the issues raised with regard to incorporating a private right of action into EU competition law), available at, http://www.luc.edu/law/academics/special/center/antitrust/symposium/woods.pdf (last visited April 16, 2006).
70 Id.
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the Regulation the new system of enforcement will ensure that EU competition law provides a base standard for the evaluation of possible violations across the entire EU "thereby establishing a level playing field for companies active in the international market."\(^{71}\)

The most critical part of the Regulation that may facilitate the opening of the door to private rights of action in the EU is that which allows national courts to "fully adjudicate" antitrust matters.\(^{72}\) Prior to this Regulation the Commission's notification and exemption system\(^{73}\) was an obstacle to private enforcement in Member States. Under this system the Commission would receive a notification of a possible antitrust law violation and then analyze the suspect action to determine whether it should be exempt from penalty under Article 81 (3).\(^{74}\) While the Commission was in the process of making a determination on the issue any ongoing private action on that matter would be forced to come to a halt, as the Commission would now be the sole law enforcer.\(^{75}\) However, now that the Regulation has eliminated the Commission's monopoly on the applicability of Article 81(3)\(^{76}\) national judges will be able to take a greater role in the enforcement of Articles 81 and 82 and there will be less interruption of ongoing private rights of action taking place in the national courts.\(^{77}\)

As the Commission does not have the power to award damages to those who have been injured by a violation of the competition law, the ability of national courts to apply competition law along with their own national law creates a number of advantages for private parties seeking action.\(^{78}\) Not only may private parties assert EU competition law claims in the same action as national law claims, but these parties will now have the benefit of a faster litigation process now that there is more than one entity involved in the

\(^{71}\) Id.

\(^{72}\) Id. at 433 (stating that before this Regulation courts in member states were inhibited in their action because the law called for notification to the Commission of possibly violations, who would then assume the responsibility of determining whether there was in fact a violation).

\(^{73}\) The notification and exemption system is the process by which the Commission investigates and determines whether or not an agreement that has been notified to the Commission meets the criteria for exemption under Article 81(3).

\(^{74}\) EC Treaty art. 81 (3).

\(^{75}\) See Woods, supra note 6, at 433.

\(^{76}\) EC Treaty art 81(3) (Setting forth the situations in which the Commission has the sole right to find section 81(1) to be deemed inapplicable).

\(^{77}\) See Woods, supra note 6, at 433.

enforcement of the law. In addition, national courts have the ability, in those Member States that permit it, to award legal costs to successful parties. While the Commission is not granted the power to award such legal costs, the private parties in certain member states will now be able to reap this benefit.

ii. Member States Applying Community Competition Law in Their National Courts

When presiding over actions for damages the application of Articles 81 and 82 by the national courts is necessary to determine the illegality of the conduct giving rise to such actions. When the national judges engage in such community law application they must "take account of the Commission's powers in order to avoid decisions which could conflict with those taken or envisioned by the Commission." Though the national courts are not bound by the rulings of the Court of Justice in the same sense that U.S. courts are bound by the precedent of higher courts, the "Court of Justice has established a number of principles which make it possible for such contradictory decision to be avoided," and the Commission encourages national courts to follow these principles.

The first step that a national court must take in determining the illegality of the "agreement, decision or concerted practice" is to look to whether it is an action covered by the reach of Articles 81 and/or 82. Making such a determination may prove to be simple if such action has previously been the "subject of a decision, opinion or other official statement issued by an administrative authority and in particular by the Commission." Again, though the national courts would not be bound by such entities' determinations, their decisions could be informative.

79 Id.
80 Id.
81 Id.
82 Id. ("The national courts may have to reach a decision on the application of Articles 81 and 82 in several procedural situations. In the case of civil law proceedings, two types of action are particularly frequent: actions relating to contracts and actions for damages. In the former, the defendant usually relies on Article 81(2) to dispute the contractual obligations invoked by the plaintiff.")
83 Id.
84 Id.
85 Id.
87 See Notice, supra note 78.
88 Id.
89 Id.

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holdings or statements can provide useful information to the national courts which can aide them in making their determinations. In the event the matter before the national court is one which the Commission has not ruled on, the national court can still be "guided in interpreting the Community law in question, by the case-law of the Court of Justice and the existing decisions of the Commission." In order to further aide the national courts in their determinations of community antitrust law, the Commission has created several notices in which they specify "categories of agreements that are not caught by the ban laid down in Article 81." Through the help of these aides the national courts should be able to make an informed and accurate finding of whether the actions of an alleged violator are in fact illegal under the community law. Should it be the case that the Commission is in the process of investigating or making a judgment in a case relating to the same action being questioned in the national court, then the court may, "if they consider it necessary for reasons of legal certainty, stay the proceedings while awaiting the outcome of the Commission’s action."

iii. National Courts Determining Exemptions Under Article 81(3)

As was stated earlier, Article 81(3) provides the Commission with the power to make exemptions for those engaging in activities that otherwise would be illegal under competition law, in a situation where such practice "contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting

90 Id. ("It should be noted in this respect that not all procedures before the Commission lead to an official decision, but that cases can also be closed by comfort letters. Whilst it is true that the Court of Justice has ruled that this type of letter does not bind national courts, it has nevertheless stated that the opinion expressed by the Commission constitutes a factor which the national courts may take into account in examining whether the agreements or conduct in question are in accordance with the provisions of Article [81] (12)").
91 Id.
93 See Notice, supra note 78.
94 Id.
95 Id. (Stating that if it is the case that the national courts have remaining doubts about how to interpret/apply the community law in a certain instance, "they may stay proceedings in order to bring the matter before the Court of Justice.").
benefit. If it is the case that the Commission has ruled a certain action exempt under the power granted to it in Article 81(3) then the national courts are obligated to honor this determination. "Agreements, decisions and concerted practices which fall within the scope of application of a block exemption regulation are automatically exempted from the prohibition laid down in Article 81(1) without the need for a Commission decision or comfort letter," and as such national courts must honor this as well.

If an agreement comes before a national court, which does not constitute a block exemption and which has not been deemed exempt by the Commission under Article 81(3), the Commission calls for the national courts to adhere the following procedure: First, the national court must determine whether the procedural requirement needed for an exemption has been complied with. In the event that the requirement was not fulfilled, then an exemption is not applicable and the national court is permitted to decide the issue in question pursuant to Article 81(2). If the requirement has been complied with, then the national court must "assess the likelihood of an exemption being granted in the case in question in light of the relevant criteria developed by the case law. . .and by previous regulations and decisions of the Commission." If it is the case that the national court has determined that the questioned action cannot be granted exemption status, then the court must then work to resolve the conflict in compliance with Article 81(1) and (2). However, if the national court determines that exemption status is achievable, then it has the duty to suspend the case until the Commission has been able to make their own determination on the matter.

The Commission recognizes that the principles it has given the national courts are difficult to implement and at times may be lacking in sufficient guidance to enable the courts to work through the process.

96 EC Treaty art. 81 (3).
97 See Notice, supra note 78. (If the Commissions has not made an official ruling on the applicability of Article 81(3), but has issued comfort letters in which it states that Article 81(3) shall apply, the "Commission considers that national courts may take account of these letters as factual elements" and follow them as well).
98 See Notice supra note 78.
99 Id. (This procedural requirement calls for proper notification of the agreement or concerted practice to the Commission).
100 Id.
101 Id. (Case law for this purpose is referring to the decisions or guidelines set forth by the Court of Justice and the Court of First Instance).
102 Id.
103 Id. (During the time in which the case is suspended in the national court, that court is permitted, so long as in compliance with the law of its nation, to implement any temporary measures it deems warranted).
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straightforwardly and apply the appropriate law without a hitch. As a result of this conflict, the national courts are permitted to bring cases which may cause them difficulty, before the Court of Justice for a preliminary ruling, or they may request the Commission’s assistance. The EEC Treaty calls for the “constant and sincere cooperation between the Community and the Member States.”

Moreover, with the Courage v. Crehan decision and the implementation of Regulation 1/2003, EU antitrust enforcement has increased from merely the Commission alone, to the Commission and the Member States bonded together as a unified force ensuring the protection of competition in the common market.

However, even with this unified public force the amount of antitrust infringement protection available is still not being fully realized because of the lack of a strong private sector acting as a deterrent to potential antitrust violators. In order to establish an effective private right of action in the EU it is necessary to look to the antitrust system of the U.S. for guidance.

104 Id. (Difficulties may arise in instances where the “…practical application of Art 81 (1) and Article 82 gives rise to legal or economic difficulties, where the Commission has initiated a procedure in the same case or where the agreement, decision or concerted practice concerned may become the subject of an individual exemption.”).
105 Id. (When a national court asks the Commission for assistance this assistance may come in the form of: “information of a procedural nature to enable them to discover whether a certain case is pending before the Commission, whether a case has been the subject of notification, whether the Commission has officially initiated a procedure or whether it has already taken a position through an official decision or through a comfort letter sent by its services,” clarification on points of law and the Commission’s “customary practice in relation to the Community law at issue,” information regarding the likelihood that the Commission would grant an exemption in the case at hand, and finally, information “regarding factual data: statistics, market studies and economic analyses.”).
106 Id.
107 Id.
108 Julian Joshua, Competition Law: Antitrust law and policy in a global market. Competition Law Insight (Oct. 12, 2004) available at http://www.howrey.com/docs/JulianJoshua_competitionlawenforcement.pdf (last visited Feb. 24, 2006). (Stating that former Commissioner Mario Monti viewed private rights of action as valuable claiming that “the threat of such litigation can have a strong deterrent effect and result in a high level of compliance with the competition rules”.)
109 See McDavid, supra note 7.
A. Class Actions

The attractiveness of the class action suit in the United States is that it enables one or more individuals with minimal, yet nonetheless important, claims to bond together and litigate their claims as a strong unified force.110 Creating a greater likelihood that wronged consumers will assert their claims, the availability of the class action suit also acts as a powerful deterrent against violations of antitrust law.111 Unlike antitrust violators in the U.S., those in the EU are comforted by the idea that a consumer with a minute monetary claim will not go through the ordeals of litigation to seek such insignificant redress because of the lack of such a legal tool like that of the class action.

Those who are critical of the class action suit argue that it tends to shift the focus from client to lawyer, from damages to attorneys’ fees and from litigation to settlement. This notion stems from the fact that often “the plaintiff’s lawyers receive high fees, while the class action members are awarded coupons of limited value.”112 There are additional negative aspects of class action settlements, such as the pressure upon defendants into settling for large damage awards in situations where a court may have awarded much less or found a lack of liability altogether. This comes about because of the threat of having to endure long litigation processes which could potentially cost them astonishing sums in legal fees.113

European unwillingness to provide for collective litigation has eased with the enactment of the 1998 European Directive on Injunctions for the Protection of Consumers’ Interests (the “Directive”).114 This Directive required

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110 See Beisner, supra note 63 (“In other words, the critical feature of the American class action is that it permits the aggregation and simultaneous determination of numerous claims...some certified classes have contained millions or tens of millions of class members”).
111 See Jones, supra note 3 (stating that though class actions amount to approximately 20 percent of all private actions in the United States, they have a deterrent effect because of the potential size of the damage awards).
112 See Woods, supra note 6, at 436.
113 Id.
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all Member States to implement laws for collective litigation by the year 2000, however the collective actions called for were not akin to class actions in the U.S. Member States are now obligated to allow some consumer organizations or independent public entities to bring actions on behalf of a group of wronged individuals. In addition, the collective actions called for under the Directive generally demand no more than injunctive or declaratory relief and in the event that damages are sought, they usually accrue to the consumer organization and not the individual members of the group. Though this collective tool exists in the EU, the inability of private individuals to come together and bring a private class action, under which they are personally reimbursed for a wrong done to them, hinders the incentive for consumers to engage in collective actions and, therefore, hinders the potential for a strong deterrent effect like that of U.S. class actions.

B. Contingency Fee Arrangements/fee Shifting

When an individual asserts a cause of action there are great transaction costs, such as money, time and energy. For many, a great obstacle to bringing a cause of action is the lack of capital necessary to fund such endeavors. In a contingency-fee system, like that of the U.S., this obstacle is surmounted with ease; a perspective litigant’s monetary worries are alleviated because law firms assume the costs with hopes of sharing in a potentially large damage award. Therefore, U.S. plaintiffs risk relatively little when deciding to pursue a cause of action; either the litigant wins and is awarded damages minus one third for his/her lawyers’ fees, or the litigant is unsuccessful and incurs no monetary cost for his/her representation. Although it is infrequent that litigants in the U.S. are also awarded their attorneys fees, under the Clayton Act the U.S. grants a private litigant who asserts an antitrust claim the right to recover three times the amount of damages he has sustained,

115 See Beisner, supra note 63, at 5.
116 Id. (stating that public bodies in this sense means some sort of administrative agency).
117 See Jones, supra note 3, at 428.
118 See Beisner, supra note 63, at 6.
119 See Woods, supra note 6, at 436.
120 Id.
121 The typical percentage gained by the law firms under a contingency-fee arrangement in the United States is 30 percent of the final damages awarded.
122 See Woods, supra note 6, at 463.
123 While the standard contingency fee arrangement in the United States calls for approximately one third of the plaintiff’s award to be turned over to his/her attorney, this amount does not include other expenses that may be deducted by the attorney as long as they are reasonable.
in addition to, the cost of suit, including a reasonable attorney's fee. Under the U.S. system however, a defendant in such an action does not receive a similar benefit.124

Unlike the contingency system practiced in the U.S., "every European legal system employs a fee-shifting standard of some type that requires the losing party to pay the prevailing party's legal fees"125 This standard heavily discourages a plaintiff from bringing any cause of action, let alone a competition violation claim against a powerful entity who is likely to rack up a great deal of legal fees, unless he/she is likely to succeed.126 Without the abolition of this fee-shifting standard and the incorporation of a contingency-fee system it may be that the private right of action in the EU will not flourish with these monetary obstacles remaining lingering overhead.

C. Damages

Under Section 15 of the Clayton Act an individual seeking a private right of action in the U.S. is permitted to sue for and recover "threefold the damages by him sustained."127 This concept is referred to as treble damages and it was initiated not only to punish the violating party for their current violation of the antitrust laws, but also to deter them from engaging in violations in the future.128

While at first glance this notion of triple the injury sustained may look like a windfall for the plaintiff, it has been argued that the amounts awarded are not actually trebled but rather are closer to the actual amount of injury sustained.129 The root of this notion is that the lack of "prejudgment interest" awarded in the U.S. causes the plaintiff's award to be closer to actual damages or even less than the actual damages sustained after their transaction costs and attorney's fees have been paid. Though the Clayton Act does state that a court presiding over an antitrust claim may award interest on actual damages calculated from the date of service of such person's claim to the date of judgment, or for a period less than that,130 courts in the U.S. usually do not award prejudgment interest unless a litigant has acted in bad faith to

124 See Clayton Act, supra note 12.
125 See Beisner, supra note 63, at 14.
126 Id.
128 See Woods, supra note 6.
129 See Jones, supra note 3.
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deliberately delay the proceedings.\textsuperscript{131}

In addition to treble damages, it has been argued that another reason why damages awarded in the U.S. are often quite large is because juries, rather than judges are usually the parties who award such damages.\textsuperscript{132} Recently, there have been a number of studies that have concluded that juries are more likely to award greater damages than judges.\textsuperscript{133} As a result of likely high damage awards, in addition to the defendant’s increased liability as a result of joint and several liability of co-defendants, a U.S. defendant in such an action is likely to choose to settle the claim.\textsuperscript{134} The increased likelihood of settlement proves to be an additional incentive for plaintiffs and plaintiffs’ firms in the U.S. to initiate antitrust lawsuits as it increases their chances of coming away with some form of redress.\textsuperscript{135}

As stated previously, there is no explicit grant of a private right of action to the citizens of the EU in Articles 81 and 82 and, as such, discussion of the types of damages one may be awarded in such an action is absent.\textsuperscript{136} Though \textit{Courage v. Crehan} stated that damages should be awarded to support the practical effect of the competition law, this case did not dictate just what process should be used to reach a suitable damage award.\textsuperscript{137} And while national courts now have the power to award damages to a plaintiff seeking an antitrust action under the community laws because of Regulation 1/2003, these awards do not prove to be as large as those in the U.S. For the most part the national courts follow the process of damage calculation that is used in their normal civil proceedings\textsuperscript{138} where a claimant’s damages are “limited to restitution; treble, exemplary or punitive damages are generally not available.”\textsuperscript{139} “In European case law it does not seem that the courts of any jurisdiction have developed a coherent approach to the subject, let alone a standardized approach across the

\textsuperscript{131} See Woods, \textit{supra} note 6.
\textsuperscript{132} See Beisner, \textit{supra} note 63, at 18.
\textsuperscript{133} Id.
\textsuperscript{134} Id. at 24. (“Cases that, based on the compensatory damages at stake, would have been relatively minor litigation are transformed by the potential of punitive damages into litigation that poses a threat to the defendants’ fiscal health”).
\textsuperscript{135} Id.
\textsuperscript{136} See Woods, \textit{supra} note 6, at 450.
\textsuperscript{138} Id. “In some jurisdictions these methods appear capable of generating delays that are aggravated by the complex nature of such calculations in competition cases”.
\textsuperscript{139} See McDavid, \textit{supra} note 7.
different jurisdictions." Again because each Member State has its own procedural law, the differences that vary from one to another certainly do not aide in providing for a "level playing field...for bringing actions for breach of Community competition law before the national courts."  

D. Discovery

Yet another obstacle facing a potential claimant in an antitrust action is access to the requisite evidence to prove his/her case. In the U.S., those seeking a private cause of action are fortunate because of the broad discovery permitted under the law. Plaintiffs' firms are much more likely to go forward with bringing an action because of the security of knowing they have such enormous power when it comes to what they may request the defendant to produce. A plaintiff's counsel may even proceed with initiating an action despite lack of knowledge of the details of the case based on his or her confidence in their ability to garner sufficient evidence from the defendant. Along with the grand requests that a plaintiff may make to a defendant may come exorbitant production costs. The ability of a plaintiff to cause a defendant to incur large discovery costs adds to the pressure put on a defendant to agree to a settlement early on in the proceedings despite the likelihood that the plaintiff's claims may be without merit. In addition to their power to persuade plaintiffs to bring an action, the U.S. discovery rules also persuade defendants to comply with such demands because they carry a threat of a maximum jail sentence of five years for the destruction or failure to produce relevant documents.

Similar to the law regarding damages in the EU, there is no discussion of the rules governing discovery for a private right of action with regard to antitrust claims. Because private rights of action are dealt with in the national courts rather than in the EJC again the possibility for inconsistencies within the system are great. While each national court does have certain rules

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140 See, Woods, supra note 6, at 456.
141 See Woods, supra note 6, at 456.
142 Id. at 438.
143 See Beisner, supra note 63, at 16.
144 Id.
145 Id. Stating that costs to a defendant to comply with discovery requests may reach sums "running in the tens of millions of dollars".
146 Id.
147 FED. R. CIV. P. 37.
148 Id. "To the extent that there are no procedural rules at the European level – and as a matter of EC law procedural rules are limited in scope for the moment – the national courts operate in the context of their national procedural rules".
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governing discovery, the depth of permissible discovery does not reach that which is permitted in the courts of the U.S., and therefore, plaintiffs will be less likely to initiate a suit without knowing exactly what violation the defendant committed or how he or she will go about proving it in a court of law. 149

E. Standing and Exclusion of the Indirect Purchaser

In order to bring a private right of action in the U.S. the claimant must have “standing” to bring suit. “The gist of standing is whether there is a justiciable controversy being litigated among adverse parties with substantial interest affected so as to bring forth a clear articulation of the issues before the court.” 150 The Supreme Court has held, in Illinois Brick Co. v. Illinois, that “indirect purchasers do not have standing to sue for violations of the antitrust laws under section 4 of the Clayton Act.” 151 In that case the defendants, a number of concrete manufacturers being sued for their collusive practices, had sold their product to contractors who then submitted bids to general contractors, who in turn submitted bids to the plaintiffs, the indirect purchasers. 152 Had the contractors themselves sued the concrete manufacturers, then they would have been able to recover damages for the inflated costs, despite the defendant’s claim that the contractors suffered no injury because they “passed on” such costs to their customers, the general contractors. 153 This is the case because the Supreme Court, in Hanover Shoe Co. v. United Shoe Machinery Corp., rejected the “passing on” defense to a suit initiated by a direct purchaser. 154 However in Illinois Brick, the defendant was permitted to use the “passing on” defense because it was being sued by the customers of the contractors, the “indirect purchasers”. 155 In allowing this defense, the Supreme Court reasoned that if you allow the use of the defense in this situation, then you would also have to allow its use in a case where the plaintiff is a direct purchaser, 156 however there would
be a great problem of multiple liability if this were the case. In reaction to this problem, the court found that the only ways to avoid creating multiple liability would be to "(1) allow indirect purchasers to sue but overrule Hanover Shoe or (2) retain Hanover Shoe and preclude indirect purchasers from suing." Eventually the court found that "the direct purchaser suit is on balance a more effective instrument for enforcement of the antitrust rule[s]. . . than the indirect purchaser suit," and so it chose to exclude indirect purchasers from bringing private antitrust damage actions.

Some view this indirect purchaser exclusion to be destructive of the "fundamental character of the private antitrust action" and against Congress' intent in providing for the private right of action. Those who take this view believe that to allow the direct purchaser to recover while denying the indirect purchaser the right to recover is inadequate because it allows a party who may not have actually been injured to collect, while leaving those actually injured without a remedy. This notion is dismissed however, by the concept that "even if indirect purchasers were given the nominal right to sue, they would often fail to receive significant compensation" because of the fact that "in a class action, much of even the compensatory portion of the judgment may end up in the pockets of lawyers or in states' treasuries." Until a new system is developed under which the windfall to the direct purchasers could be eliminated while the recovery of indirect purchasers reaches sufficient compensatory amounts, it is in the best interest of U.S. antitrust enforcement to allow the exclusion of indirect purchaser suits to continue.

The decision by the Supreme Court in Illinois Brick excluded indirect purchasers from suing. Some states alleviated the problems created by indirect purchasers either through the implementation of Illinois Brick repealer statutes or by interpreting their existing statutes to permit indirect purchaser standing based on language difference between the state and federal statutes.
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Repealer statutes were then challenged in *California v. ARC America Corp.*\(^{168}\) In this case the Supreme Court held that states were permitted to allow indirect purchasers to recover damages under state antitrust laws, even though “(1) the result may and almost assuredly will be a double recovery and (2) a preferable deterrent exists under federal law.”\(^{169}\)

While the Supreme Court had made its decision with regard to the standing of indirect purchasers in price fixing cases, it “specifically noted that its decision was not directed to standing” in general.\(^{170}\) After analyzing Congress’ intent with regard to section 4 of the Clayton Act, the Supreme Court concluded that “Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.”\(^{171}\) The United States Supreme Court responded and set forth minimum requirements in order for an individual to have standing to bring an action. These requirements however, do not take the form of a “single bright line test”,\(^{172}\) rather they require judges to assess the plaintiff’s harm, the supposed violation by the defendant, and the causal relationship between the two based on a series of factors: (1) whether the plaintiff is a consumer or competitor in the allegedly restrained market, (2) whether the injury alleged is direct and a first hand product of the restraint alleged, (3) whether there exist more directly injured parties with motivation to sue, (4) whether the damage claims are speculative and (5) whether the claims (a) risk duplicative recovery and (b) would require a complex apportionment of damages.\(^{173}\)

In some member states of the EU, such as Germany and Italy, the laws regarding standing are much narrower in that they call for the injured party to be directly targeted by an antitrust violator in order to seek compensation.\(^{174}\) While in other European jurisdictions, such as England, an individual may have standing where (1) a violator did not have any knowledge of his violation but merely engaged in it by charging a price created under an illegal cartel scheme by its parent corporation,\(^{175}\) and (2) there was no actual purchase by the plaintiff from this violator.\(^{176}\) Such differences in standing requirements are liable to

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\(^{168}\) *California v. ARC America Corp.*, 490 U.S. 93 (1989).

\(^{169}\) *See* Crouch, *supra* note 151, at 8.

\(^{170}\) *Id.*


\(^{172}\) *Id.*


\(^{174}\) *See* Woods, *supra* note 6, at 441.

\(^{175}\) *Id.*

\(^{176}\) *Id.*
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breed "forum shopping" among the member states; a trait quite uncharacteristic of an efficient legal arena.177

The procedural rules of some Member States in the EU, such as Italy, Sweden and France, call for a plaintiff to meet a strict causation requirement with regard to the defendant's actions and the injury sustained in a competition law case.178 For an indirect purchaser, meeting this requirement is likely to be unattainable, and so it seems that the "procedural laws of these member states could be said to resemble the U.S. indirect purchaser rule," in that they both prevent consumers from seeking a remedy for an injury caused by an antitrust violator.179

Again, as a result of the lack of the private right of action under the EU competition law, there is a lack of discussion of the "passing on" defense which has created such debate in the U.S. Supreme Court and within the states themselves.180 "There does not appear to be any case law directly on point from any jurisdiction in relation to actions for breach of EC competition laws," however the issue has been considered in some national courts, such as Italy, where the court declined to award damages to a plaintiff because the court found that the plaintiff had "passed on" the effects of the defendant's violation to its customers.181 Therefore, it seems that under at least one member states' law, defendants in suits by direct purchasers are permitted to utilize the "passing on" defense, though it remains unclear how other national courts would confront the matter.182

GREEN PAPER: PRIVATE RIGHT OF ACTION FOR VIOLATIONS OF EU ANTITRUST LAWS

On December 19, 2005 the Commission presented a Green Paper183 focusing on damages actions for the breach of the EU antitrust rules, or in other words private rights of action.184 The purpose of the Green Paper and its attached Commission Staff Working Paper (the "Working Paper")185 is to

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177 Id.
178 Id.
179 Id. at 449.
180 Id.
181 Id. at 459.
182 Id. at 458.
184 See Green Paper, supra note 4.
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"identify the main obstacles to a more efficient system of damages claims and to set out different options for further reflection and possible action to improve damages actions." Among other things, the Green Paper and the Working Paper discuss the obstacles facing an efficient system for a private right of action with regard to such areas as discovery, damages, costs of actions, collective actions, and indirect purchaser standing. The Commission hopes that by putting forth these documents they will encourage "interested parties to comment on the issues discussed and on the options formulated with regard to these issues." Hopefully, with these comments the Commission will be aided in its efforts to establish an efficient and effective system for private antitrust damages claims.

A. Green Paper: Discovery

As was previously mentioned, because the depth of permissible discovery not only varies from Member State to Member State, but also on the whole is much less than that which is provided for under the U.S. system, it is not as simple for a potential claimant in the EU to initiate private antitrust actions, as well as, garner enough information to be able to prove his/her case, as it is for a claimant in the U.S. In its Green Paper the Commission asks "whether there should be special rules on disclosure of documentary evidence in civil proceedings for damages under Articles 81 and 82 of the EC Treaty?"

The Green Paper proposes that once a claimant has "set out in detail the relevant facts of the case and has presented reasonably available evidence in support of its allegations (fact pleading)," then that party would be able to go forward with the disclosure process. The Green Paper list three possible options for disclosure once the fact pleading has been set forth. Under "Option 1", disclosure would be court ordered and limited to relevant and

186 See Green Paper, supra note 4.
187 Id. (Other aspects commented on consist of jurisdiction, the fault requirement, the introduction of experts, statute of limitation, etc.)
188 Id.
189 Id. at 5.
190 Id.
191 See Beisner, supra note 63, at 16-17.
192 Commission Green Paper, supra note 4, at 5.
193 Id.
194 Id.
reasonably identified individual documents. Under “Option 2”, mandatory disclosure of classes of documents between the parties would be ordered by the court, and under “Option 3” “there would be an obligation on each party to provide the other parties to the litigation with a list of relevant documents in its possession, which are accessible to them.”

In requiring the claimant to set forth a fact pleading rather than a notice pleading like that in the U.S. the proposed EU discovery system will not allow a potential claimant to set forth a claim without knowing the substance of his/her claim. This is important because it will deter potential claimants from overloading the courts with unmeritorious claims. With such a burden on the claimant to begin with, adopting Option 3 would persuade claimants to bring an action because it would allow the claimants to choose from a complete list of relevant documents which they may not have had knowledge of when initiating the case.

B. Green Paper: Damages

The Green Paper sets forth 4 possible ways in which damages could be defined. Under “Option 14” damages would be awarded “with reference to the loss suffered by the claimant as a result of the infringing behavior of the defendant (compensatory damages).” “Option 15” calls for damages to include the recovery of illegal gain, while “Option 16” calls for double damages. And finally, “Option 17” discusses the possibility of awarding prejudgment interest.

As discussed previously, in the U.S. a claimant may sue for and recover treble damages for violations of the antitrust law. The Commission

195 Id.
196 Id.
197 See Commission Staff Working Paper, supra note 185. (“Under notice pleading it is not necessary to make a prima facie case for a party to require discovery of evidence by another party).
198 Notion that because it is so easy to initiate a case in the U.S. a claimant can start discovery proceedings without actually knowing the complete substance or facts regarding his her claim, or whether such claim is legitimate or not. In doing so that claimant could potentially cost the defendant large sums in production costs, thereby putting pressure on such defendant to settle a claim that may not have merit, just to avoid the cost.
199 See Commission Green Paper, supra note 4, at 5.
200 Id. at 7.
201 Id.
202 Id.
203 Id.
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recognizes that “pure compensation of the loss does not always constitute a sufficient incentive for antitrust claimants to bring a case before the court,” however, it does not seem that they are prepared to initiate treble damages as it does not appear in the list of possible options. That which would be most persuasive in causing an individual to seek out a claim, while at the same time creating a deterrent to future violations, would be to allow potential claimants to collect double their damages calculated to include prejudgment interest. Unlike the U.S. system a claimant in the E.U. probably would not have to make a claim for attorneys’ fees as most of Europe follows a system by which the losing party pays the winning party’s fees.

C. Green Paper: Costs of Actions

Availability of litigation capital is an essential factor when deciding whether or not to bring a claim for damages, especially when the claimant is in a legal system which calls for them to pay the defendant’s costs in the event that they loose their claim. Under “Option 27” the Green Paper proposes “establish[ing] a rule that unsuccessful claimants will have to pay costs only if they act in a manifestly unreasonable manner by bringing the case.” By adopting this proposal the Commission will alleviate a great burden for claimants who wish to bring an antitrust claim.

The Green Paper, does however, fail to discuss a proposal for adopting a contingency fee type system, like that of the U.S., whereby claimants will not be discouraged from pursuing an action because of lack of litigation capital. Should the Commission provide for such a system, the amount of private actions would certainly increase, and in turn enforcement of the antitrust laws would increase as well.

D. Green Paper: Collective Actions

The Commission realizes that it is “unlikely for practical reason, if not impossible, that consumers and purchasers with small claims will bring an action for damages for breach of antitrust law.” In addition to providing a way for individuals to bring their small claims against antitrust violators, collective actions, or class actions as they are termed in the U.S., would also

205 See Commission Staff Working Paper, supra note 185, at 34.
206 See Beisner, supra note 63, at 14.
207 Id. at 61.
209 Id. at 8.
create more efficiency in the private antitrust enforcement arena because they would allow a large number of claims to be grouped together into one claim thereby saving valuable time and money.\(^\text{210}\) The Green Paper proposes under "Option 25" to create a system that would allow consumer associations to bring actions on behalf of a group of injured parties whereby damages would be awarded such that the illegal gain of the defendant would be awarded to the consumer organization, while each injured party would recover the amount of individual damage suffered.\(^\text{211}\) Initiating collective actions of this type would not only increase the incentive for individuals with small claims to seek damages action against antitrust violators, but it will also increase deterrence of antitrust violation.

E. Green Paper: Indirect Purchaser Exclusion and the "Passing On" Defense

As the Commission well recognizes, "the 'passing-on defense' substantially increases the complexity of damages claims as the exact distribution of damages along the supply chain could be exceedingly difficult to prove."\(^\text{212}\) "Option 23," set forth in the Green Paper, calls for the complete exclusion of the passing-on defense.\(^\text{213}\) While this would serve to bolster a great deterrent for parties to engage in antitrust violations because of the extreme amount of liability they would be facing, it does seem to be quite unjust. "Option 24" on the other hand, seems to be an ideal solution to the indirect purchaser problem, because it calls for "a two-step procedure, in which...the infringer can be sued by any victim, and in a second step, the overcharge is distributed between all the parties."\(^\text{214}\) However, the problem of damage calculation would remain and this process could cost valuable time and money.\(^\text{215}\) If anything can be learned from the U.S. experience on the issue of the passing-on defense, it may be that in the interest of efficient antitrust enforcement it may be necessary to allow only direct purchasers to sue and reap a windfall while indirect purchasers remain excluded.

\(^{210}\) \textit{Id.}  
\(^{211}\) \textit{Id. at 9.}  
\(^{212}\) \textit{Id. at 8.}  
\(^{213}\) \textit{Id.}  
\(^{214}\) \textit{Id.}  
\(^{215}\) \textit{Id.}
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CONCLUSION

As the European Union embarks on its journey toward a system that could efficiently provide for a guaranteed private right of action for its citizens it has many things to consider: Whether to (1) broaden discovery to enable claimants to easily get the information needed to prove their case; (2) provide for greater damages to compensate injury while creating a great deterrent to illegal antitrust actions; (3) depart from the “loser-pays” rule so that claimants won't be discouraged from bringing legitimate actions; (4) create a collective action system by which small claimants can bond together, and (5) block some claimants from bringing suit in the best interest of efficient antitrust enforcement. While it may not be ideal for the EU to adopt a system identical to that of the U.S. private antitrust enforcement, there is certainly a great deal that can be learned by looking at the U.S. system and how its framework works to create an arena that fosters private rights of action. Through the use of this example, as well as the comments that should emerge in response to the Commission’s Green Paper, the EU will soon be well on its way to establishing a private right of action and a marked increase in its antitrust enforcement for the benefit of competition and consumers alike.