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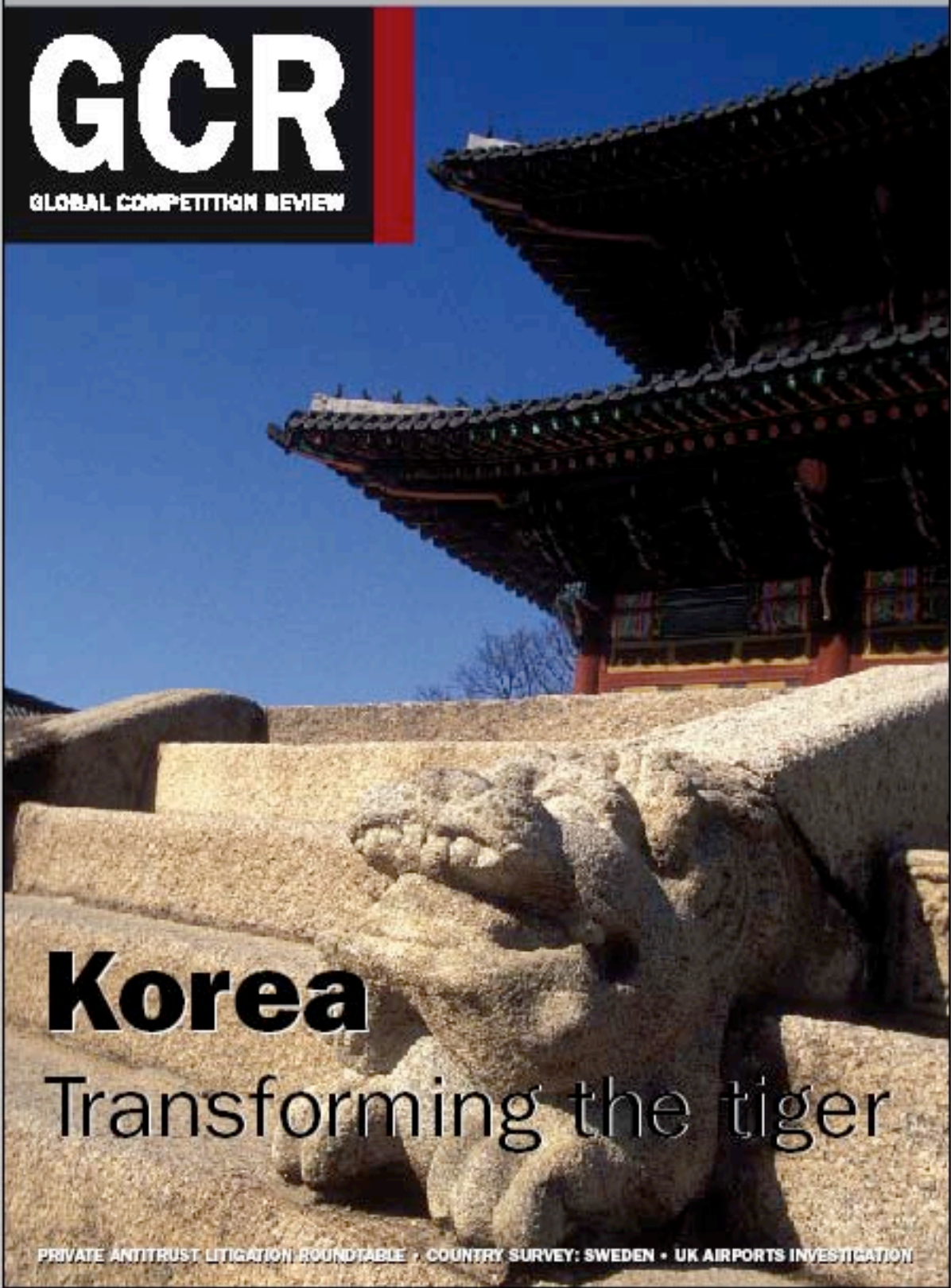

Korea
Transforming the tiger

PRIVATE ANTITRUST LITIGATION ROUNDTABLE • COUNTRY SURVEY: SWEDEN • UK AIRPORTS INVESTIGATION

Following DG Comp's recent drive to encourage private antitrust litigation, *GCR* invited eight leading competition specialists to an online round table to discuss the future of damages actions in Europe. We asked:

Will the European Union ever see US-style private antitrust litigation?

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KENT GARDINER: As we all know, the issue of private enforcement of EU competition law is the subject of intense focus and attention at this time, and properly so. Much of the debate centres on whether effective and balanced private enforcement can occur in Europe without adopting in substantial part so-called "US-style" litigation. The debate thus far has tended to be fairly high level and somewhat ideological. Critics of the American style of litigation note that things are simply done differently in Europe with regard to dispute resolution, and that US-style litigation procedures would lead to excessive litigation and other abuses. Proponents of the US system point to its effectiveness in America in achieving resolution – by trial or settlement – of an enormous number of claims arising out of competition law violations, that are determined by courts to be meritorious.

The European Commission has spoken extensively on this topic, albeit also at a fairly high level. In its recent white paper, the EC acknowledged the lack of any meaningful recovery of damages by cartel victims in Europe. According to the Commission, European victims of EC antitrust violations "only rarely obtain reparation of the harm suffered". And the Commission estimates that because these victims cannot obtain the compensation due them, these victims – including many European companies – are losing several billion euros a year. The Commission made extensive policy recommendations to remedy the problems it perceives, but, as Neelie Kroes has stated, the Commission wants to "guard against excessive litigation and the risk of abuses" – referring principally to US-style litigation.

The "middle way" suggested by the Commission calls for single damages rather than multiple damages, opt-in collective actions rather than US-style opt-out class actions, and limited disclosure rather than broad discovery. There is little analysis, however, of each of these "tools" of private damages recovery, as a mean of striking the right balance between the effectiveness of recovery on meritorious claims, and minimised risk of abuse in prosecution of non-meritorious claims.

That, we hope, is the more nuanced subject matter that will occupy our discussion. To start us off, I would propose a two-category framework of analysis of the different components of US-style litigation:

The first category includes those components that often are cited as arguably creating "inappropriate" settlement leverage and pressure on defendants to pay money to claimants that may exceed those claimants' actual provable damages. Those components arguably include US-style class actions, in which members of the class make no affirmative choice to participate in the class, but are identified and grouped together by virtue of procedural litigation rules. The other component of this category arguably is treble damages, which by its very nature imposes a penalty, or threat of penalty, that substantially exceeds actual damages suffered.

The second category arguably includes those components of US-style litigation that are aimed at advancing the cause of prompt commencement and resolution of private damages claims; strict limitation on the circumstances in which the non-prevailing party in a case would have to pay the other side's legal fees (so-called "fee shifting" provisions); prompt and effective discovery of relevant business records, with judicial oversight to ensure full compliance; depositions of relevant witnesses; and access to damages-related business data, to be used by expert economists in making sophisticated analyses of damages.


Kent Gardiner


Michael Hausfeld

To try to "unbundle" our discussions of the pros and cons of US-style private antitrust litigation, I would propose that we focus our attention on these litigation "tools", and discuss whether we believe (a) one or more of these tools are essential for effective prosecution of private damages claims in Europe; (b) the risk of abuses that exist with regard to these tools may outweigh the benefits; and (c) that in the near or medium-term these components of private damages enforcement will in fact viably exist in Europe.

TILL SCHREIBER: While the importance of private enforcement in the US antitrust system has traditionally been much stronger than in the EU, where antitrust enforcement is foremost entrusted to public authorities, we expect private antitrust litigation to significantly increase in the EU in the forthcoming years. We have seen in our practice that victims of anti-competitive conduct in the EU are increasingly aware of their right to claim damages and are looking for ways to successfully pursue their claims. In particular, publicly quoted companies cannot justify to their shareholders not to enforce damage claims which are potentially of very high value.

Given the restrictive interpretation by US courts of the standing of non-US plaintiffs to bring damage actions in the US (eg, the recent US Court of Appeals judgment in the *DRAM* case) and the recent changes in national legislation aimed at facilitating damage claims in European jurisdictions (eg, Germany, UK, Netherlands, Denmark, Sweden), we expect that European antitrust litigation will close the gap.

The success of private enforcement in the EU will not depend on the copying of all elements of the very specific US practice. There is a clear tendency of adopting civil procedural rules at national level which comply with the requirement of full and effective compensation for all victims of anti-competitive activities as established by the European Court of Justice. As a result of the Rome II agreement, we expect private enforcement in Europe to concentrate on the most favourable jurisdictions.

ELAINE WHITEFORD: As regards treble damages, it is necessary, I think, analytically, to distinguish between follow-on actions and stand-alone claims. For follow-on actions, the perpetrators have already been punished through regulatory fines. As the English High Court has already held (*Devenish*), awarding damages going beyond compensatory damages would amount to punishing a perpetrator twice, which would conflict with the principle of ne bis in idem. The principles relied on were not unique to English law and appear to be equally applicable to all EU jurisdictions. So, as regards follow-on claims at least, it appears that in the EU, treble damages are simply impermissible.

But even if they were allowed, it is difficult to see how they could be said to be "essential" for the effective prosecution of private damages claims, in follow-on claims at least. Treble damages incentivise the bringing of claims by creating a potential reward to balance and outweigh litigation risk. But in a follow-on claim, the ligitation risk is only as to quantum. Whatever the difficulties of demonstrating the quantum of any damages suffered, courts will generally start from the premise that the infringement, particularly cartel infringement, would not have been committed unless the perpetrators saw some benefit. And hence, courts will start with an expectation that loss has been suffered. Against that background, it is difficult to see why additional incentive, in the form of recovery going beyond actual loss, is required.

Is there a difference for stand-alone claims? They certainly have a greater degree of uncertainty – not only must quantum be established, but the infringement itself. So the litigation risk is greater. But is increasing the potential "reward" for success essential? Will potential windfalls push the hesitant claimant to litigate? I have my doubts. I am inclined to think that removing or ameliorating the potential downsides of litigating (and losing) are more likely to encourage wavering claimants than potential windfalls. So, for that reason, even for stand-alone claims, I do not think that treble damages are essential for the effective prosecution of private damages claims.

Opt-out class actions will certainly facilitate more effective prosecution of private claims where small losses are suffered by many, and in England, the football shirts opt-in action brought by the Consumers Association reveals the limitations of the opt-in model. For claims of that type, and for infringements with long supply chains where price increases were passed all the way down the supply chain, opt out is probably essential. But these models are less essential for claims by most direct purchasers. And allowing opt-out claims at each level of the supply chain will create enormous complexity for courts seeking to avoid over- and under-compensation, particularly given the number of jurisdictions that can, potentially, be involved and the different limitation periods applicable throughout the EU. So while opt-out class actions can certainly be seen to facilitate claims, before they are introduced, significant thought needs to be given to how the potential conflicts between different classes of claimants, potentially


Christof Swaak


Elaine Whiteford

in different jurisdictions, are going to be resolved. The CJC report 'Improving Access to Justice through Collective Actions' makes some initial proposals for dealing with some of these issues when claims are confined to a single jurisdiction, but thought needs to be given to how such issues are to be addressed across jurisdictions.

KENT GARDINER: Elaine and Till both raise a series of good points. Till notes that public companies are increasingly sensitive to their obligations to shareholders, and this provides an important incentive to initiate recovery actions in Europe. Do others agree?

Elaine notes that in a follow-on claim, the real litigation issues tend to revolve around amount of damages, and courts may start a case with something of a presumption that cartels wouldn't be hatched if the perpetrators didn't anticipate and actually obtain benefit in the form of illegal overcharges. In the US, most cases are met with arguments by defendants that their cartel "was entirely unsuccessful", which means claimants must start from the very beginning in building a damages case.

What are your views about whether defendants in Europe will have a difficult time arguing that there was no injury at all from cartels uncovered by the EC? Will there be presumptions of injury? Will claimants get the benefit of the doubt in proving the amount of damages? Or will they suffer from lack of access to defendants' business records in trying to prove damages?

DONALD BAKER: I am puzzled by what this round table is really about. Are we seriously debating the proposition, "The EU will never see US-style private antitrust litigation"?

Stated so baldly, this is essentially a political question to which the answer seems clear and simple: "no we won't!" Almost nobody in Europe – including the Commission – seems to want, or dares to admit to wanting, US-style private antitrust litigation. To achieve such a controversial result would at least require a tremendous EU encroachment on one of the most sensitive areas of member state authority and judicial processes.

Or is the question a more subtle variation: will the member states that join the Commission in allowing more private antitrust remedies necessarily end up with "US-style private antitrust litigation" once they start down this road?

This is still a largely political question and the answer still seems to me to be "no". To achieve US-type results would require lawyers to abandon core legal beliefs, and decision makers to scrap traditional legal procedures – either generally or for competition law cases. Neither is likely.

Or are we really asking: "how much will US-style private antitrust litigation be likely to influence whatever private antitrust remedies are adopted in the EU?" Here the answer is "quite a bit" – and the influence is likely to be positive in some areas and negative in others. It also seems likely that those member states where US influence is positive are more likely to become the favoured fora as more private antitrust litigation evolves in Europe.

However we frame the questions we choose to answer, we still have to face several distinct realities that separate all (or most) of Europe from the US:

There is no European system of trial courts – and hence private EU competition cases will have to be tried by various different national courts under quite diverse procedures and presumptions.

Recovery of more than actual damages would be fundamentally contrary to the civil law systems that predominate in the EU. Thus treble damages (or other litigation bonuses) will be politically unacceptable. Also, a passing-on defence will be allowed in civil law jurisdictions in order to avoid any windfall recovery for the first purchaser.

All member state systems have some variation of a "loser pays" cost rule which will surely somewhat depress plaintiffs' willingness to bring non-follow-on cases.

No political support exists to change national procedures to provide for US-style opt-out class litigation. Many member states already have some form of representative or opt-in class litigation, and they will generally want to stick to what they already have in trying competition law cases.

In sum, I see little merit in the political arguments against the Commission's proposals being made by those who say that any opening of the door will bring in US-style private antitrust litigation. This is essentially a scare tactic, poorly grounded in the fundamental procedural, psychological, and political realities that still separate the US from Europe in this area.

My own projection is that some member states will enact legislation to facilitate private antitrust litigation (but without making significant changes in local court rules), while others will not. Thus the EU is likely to see substantial diversity in how hospitable different national courts are to private antitrust claims. As the demand for recovery of cartel-generated losses continues to grow, we can anticipate more forum shopping and more *Empagran*-like litigation over a national court's


Jasper de Gou


Rainer Becker

jurisdiction over injuries suffered outside the forum nation by non-residents (as illustrated by the *Provimi* vitamins case in England).

KENT GARDINER: Don raises excellent points about fundamental differences between US-style litigation and private damages as they currently stand in Europe.

He frames several different questions, which others have discussed, but one theme cutting across these questions and the EU debate is what is required for private damages to succeed in Europe? So, I ask the group, what one change should member states make in their legal system if they are serious about encouraging private damages? Recognising this will vary somewhat across member states, what changes would this group recommend?

CHRISTOF SWAAK: The role of shareholders is particularly evident in companies that have been fined and have been the target of follow-on claims. These shareholders have become sensitive to follow-on claims against "their" company and seek to restore the balance by pushing the company to bring claims against others. I am not sure whether this is an incentive to initiate court proceedings. It is at least an incentive to pursue the claim in whatever form fits the relationship between the companies concerned.

These claims should be limited to claims for actual damages. If there is no damage, no compensation for damages should be paid out. Yet, in a remark that is easily overlooked, the Commission's white paper suggests that "the average overcharges in price-fixing cases could serve as guidance for courts in determining the quantum of damages". Apparently, the Commission's idea of "guidance on the calculation of antitrust damages" includes a proposed presumption that any given price-fixing cartel has at least an average impact, leaving it to the defendant to disprove it. However, a presumption is not a basis for granting damages. There needs to be evidence that there is actual damage and it is up to the plaintiff to prove it.

MICHAEL HAUSFELD: While there is momentum in Europe towards greater private civil enforcement and individual claimants are getting over the cultural hurdles that have made litigation unthinkable in the past, in order to hold cartelists accountable and deter recidivism, accountability must extend beyond individual lawsuits that affect only a single company or consumer.

Regulators and parliamentarians have acknowledged that in cases of price-fixing behaviour which affects markets as a whole, claims pursued only by individuals do not and cannot reflect the extent of the anti-competitive harm caused by the cartel. Selective enforcement, where only individual cartel victims can seek recovery because of judicial barriers, permits cartelists to partially retain the benefits of their crime.

Serious consideration therefore is being given to adopting amendments or revisions to present substantive and procedural rules in order to authorise forms of collective redress mechanisms. Accountability of cartelists can only then be commensurate with the harm caused to the entirety of an affected market.

And some cartelists themselves see the benefit of a mechanism that will provide them with global peace for their admitted conduct, and are prepared to work creatively with claimants to achieve this objective.

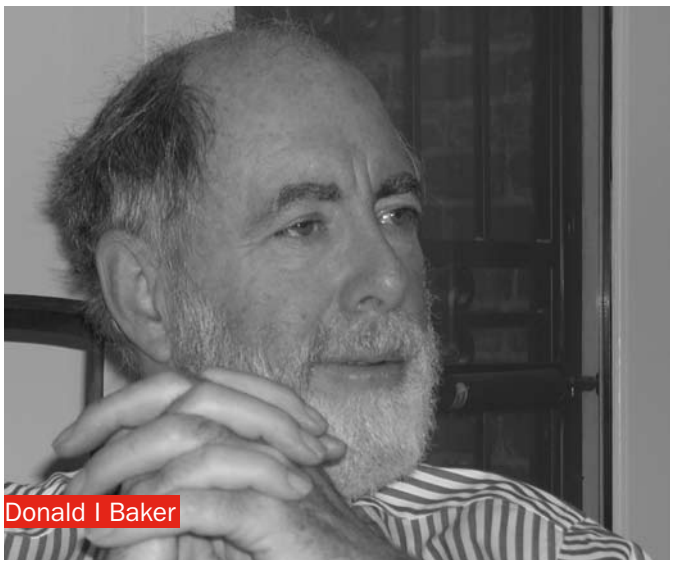
Indeed, in the face of endless individual lawsuits all around the world in cases where the Commission has issued a finding of infringement, levied fines, and the cartelist has admitted wrongdoing, we are seeing cartelists engage in serious dialogues to resolve their global exposure and move beyond their past mistakes.

We are also seeing more creative funding options for claimants to deal with the lack of contingency rules and loser pays, which will encourage more private enforcement. Thus, solutions are being found by private parties as policy changes are being considered. However, during this period of debate, the most practical policy change that seems to have support throughout Europe by public and private enforcers – opt-out class action for follow-on cases – should be implemented without delay.

One final thought on treble damages: the European argument concerning and fear of treble damages is a red herring. Most US cartel class actions are settled on the basis of single damages and few follow-on antitrust class actions go to trial. Plus, claimants get the benefit of pre-judgment interest in most EU member states, which can be substantial, especially considering many cartels take place over an extensive period.

JASPER DE GOU: I think Don makes a good point. What are we really discussing here?

The answer to the political question is indeed simple: "no, the EU will never see US-style antitrust litigation". Private antitrust litigation is not that different from "generic" tort litigation and the member


Donald I Baker


Till Schreiber

states will never accept to amend important elements of their legal system only to encourage or facilitate antitrust private litigation.

Perhaps this is not even a political issue but rather a practical one, to which Don already provided the answer: the legal systems in the EU member states differ greatly and creating a common structure for private antitrust litigation is simply not possible. I don't think that it is necessary either.

In many European jurisdictions, there is already a significant increase in private antitrust damages claims. Some of these jurisdictions have reported increased litigation without having made any amendments to their national rules. Apparently, the small number of private antitrust damage claims in the past is a matter of business culture, rather than a consequence of existing discrepancies in national legal systems. The European Commission's efforts to raise awareness and encourage private antitrust litigation (ie, by publishing its green and white papers) may to some extent already have changed that business culture.

So what else is required to facilitate private antitrust litigation? If we accept that the historical reluctance to bring private antitrust litigation is primarily a matter of business culture, the answer is probably in the hands of the plaintiffs and defendants themselves. The legal systems of the member states leave ample room for litigation, as well as creative private solutions to overcome any alleged hurdles. In my view, companies that have been involved in anti-competitive conduct are more and more likely to accept liability and cooperate with plaintiffs to trace the facts, but as Christof says, the effects must be real and damage must be proven.

GCR: Those are all critical points in advancing our dialogue. Don is surely right that the main power to influence whether Europe witnesses litigation like the United States in this field, or any, lies at the political level. But doesn't the administrative approach of agencies also play a part?

What about the receptiveness of European agencies to article 82-style complaints? London is now home to a considerable amount of business v business High Court litigation, more than many would have predicted five years ago. This increase coincides with the OFT apparently closing the shutters on complaints by a single business against a rival (unless there's a major consumer angle).

A distinctive characteristic of the US regime seems to be the extent to which those kind of business v business cases take place.

Therefore another way to look at the question is: to what extent have certain European countries already begun to emulate this aspect of US antitrust life – litigation between companies who are rivals? Do others see the same change in London and, if so, what explains it and is it permanent?

How important are schemes to help SMEs bring antitrust cases, such as the recent UK initiative to provide insurance to cover the cost of failed antitrust litigation?

What are the important issues, for example, the availability of another avenue (complaint to an authority) and the predictability of the judges? Some UK solicitors would say the "average" US judge somehow has a better intuitive feel for antitrust/competition law than the "average" UK judge.

A lawyer once told *GCR* that given a budget to spend on a client's behalf, he would advise a powerful complaint to a government enforcer over going to court, in part because the outcome just isn't predictable enough.

If competition authorities simply said "no" to more complaints, would we see an increase in private litigation?

TILL SCHREIBER: Notwithstanding all ongoing political discussions, it will have to be the victims of anti-competitive conduct who actually bring cases before the respective courts in order to provide judges across the EU with the opportunity to use the existing tool box and establish precedents, possibly shaping national law in accordance with the requirement of effective enforcement of damage claims under EU law, as established in *Courage v Crehan* and *Manfredi*. In this respect, the market is developing and offering solutions which help to overcome the litigation risks inherent to many European jurisdictions (eg, assignment of claims to specialised chambers, third-party funding, risk insurance, etc).

With regard to some of the specific elements discussed so far, one will have to take into account that in most European jurisdictions, the main objective of private enforcement is full compensation for the victims and, to a far lesser extent than in the US, future deterrence by way of punishment mechanisms.

US-style class actions without affirmative choice to participate imply that it is not the deliberate choice of victims to pursue their claims. Also, such class actions extend their legal effects to parties not involved in the proceedings. Both elements may therefore conflict with general principles of law, at least in continental Europe. Opt-out class actions may, however, be an effective tool in cases of

widely scattered and low-value damages. In the absence of effective collective mechanisms, there is a high risk that the infringers will walk away without having to compensate the damage caused.

The fact that most of the EU member states do not foresee treble damages is not detrimental to an effective enforcement mechanism in Europe. Under Community and member state laws, damages to be awarded for violations of antitrust law do not only encompass the actual loss, but also the loss of profit and the right to interest as of the first day of the infringement. Given the often long duration of infringements, damages to be compensated under European law easily amount to twice the actual damage. Considering that most of the private damage actions in the US are settled at or below the value of single damages, it may already today be more interesting to enforce damage claims in Europe.

In the EU, the vast majority of hard-core cartel cases are the result of self-denunciations of cartelists under leniency programmes, and not of complaints or private litigation. However, due to a lack of staff or political will, not all leniency applications are dealt with by the authorities at EU and national level. In order to comply with the principle of full compensation, authorities which have been notified of a cartel, but do not pursue it by means of a fining decision, should at least oblige the infringers to effectively compensate the damage caused and inform the victims about the infringement. The leniency applicant could then benefit from a limitation of the civil liability or the exposure to actions for contribution by the other cartel members.

According to the European Commission's impact assessment, the negative consumer welfare impact of hard-core cartels amounted to between €25 billion and €69 billion, or 0.23 per cent to 0.62 per cent of the EU's GDP in 2007. These figures clearly confirm the economic justification of an ex ante presumption that cartels have resulted in damages, as for example recognised by the Federal Court of Justice in Germany.

KENT GARDINER: It is undoubtedly true, as many have pointed out, that Europe will struggle with individual state challenges and a diverse multinational system. Others have pointed out that culture and the political process ultimately may have more of an impact on the developing system than the European Commission or even local courts. But no one has taken issue with the Commission's ultimate conclusion that enforcement of competition law is vital to the functioning of healthy global markets, or that private enforcement is itself vital to the enforcement of competition laws. With this in mind, and in an effort to tie some of our conversation together, I'd ask the panel to conclude by responding to some or all of the following questions.

Which jurisdiction or jurisdictions in Europe have done the best at fostering a balanced and responsive private damages system? Or, if you feel no jurisdiction has yet accomplished this, which is best positioned to provide this opportunity?

One theme throughout our conversation has been speed, or the lack of speed, in bringing cases to resolution, as well as the very limited nature of discovery in Europe. With these issues in mind, should the European Commission or individual states require the leniency applicant to disclose its leniency application to private claimants? To the extent this may chill a company's willingness to seek leniency and cooperate, should other companies be required to disclose their portion of the European Commission file to claimants, absent a compelling showing of confidentiality or trade secrets? Would this help support cases or delay EC investigations?

Finally, there was broad consensus on the panel that claimants must be properly motivated before private damages actions will take hold. Most on the panel appear to believe that US-style treble damages are not necessary. But questions remain as to how damages should be proven. In systems that do not provide discovery, can plaintiffs truly be expected to come to court at the pleading stage with full proof of their damages?

Christof Swaak points to the language in the Commission's white paper, suggesting "the average overcharges in price-fixing cases could serve as guidance for courts in determining the quantum of damages". While Christof and Jasper have suggested that there should be a requirement that damages are proven, there has not been any discussion of how that would happen in any European court. Does the Commission have a valid suggestion? Should it be modified? If it should be rejected, how should damages be proven in Europe? What is the standard and when should parties be required to produce evidence to meet that standard?

TILL SCHREIBER: According to our practical experience, Germany has developed a solid private damages system. The advantages are the establishment of clear statutory rules concerning (i) a specific legal base for damage claims related to infringements of competition law; (ii) the binding effect of decisions by competition authorities; (iii) the limited availability of the passing-on defence; (iv) the duration and suspension of limitation periods; and (v) the right to claim interest as of the first day of the infringement.

However, court cases in Germany are characterised by high upfront court costs and a long duration. This, in combination with the absence of collective actions, may in particular deter claimants in cases of relatively small and scattered damages. Other jurisdictions with a balanced private damages system are the Netherlands and Sweden. In both jurisdictions, the upfront costs to bring a case are low and both provide for effective disclosure mechanisms. Sweden has the further advantage of a specialised competition court, while the Netherlands provides for specific opt-out solutions for settlements. Also, the UK and Ireland are interesting jurisdictions for private damage litigation. Ireland provides, for example, for punitive damages. With regard to cases of scattered damages at end consumer level, Italy, Denmark and Portugal have recently adopted new sets of legislation aimed at facilitating collective actions.

Access to information provided by leniency applicants is important for the success of private damage actions. A general requirement for leniency applicants to cooperate with private claimants, possibly against a limitation of its civil liability or the exposure to actions for contribution, therefore seems desirable. However, other alternatives may be as effective without imposing a direct obligation on the leniency applicant. The Commission could, for example, include relevant information provided by leniency applicants, which does not amount to business secrets *stricto sensu*, in the public versions of its decisions. One could also think of a change in the Commission's practice concerning access to the file. In Germany, for example, interested third parties may request access to the file of the Federal Cartel Office under the condition not to disclose any business secrets. In any event, the Commission should – contrary to its current practice – not hinder leniency applicants to freely decide to disclose their leniency applications to victims of the anti-competitive conduct (eg, in the context of settlements).

While an inter partes disclosure, as proposed in the Commission's white paper, seems desirable, in our view the current legal systems in the EU already offer sufficient means to substantiate damages without requiring full proof by the defendants. For example,

legal principles such as the shift of the burden of proof in case the defendant rebuts an allegation relating to facts which can only be provided by the defendant, are common throughout the EU. Also, courts can and do grant an alleviation of the burden of proof with regard to specific aspects, for example, a general presumption that a price-fixing cartel results in a price increase and thus damages. Furthermore, judges generally have the power to oblige all parties to a proceeding to provide information and data which they consider relevant for reaching a final decision on the damage amount. In some jurisdictions, judges may also estimate the damages themselves, based on the evidence provided by the parties, possibly evaluated by court-appointed experts.

RAINER BECKER: At the European Commission, we are happy to see that our green and white papers are said to have raised awareness of the rights victims have under EC law and the difficulties they face when they attempt to enforce them in national courts. But it is not increased awareness or a change in business culture (as Jasper de Gou described it) alone that will be sufficient to overcome the very real legal and practical obstacles that claimants for antitrust damages continue to encounter in the EU. The results of the public consultation on the white paper are very clear on this point: out of the more than 170 respondents, the great majority seems to agree with the factual finding of the white paper that most victims of antitrust infringements, in practice, do not obtain the compensation they are entitled to. A large number of respondents agreed that something needs to be done to change the current situation. The views were, of course, far more diverging regarding the "what" should be done and the "by whom".

As to what measures are not suitable in a European context, I largely agree with the points made by Don Baker. The Commission's white paper is clearly not about introducing US-style antitrust litigation into Europe. On the contrary, the white paper contains a range of safeguards consciously designed to avoid certain central features of the US antitrust litigation system that may lead to undesired effects. Some of these mechanisms Don Baker already mentioned. Other safeguards include the careful selection and continuous control of the entities allowed to bring representative actions on behalf of large groups of victims, and the very circumscribed scope and conditions of evidence disclosure compared to US-style discovery.

The white paper sets out a genuinely European approach to private antitrust damages actions, both in terms of the underlying policy choice (compensation as the primary objective, deterrence as welcome side effect, not a policy driver), and in terms of the measures recommended. All of these measures are rooted in the European legal traditions, meaning that they are directly derived from the legal orders of the member states. Compatibility with the existing legal (including constitutional) landscapes in the member states was indeed one of the important aspects that the Commission considered during its discussions with member states (competition authorities, ministries and judges) and in the impact assessment exercise leading to the white paper (see the Commission's Impact Assessment Report and the 600-page Impact Study by external experts, published on the Commission's website).

Given that private antitrust damages actions in the EU thus serve primarily a compensation (not deterrence) purpose, they can only be a complement, not a substitute to public enforcement. Private enforcement, as conceived in the white paper, and public enforcement fulfil different functions. No matter how closely public intervention mirrors the concerns of consumers, no matter how effectively the fines that authorities impose punish and deter unlawful behaviour, the victims of illegal behaviour will still not be compensated for their losses. Public enforcement agencies in Europe are neither equipped nor authorised to grant compensation to individual consumers and businesses. Delivering corrective justice in individual cases is the task of national courts. There may be some connection between the level of complaints to competition authorities and the level of damages actions before courts, as pointed out by *GCR*, but there are certainly limits to this connection given the different functions of public enforcement and actions for damages.

Christof Swaak raised the important issue of quantification of damages and referred to the Commission's commitment to provide further guidance in this respect. Even if in a given case it is clear that the defendant infringed antitrust law and that this breach of law caused some form of damage to the claimant, the latter may still face great difficulties in court to show, to the standard required under national law, the extent of the harm suffered. Many stakeholders have reported that the difficulties in establishing the amount of the damage are among the most important obstacles to the effective enforcement of meritorious claims. Establishing the harm that a purchaser (or a supplier) suffers as a result of an upstream (or downstream) competition law infringement can be a highly complicated task involving complex economic analyses. Under certain circumstances, it can even be totally impossible for the victim to show with the required degree of certainty the exact amount of loss suffered.

In the white paper and in the accompanying staff working paper, the Commission puts forward two suggestions to address these difficulties. First, it recalls that the EC law principle of effectiveness excludes calculation requirements, as imposed by national law or by the courts, that make it excessively difficult for victims to obtain the damages to which they are entitled under Community law. Legislators and, in the absence of their action, judges thus have to mitigate these requirements to an appropriate level. The compensation objective implies that judges must do their utmost to ensure that the damages awarded correspond as much as possible to the actual harm suffered. But it also implies that, where ultimate scientific accuracy cannot reasonably be achieved, judges should be allowed to approximate the harm suffered given that the alternative would be depriving victims of meaningful damages.

Secondly, the Commission committed to produce non-binding guidance on the calculation of damages, in order to provide judges and parties with a framework for the economic analysis that allows pragmatic solutions. In order to assist the Commission in the drafting of the guidance, it tendered an external study. The objective of this study is to identify reliable econometric models for the quantification of damage caused by antitrust infringements and possible proxies, presumptions, grounds for estimations, or other practical methods facilitating the calculation of damages in antitrust cases. Where judges, in accordance with the principle of effectiveness, approximate the harm suffered, it is desirable that they do so in knowledge of the relevant economic parameters and have at their disposal straightforward methods to apply reliable findings of economics in practice.

Contrary maybe to what Christof Swaak is suggesting, I therefore have no doubt that in the quantification of damage in antitrust cases, the use of proxies or presumptions can fulfil a very useful and legitimate purpose, provided of course that they are safely grounded in sound economics and analysis. Indeed, such proxies may sometimes be the only practical way to ensure the effectiveness of the victims' right to damages, as required by the European Court of Justice. ■