

**Comments of the Section of Antitrust Law
and the Section of International Law
of the American Bar Association
in Response to the
Request for Public Comment of the
Commission of the European Communities
On Damage Actions for Breaches of EU Antitrust Rules**

April 2006

The Section of Antitrust Law and the Section of International Law (together, “the Sections”) of the American Bar Association (“ABA”) are pleased to submit these comments to the Commission of the European Communities (“the Commission”) in response to its Green Paper request for public comments dated 19 December 2005 regarding damage actions for breaches of EC antitrust rules (the “Green Paper”)¹ and the annexed Commission Staff Working Paper (“Working Paper”).² The views expressed herein are being presented on behalf of the Sections only. These views have not been approved by the House of Delegates or the Board of Governors and, accordingly, should not be construed as representing the policy of the ABA.

These comments are presented in two parts. Part I is drafted from the perspective of U.S. antitrust practitioners and describes how private damages actions work in the United States.³ This part is intended to provide the Commission insight into the U.S. system after a

¹ Commission of the European Communities, Green Paper: Damages Actions for Breach of the EC Antitrust Rules, Brussels (Dec. 19, 2005), SEC (2005) 1732, *available at* http://europa.eu.int/comm/off/green/index_en.htm.

² Commission of the European Communities, Commission Staff Working Paper, Annex to the Green Paper: Damages Actions for Breach of the EC Antitrust Rules, Brussels (Dec. 19, 2005), COM(2005) 672 final, at 11, *available at* http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/sp_en.pdf (hereinafter, “Working Paper”).

³ The ABA’s Section of Antitrust Law has long considered issues relating to private rights of action and has recently submitted comments to the Antitrust Modernization Committee on such issues. The comments in Part I reflect the Section’s extensive experience in working within the U.S. system and are contributed by Paul Friedman, David Gelfand, Stephen Kinsella, Kerri Chase, Thomas Luebbig, Stacy Mahoney, Don

century of private damage actions and to demystify any preconceived notions about the manner in which the U.S. litigation system operates. Except for points on which a clear consensus exists in the U.S. antitrust bar, Part I generally does not recommend any particular rule or procedural regime. Instead, the Sections attempt in this part to focus on certain aspects of the U.S. adversary system of private litigation and to illuminate some of the policy choices that may lie ahead for the Commission and the Member States.

There is a fundamental tension inherent in many of the choices that lie ahead: choices that may foster deterrence (for example, by making access to evidence easier or shifting or relaxing the burden of proof or imposing enhanced damages), versus choices that may impose unintended or undesirable burdens on business (for example, the cost of providing access to evidence or the chilling effect of enhanced damages on pro-competitive collaborative activities). In Part I, the Sections address where the U.S. system has set the balance and share their view of the benefits and disadvantages of those policy choices.

Part II is drafted from the perspective of international antitrust practitioners and discusses the compatibility of alternatives suggested in the Green Paper with the culture and existing legal framework of the Member States.⁴ This part draws broadly on the North American experience with private damages actions, both in the United States and in Canada.

Broadfield, Bill Page, Bill Blechman, Brian Grube, Michelle Fischer, Edwin Fountain, Tom Mueller, and Christina Nordlander.

⁴ The Section of International Law represents thousands of ABA members, many of whom are non-U.S. lawyers, with substantial expertise with antitrust law in the United States and around the world. The comments in Part II reflect the Section's expertise on how the U.S., Canada, and other jurisdictions approach private rights of action and were contributed by Béatrice Honorat, Dr. Manja Epping, Jon Lawrence, Nicholas Gibson, Benjamin G. Bradshaw, Christopher Naudie, Matthew R. Cosgrove, David Beddow, and Conor Maguire.

Part II also examines how certain options described in the Green Paper might be implemented, or the friction that might exist in implementing them, in three main European jurisdictions, namely France, Germany and England and Wales.

In view of the Sections' substantial experience with private enforcement of the antitrust laws in multiple jurisdictions, we look forward to further opportunities in the future to assist the Commission to develop policies in this area, based upon the conclusions it draws from all the comments received in response to the Green Paper.

PART I: THE U.S. PERSPECTIVE

I. INTRODUCTION

Since enactment of the Clayton Act in 1914, private damage actions have been an important weapon in the fight against anticompetitive behavior under the United States antitrust laws. U.S. courts and policy makers have long recognized that vigorous enforcement of the antitrust laws through private actions for damages complements public enforcement and increases dramatically the deterrent to antitrust wrongdoing. The Sections reaffirm their full support of this view of the role of private damage actions under the antitrust laws. Together, public and private enforcement actions further the twin goals of U.S. antitrust policy – deterrence of infringements, and compensation of victims of infringements – goals that the Sections recognize are shared by the Commission.

Part I focuses on four of the areas raised by the Green Paper: (1) access to evidence; (2) damages; (3) the passing-on defense; and (4) defending consumer interests.

II. ACCESS TO EVIDENCE

In many instances, specific information regarding the existence and scope of an unlawful conspiracy rests largely in the hands of the conspirators. Absent an obligation on the

part of conspirators to preserve and disclose relevant information, private parties face an enormous hurdle in proving their case. Accordingly, reasonable access to evidence related to an alleged infringement is vital to an effective private enforcement regime.⁵

At the same time, allowing private plaintiffs to obtain far-reaching and burdensome discovery of defendants can provide an incentive to file lawsuits without a real factual basis.⁶ Such suits might have as their primary aim the use of expensive and burdensome legal proceedings to exact a settlement. Or they might be the product of the plaintiffs' speculation that an infringement might have occurred and that evidence will emerge during the course of discovery in support of the claim. It is a challenge to resolve the tension between the laudable goal of facilitating legitimate private antitrust enforcement actions and preventing the waste of private and judicial resources that results from baseless lawsuits and the imposition of burdensome discovery obligations.

The United States has chosen to permit private lawsuits without requiring fact pleading, and granted litigants fairly broad discovery rights. The purpose of discovery is to bring to light the relevant facts, which the parties can present to either a judge or jury, which then can resolve disputed issues of fact and render a judgment. The process relies on the adversary system to set limits and curtail unreasonable discovery requests, supervised by the court when called upon by one of the parties to the proceedings.

⁵ The Commission itself has observed significant deficits in many Member States' pre-trial disclosure requirements and in the ability of a private plaintiff to access evidence. *See* Working Paper at ¶¶ 34-35.

⁶ Federal Rule of Civil Procedure 11(b) requires that a lawyer or an unrepresented party asserting a claim certify that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, the claim is legally warranted and that the allegations and other factual contentions have evidentiary support or are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. Whether this standard is a sufficient basis to warrant broad discovery has been the subject of some contention.

Under U.S. practice, failure to comply with one’s discovery obligations can have serious repercussions. These can range from the simple assessment of additional costs incurred by the other side in compelling the refused disclosures, to limiting the testimony of particular witnesses, to barring certain documentary evidence, to shifting the burden of proof on specific issues, to instructing the jury that adverse inferences may be drawn from a party’s failure to provide discovery. Discovery in U.S. proceedings is handled on a case-by-case basis and judges are given broad discretion to tailor their discovery orders to the circumstances at hand. Thus, while there are principles of general application, there are few hard and fast rules.

A. **The U.S. Approach to Discovery**

The fundamental principle underpinning discovery policy in the United States is that disclosure of information reasonably likely to lead to the discovery of admissible evidence in advance of trial typically produces a fairer and more correct outcome. This has been the bedrock of U.S. litigation practice. As noted by the Supreme Court, “For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man’s evidence.”⁷

Proceedings in U.S. federal courts are governed by the Federal Rules of Civil Procedure (the “Federal Rules”). Pursuant to Federal Rule 26(a)(1), each party is obligated to make certain initial disclosures to other parties in the case without awaiting a formal discovery request or court order. These initial disclosure obligations include the name, address and telephone number of “each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses” and the subjects as to which that individual may

⁷ *United States v. Bryan*, 339 U. S. 323, 331 (1950) (quoting Wigmore, *Evidence* § 2192 (3d ed. 1940)).

have information.⁸ The initial disclosure must also include either copies of documents (defined broadly) or descriptions of documents by category and location that are in the possession, custody and control of the disclosing party and that it may use to support its claims or defenses.⁹ A damages claimant must also disclose any calculation of damages and make available for inspection and copying the documents on which such a computation is based.¹⁰ Finally, each party must make available for inspection and copying any insurance agreement that may satisfy all or any part of a judgment that may be entered in the action.¹¹ These initial disclosures must be made fairly early in the case. Unless otherwise stipulated by the parties or ordered by the court, the disclosures must occur within 14 days of an initial conference between the parties to develop a proposed discovery plan for approval by the court. As a practical matter, however, parties in complex antitrust cases often request that the court defer or excuse these initial disclosures altogether and proceed with more specific discovery requests.

Beyond the initial disclosure requirement, there are three principal methods for a party to obtain discovery under the Federal Rules.¹² First, there are written interrogatories. Pursuant to Federal Rule 33, a party may serve up to 25 written questions to each party in the case, though this number can be changed by agreement or court order and in complex antitrust

⁸ Fed. R. Civ. P. 26(a)(1)(A).

⁹ Fed. R. Civ. P. 26(a)(1)(B).

¹⁰ Fed. R. Civ. P. 26(a)(1)(C).

¹¹ Fed. R. Civ. P. 26(a)(1)(D). Note, however, that damages in antitrust cases typically are not covered by insurance policies.

¹² A fourth method, known as “requests for admissions,” allows one party to ask the other to admit certain facts. Fed. R. Civ. P. 36. Requests for admissions are often of limited utility for complex cases with many factual issues. Accordingly, this paper does not discuss this method.

cases the limit is often increased.¹³ The party to whom interrogatories have been posed must provide a written response to each interrogatory. A responsible individual must verify responses. That response can consist of either an objection to the appropriateness of the interrogatory, an answer to the question posed, or both. Objections are frequently based on the breadth of the questions, the lack of relevance of the information sought, and the burdensomeness of compiling the answer. In answering interrogatories, a party may also specify the business records from which the answer to the question can be derived or ascertained. Objections are resolved either through negotiation among the parties or, if no agreement is reached, by a ruling of the court.

A second method of discovery is a request for documents.¹⁴ Documents are thought to provide some of the best evidence of what actually happened in a case. They are often considered contemporaneous evidence of events, rather than testimony that might be biased or based on faded memories of events. They can be used to constrain witnesses from straying too far into speculation or untruths about what has occurred. Document requests are usually the backbone of discovery proceedings in the United States.

In today's world of e-mail and massive storage of electronic documents, however, document requests also present the greatest risk of imposing disproportionate burdens on the parties. It is not unusual in U.S. antitrust cases for parties to produce millions of documents and use dozens of lawyers to compile and review these documents, often resulting in millions of dollars in attorneys' fees and litigation expenses. Thus, it is critical that any system that allows document discovery also provide controls on the use of document requests.

¹³ Fed. R. Civ. P. 33.

¹⁴ Fed. R. Civ. P. 34.

Federal Rule 34 places no statutory limits on the number of documents that may be requested. A party may request either specific documents, or identify categories of documents that need to be produced. While requests must limit themselves to relevant documents, relevance is broadly defined. “[R]elevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”¹⁵ Accordingly, information that on its face may not appear to be relevant or admissible but which could reasonably lead to admissible evidence is usually discoverable. Once again, the party being asked to produce documents must file a written response that sets forth any objections to each request and whether or not documents responsive to the request will be produced. Objections are usually the subject of extensive negotiations among the parties over the scope of the requests. If no agreement is reached, the party seeking production will apply to the court for an order to compel the production sought.¹⁶

Many practitioners in the United States feel that the U.S. courts have not done an adequate job of protecting parties from these burdens in many cases. As a general principle, U.S. courts will compel a party to produce documents that “may lead to the discovery of admissible evidence” unless the party opposing production demonstrates a burden that outweighs the likely utility of the requested discovery. While it is difficult to document empirically, most practitioners would agree that the tendency in U.S. courts is to err on the side of more discovery. This can and does lead to significant costs to gather, review and organize documents (including electronic “documents”) many of which ultimately add nothing to the resolution of the dispute.

¹⁵ Fed. R. Civ. P. 26(b)(1).

¹⁶ Fed. R. Civ. P. 34 governs document requests issued to parties to the case. Documents may also be requested from non-parties through the use of subpoenas under Fed. R. Civ. P. 45. The procedures for making requests and responding thereto are generally the same for parties and non-parties although both the rules and the courts are more sympathetic to burden objections from non-parties than from parties.

In some cases, particularly in situations requiring the retrieval of documents stored on computer backup tapes, courts will condition discovery on the party requesting it paying for the costs of discovery.

The third principal method of obtaining discovery is oral testimony through depositions. Pursuant to Federal Rule 30, a party may seek the testimony of any person.¹⁷ Parties are obligated to make available for deposition any individuals who are under their control. While Federal Rule 30 generally limits the number of depositions to ten per side, in practice, parties to complex antitrust cases frequently stipulate or, in the absence of an agreement, seek a court order to enlarge that number substantially.¹⁸ Parties may also be required to designate a corporate representative to testify regarding specified matters known to the corporation, and are required to educate the designated person on matters of which he or she lacks personal knowledge.¹⁹ Each deposition is limited to one day of seven hours, though that duration may be enlarged by agreement or court order.²⁰ At a deposition, the witness is placed under oath and is required to truthfully answer all questions posed to him. A stenographic record is made of the questions and answers. Increasingly, parties also videotape the deposition for possible use at trial or at a pre-trial hearing.²¹

Lawyers generally prepare their witnesses before the deposition. While experienced counsel often can anticipate what questions may be asked by the other side and

¹⁷ Fed. R. Civ. P. 30.

¹⁸ Fed. R. Civ. P. 30(a)(2).

¹⁹ Fed. R. Civ. P. 30(b)(6).

²⁰ Fed. R. Civ. P. 30(d)(2).

²¹ As with document requests, Fed. R. Civ. P. 45 provides a mechanism to compel the deposition testimony of non-parties.

prepare his client accordingly, the questions themselves are not made available prior to the deposition. One party's lawyer poses questions to the witness. A personal lawyer or a company's counsel, and sometimes both, usually accompany the witness at the deposition. The lawyer representing the witness has the ability to object to the form of the questions and thereby preserve those objections for later rulings at trial. With very limited exceptions, such as where testimony would intrude on the attorney-client privilege, the attorney may not instruct the witness not to answer a question. The two exceptions that allow a witness not to respond to questions are: (i) where a recognized privilege applies or (ii) where the answer might incriminate the witness.²² A judge will not be present at the deposition. On rare occasions, the parties may suspend the deposition to reach a judge by telephone or in person if the parties require a prompt ruling on an issue that arises during the deposition, such as the proper application of a privilege, a witnesses' refusal to answer a question, or even the conduct of the lawyers at the deposition. The judge can also rule on these issues after a deposition and order that the deposition be resumed if necessary.

The scope of discovery in each case, whether by interrogatory, document request, or deposition, is the subject of constant negotiation and, where negotiations fail, applications to the court. The issues can be contentious; as one party seeks to obtain as much information as possible and the other party seeks to avoid the burden of complying with broad requests. Obviously, the need for information will vary depending on the issues in dispute. Similarly, the burden can vary greatly depending on the resources of the parties subject to the information request and the manner in which that information is kept. Rigid and formalistic rules about what

²² The Fifth Amendment to the U.S. Constitution provides a person with the right against self- incrimination.

a party needs to produce carry the dual risks of not providing sufficient access to information in some cases and creating undue discovery burdens in others. The case-by-case approach employed in the United States strives to provide both the parties and the court with flexibility to determine the correct balance between one party's need for information and the burden on the other party. In general, courts are inclined to require disclosure of potentially relevant information unless the party resisting discovery demonstrates that compliance would impose an undue burden. While the checks and balances provided by this adversarial system are intended to strike an appropriate balance between granting access to discovery and protecting the parties from abusive requests, some U.S. practitioners have criticized the system for frequently imposing excessive discovery burdens on the parties.

By contrast, other U.S. lawyers feel that the right balance is usually struck. They note that the scope of discovery is usually proportionate to the amount at stake in a case. For example, plaintiffs and defendants generally tend not to engage in full-blown discovery if a relatively small amount is at issue. In large antitrust cases where the amounts at stake can involve hundreds of millions or even billions of dollars, the courts often require extensive discovery by the parties and the costs can run into the millions of dollars. The discovery process in such cases can take several years to complete.

The Sections recognize that in most European jurisdictions, litigants are not accustomed to extensive discovery. While discovery in the United States exceeds what most Europeans would expect by an order of magnitude, the benefits of broad discovery may outweigh the burdens to the parties in some cases. Access to relevant information prior to trial allows the parties to uncover crucial facts, test and verify assertions made by the other party, and ultimately prepare and present a more complete case. As a practical matter, when evaluating the

discovery process, the burden of discovery should be weighed against the cost of incorrect decisions.

In point of fact, the overwhelming majority of private antitrust cases settle before trial. This is due in substantial part to the discovery process, which eliminates surprises and enables the parties realistically to assess the strengths and weaknesses both of their own and their adversary's position based on evidence that is equally available to all sides. In some cases, the very burdensomeness of discovery itself is thought to induce settlements which might not otherwise be warranted.

B. Electronic Data and the Destruction of Evidence

Currently, one of the most challenging discovery issues in the United States is the scope of a party's obligation to preserve and produce electronic data, in particular e-mail. In general, a party has an obligation to preserve data, regardless of whether it is stored electronically or in hard copy form, as soon as "the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation."²³ "The scope of a party's preservation obligation can be described as follows: Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents."²⁴ Significantly, the obligation to preserve data is automatic once the party has a reasonable

²³ *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001) (citing *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998)). See also *Silvestri v. GMC*, 271 F.3d 583, 591 (4th Cir. 2001) ("The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation") (citing *Kronisch*, 150 F.3d at 126).

²⁴ *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (J. Scheindlin).

anticipation of a claim. No court order or notice from the adverse party to preserve information is required.

While traditional paper discovery could at times be burdensome, the explosion in e-mail and other electronically stored data has increased the burden of preservation, review, and production. In addition to the volume of data now subject to discovery requests, parties must also deal with the automatic deletion of certain data by company systems. These automatic delete functions are a necessary element that seeks to limit the amount of data a company needs to store and allow smooth and efficient operation of the company's data systems. Yet, the automatic nature that makes such delete functions essential also poses the great danger that potentially relevant information is deleted after a party obtains notice of a claim or suit against it or otherwise has a reasonable anticipation of a claim.

The scope of a party's preservation obligations and the penalties to be assessed for destruction of data, whether inadvertent, negligent or deliberate, are the subject of numerous recent court decisions.²⁵ Sanctions for the loss of evidence (often referred to as spoliation) run across a wide spectrum, from the assessment of costs or other fines, bars to testimony of certain witnesses or the shifting of the burden of proof on certain issues, to adverse inferences or even the entry of judgments against the offending party.²⁶

²⁵ See *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. Inc.*, No. CA 03-5045 AI, 2005 WL 674885, at *9 (Fla. Cir. Ct. Mar. 23, 2005) (entering partial default judgment against Morgan Stanley as sanction for Morgan Stanley's failure to do a good faith search for backup tapes); *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 439 (S.D.N.Y. 2004) ("*Zubulake V*") (ordering sanctions and finding that UBS and its counsel had not taken all necessary steps to guarantee that relevant data was both preserved and produced).

²⁶ See *Danis v. USN Comm'ns Inc.*, No. 98 C 7482, 2000 WL 1694325, at *53 (N.D. Ill. Oct. 23, 2000) (fines); *United States v. Philip Morris USA, Inc.*, 327 F. Supp. 2d 21, 26 (D.D.C. 2004) (fines and bar to testimony of certain witnesses); *Coleman (Parent) Holdings, Inc.*, 2005 WL 674885 at *5 (shifting burden

Courts are often receptive to broad requests for the production of electronic documents.²⁷ Several federal courts and state courts in the past few years have promulgated specific electronic discovery rules that impose substantial disclosure and other obligations on producing parties.²⁸ Other courts have issued guidelines or non-binding standards in connection with issues related to electronic discovery.²⁹

The topic is also being discussed in rule-making sessions. In September 2005, the Judicial Conference of the United States unanimously approved amendments to the Federal

of proof); *Zubulake*, 229 F.R.D. at 437 (adverse inference); *Metro. Opera Ass'n v. Local 100, Hotel Emples. & Rest. Emples. Int'l Union*, 212 F.R.D. 178, 231 (S.D.N.Y. 2003) (entry of default judgment).

²⁷ See *Hahn v. Minnesota Beef Indus., Inc.*, No. Civ. 00-2282 RHKSRN, 2002 WL 32667146, *4 (D. Minn. Mar. 8, 2002) (delaying trial and awarding fees and costs when defendant produced incomplete and inaccurate electronic information).

²⁸ See, e.g., U. S. Dist. Ct. Rules D.N.J., L.Civ.R. 26.1(d)(3) (“During the Fed.R.Civ.P. 26(f) conference, the parties shall confer and attempt to agree on computer-based and other digital discovery matters”); U. S. Dist. Ct. Rules D.Wyo., Civil Rule 26.1(e) (“Prior to a Fed.R.Civ.P. 26(f) conference, counsel should carefully investigate their client’s information management system so that they are knowledgeable as to its operation, including how information is stored and how it can be retrieved. Likewise, counsel shall reasonably review the client’s computer files to ascertain the contents thereof, including archival and legacy data (outdated formats or media), and disclose in initial discovery (self-executing routine discovery), the computer based evidence which may be used to support claims or defenses”); U.S. Dist. Ct. Rules Ark., L. R. 26.1(4) (“The Fed.R.Civ.P. 26(f) report filed with the court must contain the parties’ views and proposals regarding ... [w]hether any party will likely be requested to disclose or produce information from electronic or computer-based media”).

²⁹ See, e.g., U.S. Dist. Ct. for Dist. of Delaware, Default Standards for Discovery of Electronic Documents (“E-Discovery”), Rule 2, available under miscellaneous papers at <http://www.ded.uscourts.gov/SLRmain.htm> (“[P]rior to the Rule 26(f) conference, the parties shall exchange . . . [a] list of each relevant electronic system that has been in place at all relevant times and a general description of each system, including the nature, scope, character, organization, and formats employed in each system”); U. S. Dist. Ct. Rules D.Kan., Elec. Discovery Rule 4 (“During the Fed.R.Civ.P. 26(f) conference the parties shall confer regarding the following matters: (a) steps the parties will take to segregate and preserve computer-based information in order to avoid accusations of spoliation, (b) scope of email discovery and e-mail search protocol, (c) whether deleted information still exists, the extent to which restoration of deleted information is needed, and who will bear the costs of restoration, (d) whether back-up and archival data exists, the extent to which back-up and archival data is needed, and who will bear the cost of obtaining such data, (e) the anticipated scope, cost, and time required for disclosure or production of data beyond what is reasonably available to the parties in the ordinary course of business”).

Rules of Civil Procedure to address electronic discovery issues.³⁰ These amendments were developed after several public hearings and numerous submissions by judges and lawyers. They will take effect on December 1, 2006 unless Congress intervenes to prevent their adoption.³¹ Accordingly, it is anticipated that the Federal Rules of Civil Procedure will be amended at the end of 2006 to require greater attention to electronic discovery on the part of counsel and parties in all federal cases.

C. **Interplay Between Private Enforcement and Evidence Obtained by Competition Authorities in Public Enforcement Actions**

Experience has shown that private enforcement actions frequently follow on the heels of publicity surrounding enforcement efforts by national and regional competition authorities or the public announcement of plea agreements or decisions by competition authorities. Consequently, private actions often lag somewhat behind governmental investigations. As a result, competition authorities have often collected documentary evidence before a private litigant even commences its suit.

In the United States, private plaintiffs can obtain from the defendants access to the same documents they have provided to competition authorities by issuing a discovery request for all documents relating to the markets at issue in the investigation or perhaps for all documents relating to any governmental investigation or inquiry into the industry.³² (As in the EU, it is

³⁰ The Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure dated September 2005 includes a copy of the amendments and is *available at* <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf> (last visited April 25, 2006).

³¹ *See* Thomas Allman, *US poised for new disclosure laws*, Legal Week (Oct. 27, 2005), *available at* <http://www.legalweek.com/ViewItem.asp?id=26161> (last visited April 25, 2006).

³² There are some cases holding that because of federal grand jury secrecy rules, plaintiffs cannot simply request everything that has been submitted to a grand jury. *See, e.g., In re Cisneros*, 426 F. 3d 408, 412

extremely unusual for plaintiffs to obtain documents from the competition authorities themselves, unless the documents are made public in connection with a trial or other judicial proceedings.) In this way, plaintiffs can obtain the defendant's existing business records submitted to the authorities and perhaps even their written submissions to the authorities. In recent years, private plaintiffs in the United States also have requested and obtained from the defendants submissions to non-U.S. competition authorities. This once again includes not only the existing business records submitted to the competition authorities, but also the so-called "corporate statements" that frequently are required to be submitted.³³

In the United States, written corporate submissions in connection with an investigation by competition authorities generally are not required. In order to balance the competing interests of encouraging a party's cooperation and simultaneously avoiding the risk that the party generates admissions that would be harmful in private follow-on litigation, correspondence with and submissions by a party to the U.S. competition authorities are kept to an absolute minimum. The general practice in the United States is for plea negotiations, including offers of proof by a party, to be conducted orally rather than in writing. Similarly, interviews of company employees as part of a plea agreement generally are conducted without a stenographer. The attorneys and investigators present at the interview merely take notes. Internal documents generated by the competition authorities (*i.e.*, attorney notes and memoranda analyzing the party's oral statements) generally are not available to private plaintiffs.

(D.C. Cir. 2005); *United States v. Johnston et al.*, CR-03-1167-PHX-DGC, 2006 U.S. Dist. LEXIS 5045, at *12 (D. Ariz. Feb. 3, 2006).

³³ The Commission has recently proposed rules to formalize its practice of taking oral corporate statements, in part to avoid the creation of discoverable evidence that can be used in private actions in the United States.

A plea agreement is an admission by the defendant of its involvement in an antitrust violation. While it establishes the plaintiff's prima facie case in a follow-on private damage action, issues remain about the temporal scope of the violation and the extent of the plaintiff's damages. Therefore, in private cases that follow public enforcement actions, discovery remains critical to the plaintiff in preparation of its case.

Additionally, a final judgment against a defendant in an action under the antitrust laws by the United States may be admissible in a follow-on private damage action as prima facie evidence of the antitrust violation actually decided in the government action.³⁴ This powerful tool is only available, however, with respect to matters that were put in issue, directly determined, and necessarily decided. This rule derives from the principle that matters that have been fully, fairly, and finally adjudicated in a judicial proceeding shall be entitled to some presumptive effect. In the United States, this presumption is not available except in cases where the finding of a violation has been tested by the adversary system and survived the rigors of the judicial system.

The U.S. system balances the need for access to relevant information against the burdens of discovery on the parties. The Sections recognize that the U.S. has adopted a system that permits greater discovery – and tolerates more burden on parties – than is seen in the EU. This reflects the view that discovery enables the parties to avoid surprises at trial, leads to better-informed outcomes, and increases the probability that the judgment will achieve a just result. As the Commission considers where to strike the balance, it is our view that a system that both

³⁴ 15 U.S.C. §16(a) (2000).

requires and enables the parties on both sides to present evidence to support their claims and defenses is most likely to further the goals of deterrence and compensation.

III. DAMAGES

This section addresses several of the damages issues identified in the Green Paper: (1) whether recovery should be based on loss to claimants or gain by the infringer; (2) the nature of economic models to estimate damages; (3) the use of a multiplier such as double damages; (4) the availability of prejudgment interest; and (5) the use of split proceedings for liability and damages.

A. Damages Practice in the United States

At the federal level in the United States, the scope of recovery by private plaintiffs is prescribed by Section 4(a) of the Clayton Act.³⁵ This statute, which was enacted in 1914, provides that “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor ... and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.” As is clear from the language of Section 4, damages in a U.S. civil antitrust case are based on loss to the plaintiff, not gain by the infringer.³⁶ Where a violation of the antitrust laws is found, these damages are automatically trebled.

³⁵ 15 U.S.C. §15(a) (2005).

³⁶ Gain by the infringer is relevant for other purposes under U.S. antitrust law. For example, the maximum fine for a criminal antitrust violation can be the greater of double the loss to victims and double the gain to the defendant. 18 U.S.C. §3571(d). Also, the Federal Trade Commission has sought disgorgement of unlawful profits in government enforcement actions. *FTC v. Mylan Labs, Inc.*, No. 1:98CV03114 (TFH) (D.D.C. Feb. 9, 2001); *FTC v. The Hearst Trust*, No. 1:01CV00734 (TJP) (D.D.C. Nov. 9, 2001). For private plaintiffs suing under the federal antitrust laws, however, recovery under Section 4 of the Clayton Act is based on loss to the plaintiff.

Treble damages are intended to deter violations of the U.S. antitrust laws.³⁷ The courts do not have discretion to limit recovery to single damages regardless of the nature of the violation. Legislative proposals to de-treble damages have, however, succeeded in a few instances. For example, the U.S. Congress has de-trebled damages in certain circumstances for research or production joint ventures submitted for review by the antitrust enforcement agencies,³⁸ for standard-setting organizations,³⁹ and for firms participating in the DOJ's Amnesty Program that provide cooperation and restitution to victims.⁴⁰

A limited right to simple prejudgment interest is also provided in Section 4 of the Clayton Act. Prejudgment interest is available only for the period beginning with the initiation of the lawsuit, not the date of the infringement. An award of interest under Section 4 is left to the discretion of the court and is available to compensate the plaintiff for delays associated with the litigation process. Thus, in deciding whether to award interest, the court considers whether the parties have been dilatory in their handling of the lawsuit.⁴¹

U.S. law does not impose any predetermined constraints on the methods that plaintiffs may use to estimate damages as long as the method is not speculative. While plaintiffs have the burden of proving damages, it is settled law that they do not have to prove damages with absolute precision. It is sufficient that plaintiffs offer a method of proof that results in a

³⁷ See, e.g., *Blue Shield of Va. v. McCready*, 457 U.S. 465, 470 (1982).

³⁸ 15 U.S.C. § 4301 (2000).

³⁹ Antitrust Criminal Penalty Enhancement Reform Act of 2004, Pub. L. No. 108-237, §§ 201-221, 118 Stat. 661, 665-69 (2004) (codified in scattered sections of 15 U.S.C. and accompanying notes).

⁴⁰ *Id.* at § 213(a).

⁴¹ See 15 U.S.C. §15(a)(1)-(3).

reasonable estimate of their damages.⁴² To require greater precision than this may allow defendants to escape liability for their violations.

In estimating damages through economic models and expert testimony, however, plaintiffs must rely on methods that have received some level of acceptance in the economic community. Otherwise, they may not meet conventional standards for offering expert proof into evidence.⁴³ These standards are necessary – particularly in the U.S. jury system where the factfinders do not have the training and technical expertise to evaluate complex scientific evidence on their own – to prevent speculative methods from dictating the outcome of a case.

The method used to estimate damages in a particular case depends upon the type of antitrust violation and injury alleged. In a typical cartel case, where the plaintiffs allege that horizontal competitors have colluded to increase prices, the measure of damages may be the difference between the price paid by the plaintiffs and the “but for” or competitive price that would have prevailed in the absence of the cartel.⁴⁴ In such a case, the prices actually paid are usually ascertainable from purchase records. The challenge is to determine what the “but for” price would have been in the absence of the conspiracy.

Economists have developed models for estimating “but for” prices. These models may be based on multivariate regression techniques that assess the impact of the conspiracy along with other factors that might influence price (such as input costs, demand, capacity and

⁴² See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 124 (1969); *Bigelow v. RKO Pictures*, 327 U.S. 251, 264 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931).

⁴³ See *Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579 (1993); *Blomkest Fertilizer Inc. v. Potash Corp.*, 203 F.3d 1028, 1037 (8th Cir. 2000); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000); *American Booksellers Assoc., Inc. v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 1031 (N.D. Cal. 2001).

⁴⁴ See *In re: Potash Antitrust Litig.*, 159 F.R.D. 682, 697-698 (D. Minn. 1995) (describing appropriate methodologies of damage calculations); *Three Crown Ltd. P’ship v. Salomen Bros.*, 906 F. Supp. 876, 885 (S.D.N.Y. 1995).

production levels, exchange rates, *etc.*).⁴⁵ The general validity of such regression techniques is largely beyond dispute. However, the outcome in particular cases may be highly dependent on the quality of data that goes into the model and the assumptions that are used in running the model.

For example, a “before and after” model may assume that the conspiracy began and ended on certain dates. It can then look at prices over time as a function of various factors including whether the conspiracy was in effect at a particular time. If the assumptions about beginning and ending dates are incorrect, however, the results of the regression may be skewed and this may affect the reliability of the result. There may be statistical tools that can test alternate dates and possibly address this situation. Similarly, a “yardstick” approach compares the prices paid in a market affected by a conspiracy with the prices paid in a comparable market not affected by the conspiracy. But if the assumptions about the comparability of the two markets or the existence of the conspiracy in one but not the other are incorrect, then the model may not produce reliable results.

In some cases, the effect of an antitrust violation on price might be more easily determined without reference to economic modeling techniques. For example, if a defendant’s internal documents in a bid-rigging case reveal that the defendant decided to raise its bid from \$X to \$Y as a result of a collusive arrangement with a competing bidder, it may be reasonable to award the plaintiff damages based on the difference between \$X and \$Y without any further

⁴⁵ Multivariate regression is a statistical technique that seeks to determine the relationships between the variation in a particular variable (the dependent variable, such as price) and the variations in other variables (the explanatory variables, such as costs, demand conditions and the existence of an antitrust violation.) The technique uses data from numerous observations to determine whether statistically significant relationships exist between the dependent variable and the explanatory variables. If no pattern between the dependent and explanatory variables emerges, or if an insufficient number of data points are available, then the results will not be statistically significant.

economic evidence. Cartel documents themselves may reveal directly the extent to which a given price is higher than it would have been in the absence of collusion. The extent to which economic evidence is necessary as opposed to documentary and testimonial evidence is fact specific and determined on a case-by-case basis.

In some antitrust cases – for example, where the plaintiff alleges that it was foreclosed from competing in a market – the plaintiff might seek recovery for impact to its business (*e.g.*, lost profits) as opposed to overcharges it paid for the defendant’s products. Showing how the business was affected may involve quantifying the present value of the financial loss (or profits lost) due to the anticompetitive act. Damage estimates based on the diminished value of a business may involve the estimation of the firm’s future earnings or market value as a going concern. Here the use of industry experts and financial analysts may aid in reaching a reasonable estimate of injury to the business.

B. Lessons Learned from the U.S. Experience with Damages

1. *Harm to Victims vs. Illegal Gain*

Basing recovery on plaintiff’s loss rather than illegal gain generally has worked well in U.S. antitrust cases. It aligns incentives for bringing an action with the parties most affected by the violation, as they have the most to gain from a successful lawsuit. It allows a plaintiff to focus on its own damages, which are better understood by the plaintiff than the possible gain to the infringer, in deciding whether to pursue an action. It avoids difficult questions of proof in determining the extent to which an infringer has benefited from a violation. (For example, calculating the net gain from a violation might require the court to assess whether a defendant has lost sales or incurred higher costs.) And, it avoids questions about how to allocate any recovery of the defendants’ illegal gain among plaintiffs. Indeed, the most logical

way to allocate recovery might be based on injury to each plaintiff, so actual injury would have to be demonstrated by each plaintiff in any event.

Recovery in a cartel case based on loss by the plaintiff often results in at least the same as (and often more than) recovery based on gain to the infringer. In cases involving overcharges, for example, the overcharge paid by the plaintiff is the same as the overcharge earned by the defendant. In cases involving lost business or destruction of a business, on the other hand, the plaintiffs' loss can greatly exceed the benefit to the infringer. Thus, as a general rule, compensating losses rather than ordering disgorgement of gains will create greater incentives for plaintiffs to pursue their claims and deter future violations.

Economic theory developed in the United States supports the view that recovery should be based on plaintiffs' loss. Under one widely cited model, the optimal penalty for antitrust violations is the "net harm to persons other than the offender"⁴⁶ multiplied by the reciprocal of the probability of detection.⁴⁷ The net harm to others includes both the overcharge to purchasers from the offender and what is called the "deadweight loss" in welfare to those who do not purchase from the offender because of the higher price.⁴⁸ Although it is difficult to implement this model with precision, it supports the view that loss to the plaintiff is the appropriate measure of recovery.

⁴⁶ William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. Chi. L. Rev. 652, 656 (1983). See also Robert H. Lande, *Why Antitrust Damage Levels Should Be Raised*, 16 Loy. Consumer L. Rev. 329 (2004) (observing that the Landes model of optimal deterrence "is almost universally accepted, even by those who are not of a Chicago School orientation"). See also William H. Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. Chi. L. Rev. 467 (1980).

⁴⁷ Landes, *supra* note 40, at 657. For example, if the probability of detection were 50%, the multiplier would be 2; if the probability of detection were 33%, the multiplier would be 3; and so on.

⁴⁸ "Deadweight loss" is loss to plaintiffs arising out of their inability to buy the product due to its artificially high price. For example, a plaintiff might lose the opportunity to profit from a downstream sale. There are no reported U.S. cases involving deadweight loss as part of the measure of damages. Deadweight loss in and of itself does not benefit defendants.

If damages are measured by harm to victims, then the right to relief should be limited by the antitrust injury doctrine, which restricts the right to recover to harm caused by the anticompetitive aspect of a practice.⁴⁹ The overcharge produced by a monopolistic output restriction is clearly antitrust injury,⁵⁰ as are lost profits associated with exclusionary practices.⁵¹ But other types of harm that antitrust violations cause may not qualify. For example, competitor claims of lost profits due to a merger of its rivals that enables the rivals to cut costs and prices thereby driving market prices down, are not antitrust injury. That sort of harm bears no relationship to what is anticompetitive about the merger – the longer-run risk of supracompetitive prices.

If private actions become easier to bring, there will be an incentive for rivals (as well as customers) to sue infringers. Although rivals might well have a legitimate claim of harm flowing from an infringement of competition law (*e.g.*, predatory conduct that raises the rival's costs), the courts should be careful to prevent them from suing for alleged losses that are not related to legitimate competition concerns (*e.g.*, lower prices arising out of more efficient operations).

⁴⁹ *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489-90 (1977). For discussion of the antitrust injury doctrine and the related doctrine of antitrust standing, see William H. Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445 (1985). For recent criticism of some judicial applications of the doctrine, see Ronald W. Davis, *Standing on Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury*, 70 Antitrust L.J. 697, 723 (2003); Joseph P. Bauer, *The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing*, 62 U. Pitt. L. Rev. 437 (2001). Others have suggested that the EC should recognize the antitrust injury doctrine. See Douglas H. Ginsburg, *Comparing Antitrust Enforcement in the United States and Europe*, 1 J. Competition L. & Econ. 427, 436 (2005); Donald I. Baker, *Revisiting History – What Have We Learned About Private Antitrust Enforcement that We Would Recommend to Others?*, 16 Loy. Consumer L. Rev. 379, 390 (2004).

⁵⁰ Page, *supra* note 44, at 1465-67.

⁵¹ *Id.* at 1475-79. See also Roger D. Blair & William H. Page, *Controlling the Competitor Plaintiff in Antitrust Litigation*, 91 MICH. L. REV. 111 (1992); William H. Page, *Optimal Antitrust Penalties and Competitors' Injury*, 88 MICH. L. REV. 2151 (1990).

2. *Estimating Damages*

Experience in the United States demonstrates that economic models can be useful tools in private litigation. Many aspects of the basic methodology (such as regression techniques) are broadly accepted as having scientific merit. However, simple models that are not sufficiently sensitive to the facts of a case may prove to be unreliable estimates of damages.

For example, assume that a cartel is formed at a time of declining prices and that prices continue to fall, albeit at a lower rate of decline, even after the cartel is formed. An economic approach that merely examines pricing before the cartel and pricing after the cartel might lead to a finding of no damages by the plaintiff even though the “but for” price might have been significantly lower than the price paid by the plaintiff. In this circumstance, the plaintiff may be incorrectly deprived of any recovery. Conversely, assume that prices rose 20% after an antitrust violation was committed but costs also rose by 20% at that time. An economic model that failed to recognize the increase in costs might award a windfall to the plaintiff even though the price increase was the result of cost increases rather than the antitrust violation.

A reliable model may be simple and transparent, yet elegant and robust. An unreliable model may be so complicated as to be indecipherable. A key here is not to be intimidated by the economics and to permit economists to have a role in the process. As noted above, there are tried and tested procedures to estimate damages in antitrust cases. Under U.S. antitrust law, once a plaintiff proves the fact of damage, it is afforded reasonable leeway in quantifying its damages. This rule prevents defendants from escaping liability for an infringement. On the other hand, courts must be careful to avoid techniques that are not based on real economics or that produce speculative results.

While basic modeling techniques are well understood, there is almost always disagreement between the parties in U.S. cases about how to apply those techniques to the case at hand. Economic models are only as good as the assumptions and input data that go into them. If the inputs are unreliable or incomplete, the results will not be reliable. And much of the data and information necessary for economists to perform their analysis are often in the hands of the parties rather than available through public sources. This leads to an essential element of U.S. litigation that the Commission should consider in evaluating the U.S. experience with economic models. As noted in Section II of this part, the U.S. system affords parties generous discovery rights. It is critical that the parties be given an opportunity to obtain relevant data from each other, review documents that might bear on the question of damages, take the testimony of knowledgeable witnesses and, very importantly, review the work of each other's experts and cross-examine them under oath.

The Commission's consideration of economic modeling should take into account any limitations on discovery rights that are available to parties litigating cases in the EU. Without the ability to obtain evidence and test the work of opposing experts, there is a serious risk that the use of models in private litigation will fail to produce meaningful or reliable results. If discovery is not to be made available, then the Commission and the courts should carefully consider how to obtain data and evidence and how to test the work of experts who present conclusions on damages.

3. *Double Damages for Cartels*

The automatic trebling of damages under U.S. antitrust law has been the source of extensive debate and disagreement within the antitrust bar throughout the history of Section 4 of the Clayton Act. Some have long argued that trebling damages creates too great an incentive for

private litigation because it creates an incentive to file lawsuits even when there is less than a 50% chance of establishing a claim. Treble damages can also result in a windfall to plaintiffs. And in cases not involving hard core cartel violations, the possibility of treble damage liability can deter companies from engaging in conduct that may be procompetitive and efficiency enhancing. It has also been pointed out that large fines and the potential for criminal sanctions, including prison sentences in the United States, create a powerful deterrent against violations, without the need for treble damages. This applies in the EU as well, where fines for infringements can be very substantial.

On the other hand, it has been argued that treble damages are an essential element of private antitrust enforcement. Without treble damages, some argue, many plaintiffs would not have the incentive to pursue their claims even where clear violations have occurred. Government enforcement resources are limited and encouraging vigorous pursuit of private actions is an essential feature of U.S. antitrust enforcement. It is also believed by many in the United States that the possibility of treble damages serves as an important deterrent against violations. Still, even with treble damages, along with other deterrents such as harsh criminal sanctions for individuals and corporations, antitrust violations continue to occur.

Because of these divergent positions, the Sections are not able to present a consensus U.S. view about the Commission's questions regarding double damages. Some would encourage the Commission to drop double damages or at least provide the courts with discretion to reject double damages except in egregious cases. At the same time, those advocating such a position might well applaud the Commission for recognizing that multiplying damages is only appropriate, if at all, where the violation at issue is one that the infringer clearly understood to

break the law – *i.e.*, hard core cartel activities – and for considering circumstances like those of amnesty applicants that might justify a de-doubling of damages.

Those holding the opposing view would encourage the Commission to impose double damages automatically when an antitrust violation has occurred. Proponents of this view would argue that without multiple damages, private actions would not serve as a deterrent to violations of competition law because infringers need not worry about adverse consequences resulting from their infringements. The worst that could happen is that they would have to repay damages in the event that their conduct is challenged in a private action and the plaintiff prevails. And even then, defendants may still have profited from their cartel. Allowing a court discretion in awarding double damages threatens to create conflicting decisions about when multiple damages are appropriate and eliminates certainty that is useful in deterring infringers.⁵² Moreover, many potential plaintiffs will not have an incentive to pursue an antitrust case for single damages, especially in court systems that do not provide discovery rights and do not have a track record of allowing plaintiffs to uncover the extent of a defendant's misconduct. Proponents of this position would point to the fact that even in the United States, where defendants face criminal sanctions, large fines, and treble damages in private actions with broad discovery rights, new violations continue to be detected every year.

One way to think about multiple damages is as a means of compensating for violations that go undetected. From this perspective, a multiplier is necessary if the probability

⁵² Although the Commission is only considering the possibility of double damages for horizontal cartels, there are many US practitioners who would recommend extending double damages to all infringements of competition law, including exclusionary practices by dominant firms.

of detecting and penalizing the offense is less than one.⁵³ This is most justified for practices that are concealable, particularly cartels.⁵⁴ In that sense, the Green Paper's limited doubling proposal is justifiable because the probability of detection of cartels is surely less than one-half, and may well be far lower.⁵⁵ By the same token, limiting the multiplier to cartels makes sense, according to some, because exclusionary practices and mergers are ordinarily not concealable.⁵⁶ In addition, exclusionary practices are most likely to be challenged by rivals, which are more likely than consumers to use the antitrust laws for strategic purposes. Limiting recovery in those cases to single damages will reinforce the role of the antitrust injury doctrine in mitigating the strategic use of the private remedy by rivals.

On the other hand, some would argue that the rationale for multiple damages applies to exclusionary conduct and mergers as well as hard core cartels. For example, a firm with monopoly power may engage in predatory practices openly and notoriously. The fact that such conduct is not concealed should not enable the dominant firm to escape multiple damages, which might otherwise have deterred the behavior. Moreover, a dominant firm has market power, and absent a damage multiplier there may be no effective and economically rational way for a rival to seek legal recourse to constrain that power. Consumer welfare may be injured when monopoly power is allowed to go unchecked by other rivals. Their legal action is not

⁵³ Landes, *supra* note 40, at 657. See also Wouter P.J. Wils, *The Optimal Enforcement of EC Antitrust Law* 24-26 (2002), discussing A. Mitchell Polinsky & Steven Shavell, *Should Liability Be Based on the Harm to the Victim or the Gain to the Injurer?*, 10 J.L. Econ. & Org. 427 (1994).

⁵⁴ Frank Easterbrook, *Detrebling Antitrust Damages*, 28 J.L. Econ. 445, 450 (1985).

⁵⁵ Peter G. Bryant and E. Woodrow Eckhard, *Price Fixing: The Probability of Getting Caught*, 73 Rev. Econ. & Stat. 531 (1991) (estimates a probability of 0.15, which would yield a multiplier of over 6). See also Lande, *supra* note 40, at 336 n.24 (citing the Assistant Attorney General Douglas Ginsburg's estimate that only 10 percent of cartels are detected).

⁵⁶ Easterbrook, *supra* note 50, 458-61.

strategic, say proponents of this position, but rather is a matter of survival, which benefits consumers with price competition and innovation.

4. *Prejudgment Interest*

Any system of private damages arguably should provide for prejudgment interest to account for the time value of money.⁵⁷ It may be that double damages will be against public policy in many of the EC's Member States, even if it is presented as in part compensatory.⁵⁸ If so, allowing prejudgment interest may be appropriate because it provides a more realistic measure of harm. Prejudgment interest also reduces the incentive of offenders to prolong litigation.⁵⁹ One should recognize, however, that systems that provide for prejudgment interest have been plagued with uncertainties about many elements in the calculation.⁶⁰ Consequently, if the proposal for prejudgment interest is adopted, the law should also include rules governing the calculation that are clear and consistent with financial principles.

The Green Paper asks whether interest should be determined from the date of the infringement or the date of the injury. If these times differ, the latter is the appropriate one under a victim loss approach to damages, because the interest calculation is designed to make the damage award correspond to the real injury, that is, to put the victim in the same position as if the offender had compensated him for his injury as soon as it occurred.⁶¹ The U.S. system

⁵⁷ Clifford A. Jones, *Exporting Antitrust Courtrooms to the World: Private Enforcement in a Global Market*, 16 LOY. CONSUMER L. REV. 409, 423 (2004).

⁵⁸ Working Paper at ¶ 121.

⁵⁹ Michael S. Knoll, *A Primer on Prejudgment Interest*, 75 TEX. L. REV. 293, 297 (1996).

⁶⁰ *Id.* at 299-301. Plaintiffs say these uncertainties are not sufficient reason to forego prejudgment interest. The proper interest rate might be debatable, but a zero interest rate is plainly inadequate from a plaintiff's perspective.

⁶¹ *Id.* at 353-54.

provides for prejudgment interest, if at all, only from the time the lawsuit is filed.⁶² Such a rule encourages early filing and also discourages dilatory tactics by the defense. This approach, however, departs from the principle of awarding actual damages, though the treble damages available under U.S. law will almost always be significantly greater than prejudgment interest. Also, encouraging early filing might make little sense in cases involving concealable offenses like cartels. In the United States, where treble damages are available and plaintiffs have other advantages that may not be available to litigants in Europe, a limited right to prejudgment interest may not be very important. Where plaintiffs will have double damages available only in certain cases and where plaintiffs have other disadvantages, on the other hand, a robust system of awarding prejudgment interest from the date of injury may be an important aspect of private actions.

5. *Split Proceedings*

Trial judges in the United States are afforded broad discretion to determine how best to conduct the proceedings before them. This allows judges to take into consideration all relevant factors – including judicial efficiency, burden on the parties, delay, and the overlap of evidence relevant to liability and to damages – before deciding whether to bifurcate a case between liability and damages. In some cases, there may be a discrete body of evidence relating either to liability or damages that could be dispositive of the case, and that should be considered in an initial proceeding before imposing on the parties the burden of trying the entire case. On the other hand, the evidence relating to liability and damages is often intertwined and it would be inefficient to present the same evidence in two separate proceedings. Affording judges

⁶² As a practical matter, prejudgment interest is rarely awarded in the United States.

discretion to determine whether to bifurcate the proceedings on a case-by-case is a useful case management tool, though as a practical matter most cases in the United States are not bifurcated.

IV. THE “PASSING-ON” DEFENSE AND INDIRECT PURCHASER LITIGATION

As a general principle, the “passing-on” defense is not available to a defendant in a private damage action brought under the federal U.S. antitrust laws. As discussed below, this principle became embodied in federal U.S. antitrust law in 1968 by a Supreme Court decision. Nearly a decade later, in 1977, the Supreme Court adopted a rule that, in most cases, denied the right to sue under the federal antitrust laws to indirect purchasers to whom unlawful overcharges had been “passed-on.” In response to this latter Supreme Court decision, parties representing indirect purchasers who have been harmed by unlawful overcharges sued and sought recovery under state law. In 1989, the Supreme Court held that these state law arguments were not preempted by the contrary federal law. Following that decision, states enacted additional laws and parties pursued additional state law arguments designed to permit indirect purchasers to recover overcharge damages. Today, more than half of the states permit recovery by indirect purchasers, some states deny recovery, and this area of law remains unsettled for the rest.

As a consequence, today antitrust defendants face the possibility of treble damage lawsuits in federal court brought by direct purchasers, and treble damage lawsuits arising out of the same conduct brought by indirect purchasers in state (or possibly federal) courts. This multi-forum, multi-jurisdictional, uncoordinated litigation creates a risk of inconsistent outcomes and the possibility of duplicative damage awards. The general consensus is that this situation is far from the best possible system.

In this section, we describe the path that led to this current state of affairs in the hope that it will provide helpful guidance as the Commission and the Member States consider how to deal with the passing-on defense. We also describe a report that the Antitrust Law Section has presented to the Antitrust Modernization Commission, which is considering this issue.⁶³

A. **Evolution of the Rules Governing the Passing-On Defense and Indirect Purchaser Litigation in the U.S.**

In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, the United States Supreme Court held that an antitrust conspirator cannot avoid liability to a direct purchaser by showing that the purchaser suffered no injury because it passed on any overcharge to its own customers.⁶⁴ The Supreme Court’s decision was motivated by the twin goals of deterring violations and compensating victims. The Court specified three policy reasons for its decision: (i) calculating the pass-on would “normally prove insurmountable”; (ii) allowing the defense would reduce the incentive of direct purchasers to sue for damages, which would adversely affect the deterrent value of private enforcement; and (iii) allowing the pass-on defense would mean that infringers would gain from their violations since suits by direct purchasers would decline.

Hanover Shoe was a follow-on case to a government enforcement case. In the private case, the plaintiff, a shoe manufacturer, alleged that United Shoe exercised monopoly power over shoe-making equipment, which the defendant offered on a lease-only (no sales)

⁶³ The Antitrust Modernization Commission was created to examine whether U.S. antitrust laws should be modernized.

⁶⁴ 392 U.S. 481 (1968).

basis, resulting in a significant overcharge to Hanover, the lessee. United Shoe argued in defense that the plaintiff “passed-on” some, if not all, of the overcharges by raising the price it charged for shoes sold to its customers. United Shoe contended that plaintiff suffered no injury because it recouped any overcharge through its own increased prices. The Supreme Court rejected the use of the pass-on defense for the reasons described above.

Hanover Shoe did not address whether indirect purchasers, who were harmed by an unlawful overcharge that had been passed on by a direct purchaser, could maintain an antitrust damage action against the infringer. The Supreme Court answered that question in *Illinois Brick Co. v. Illinois*.⁶⁵ *Illinois Brick* was a follow-on action to Department of Justice civil and criminal proceedings against Illinois Brick and a group of its rivals, who allegedly fixed the price of concrete blocks. The State of Illinois was an indirect purchaser of concrete blocks – it sued in its capacity as a consumer of buildings, which incorporated concrete blocks that had been purchased at inflated prices. There were at least two intervening purchasers between the defendants and the State of Illinois, and neither of the intervening purchasers was alleged to be part of the conspiracy.

The *Illinois Brick* defendants argued that indirect purchasers should not be permitted to sue for damages under federal antitrust laws. They reasoned that, if *Hanover Shoe* disallowed the use of a “pass-on defense,” the law should be symmetrical and forbid indirect purchasers from using “passing on” offensively. The Supreme Court agreed with the defendants, for a number of reasons: (i) the use of a “pass-on offense” would be inconsistent with the holding in *Hanover Shoe*; (ii) allowing offensive but not defensive passing-on would create a serious risk

⁶⁵ 431 U.S. 720 (1977).

of multiple liability for defendants; (iii) federal indirect purchaser damage actions would be too complex, as they would require parties to trace alleged overcharges through multiple layers of distribution; and (iv) deterrence would be best served by concentrating the right to recover exclusively in the direct purchaser.

The Supreme Court carved out two very narrow exceptions to the general rule that bars indirect purchasers from suing for damages. First, the Court held that an indirect purchaser could sue for damages where there was a pre-existing cost-plus contract between the first purchaser and its customer. Second, an indirect purchaser could sue for damages where the first purchaser is owned or controlled by its supplier.

The Court reasoned that the first purchaser is not at risk to suffer antitrust injury where it has a cost-plus contract that commits its customer to purchase a fixed quantity of the product, without regard to price.⁶⁶ An indirect purchaser also has standing to sue for damages if it can show that the alleged infringer owns or controls the first purchaser. This exception is necessary to prevent an infringer from avoiding antitrust liability by creating a “dummy-entity” to serve as the “direct purchaser” and thereby insulate the infringer from antitrust liability.

The prohibition on indirect purchaser damage actions under federal antitrust laws – the *Illinois Brick* rule – has been the subject of sharp criticism and fierce debate as well as unsuccessful efforts at legislative reform.⁶⁷ The case for overruling the *Illinois Brick* rule generally is framed in one of the following ways. First, opponents of *Illinois Brick* argue that the

⁶⁶ See also *Lefrak v. Arabian Am. Oil. Co.*, 487 F. Supp. 808 (S.D.N.Y. 1980).

⁶⁷ A series of federal statutes overturning *Illinois Brick* legislatively were proposed during the 1977-78 Congress, but none were enacted. More narrowly tailored legislation, which would explicitly allow state attorneys general to sue on behalf of indirect purchasers, also failed to gain passage in 1983.

rule fails to compensate all victims of illegal conduct, *i.e.*, the indirect purchasers. Opponents note that, while victims have no federal remedy, direct purchasers who simply passed-on overcharges into the chain of distribution receive a windfall. Second, opponents argue that *Illinois Brick* weakens deterrence because those empowered to sue – direct purchasers – often have ongoing business interests with the alleged infringers, and therefore, will not sue, but instead will simply pass on the damages to those who cannot sue. Third, opponents argue that *Illinois Brick*'s holding conflicts with the right Congress gave the states to sue for damages on behalf of the citizens of their states in certain circumstances. Finally, opponents to the rule contend that the procedural concerns identified in *Illinois Brick* (*i.e.*, duplicative judgments, multiple suits, inconsistent outcomes) could be overcome with simple procedural mechanisms such as mandatory consolidation, and the other concerns (*i.e.*, complex, if not impossible, damages calculations) are present in any antitrust litigation.

Supporters of the *Illinois Brick* rule generally argue that overruling *Illinois Brick* (and potentially also *Hanover Shoe*) would weaken deterrence by fragmenting claims and reducing the incentive to sue. Supporters of *Illinois Brick* also contend that the Supreme Court correctly observed that tracing alleged overcharges through various layers of the distribution chain is not only difficult, but it also yields unreliable and speculative results. A direct purchaser may increase the prices to its customers for a variety of reasons that may be independent of an overcharge it received from its supplier. For instance, increased labor costs, other overhead expenses, or a general desire to increase profitability could lead to a price increase to an indirect purchaser. Permitting indirect purchasers to sue tests the ability of economic models to sort out “overcharges” due to unlawful behavior from price increases unrelated or independent of any such behavior. Finally, supporters of *Illinois Brick* dispute the effectiveness of the proposed

procedural remedies, such as consolidation, at preventing inconsistent decisions and multiple recoveries against single defendants.

The decision in *Illinois Brick* had consequences. Following the decision, a movement emerged to secure compensation under state law for all victims of anticompetitive behavior. Over the last 30 years, many state legislatures amended or enacted state statutes and courts have construed state laws to allow indirect purchasers who were victims of illegal overcharges to sue for damages. As those state law arguments developed and were pursued, the consequences that the Supreme Court discussed in *Illinois Brick* became manifest: multiple suits in different jurisdictions, the risk of duplicative recoveries, the risk of inconsistent verdicts, and complex and potentially speculative damage analyses.

Whether these state law arguments were preempted by contrary federal law came before the Supreme Court in 1989 in *California v. ARC America*.⁶⁸ *ARC America* involved allegations of a nationwide price fixing conspiracy in the cement industry. In *ARC America*, direct purchasers sued in federal court under the federal antitrust laws. In addition, four states sued in federal court under both federal and state antitrust laws seeking to recover as indirect purchasers on their own behalf and as representatives of other governmental entities within their states. The cases were consolidated in a single federal court, and a settlement was reached before trial. After settlement was reached, the direct purchaser plaintiffs argued that, under *Illinois Brick*, the States, as indirect purchasers, were not entitled to share in the settlement fund. Although *Illinois Brick* clearly barred a damage award to an indirect purchaser under federal

⁶⁸ 490 U.S. 93 (1989).

antitrust law, the key question before the Supreme Court was whether federal antitrust law preempted state laws that permitted indirect purchasers to maintain antitrust claims.

The Supreme Court held that indirect purchasers could sue for damages under state law. The Court concluded that “Congress intended the federal antitrust statutes to supplement, not displace, state antitrust remedies,” and an individual state’s indirect purchaser law would not complicate federal antitrust litigation because many state claims would be brought in state court. The decision rested on principles of federalism and preemption, and thus, the Court did not revisit the basis for its earlier decisions in *Hanover Shoe* or *Illinois Brick*.

The tensions between the Supreme Court’s reasoning in these three decisions are striking. In *Hanover Shoe* and *Illinois Brick*, the Supreme Court stressed that federal courts were ill-equipped to engage in tracing overcharges through a supply chain, and that any attempt to do so would yield unreliable results. In *ARC America*, the Supreme Court upheld state laws that might require federal (or state) courts to preside over cases in which it would be necessary to trace overcharges through a supply chain. In *Hanover Shoe* and *Illinois Brick*, the Supreme Court barred passing-on in antitrust cases to avoid diluting the incentive of direct purchasers to sue and to avoid the risk of inconsistent results or duplicative recoveries. Following the decision in *ARC America*, additional states enacted statutes and additional state law arguments were pursued with the goal of permitting indirect purchasers to sue for overcharge damages, and to recover damages, often treble damages. State law arguments that permit indirect purchaser damage actions now exist in approximately two-thirds of U.S. states. As a consequence, today, direct purchasers file damage actions in federal courts, and those cases are typically transferred and consolidated in a single federal court. Indirect purchasers typically file in state courts; in

some, but not all, instances, those cases may be removed to federal court and consolidated with the federal cases.

B. **Optimal Rule for Pass-on Defense and Indirect Purchaser Standing and Best Procedure for Allocation of Damages**

In August 2004, the Antitrust Law Section issued a report to address this issue (the “Report”). The Report recognizes that there is no perfect solution that will be acceptable to all interested parties, and thus, seeks to balance the interests recognized by the Supreme Court in maximizing deterrence and providing compensation while at the same time avoiding inconsistent results and duplicative recoveries. The Report includes an illustrative example of legislation intended to strike this balance, which includes the following provisions:

1. Indirect purchasers and sellers would be permitted to recover overcharge damages under federal antitrust law;
2. Claims would be consolidated in a single forum thereby eliminating the risk of inconsistent results or duplicative recoveries (except insofar as state law permitted duplicative recoveries);
3. Prejudgment interest would be allowed;
4. Federal and state cases would be consolidated in federal court;
5. State laws would not be preempted; and
6. Hanover Shoe would not be overturned, and defensive passing-on would not be permitted or necessary inasmuch as all plaintiffs would be consolidated in a single proceeding.

The Antitrust Law Section has characterized its Report as “not a recommendation but an illustration of how a compromise measure might be worded.”⁶⁹ One goal is that the compromise “would bring uniformity and would permit indirect purchasers and sellers in the remaining states [*i.e.*, those that had not enacted laws enabling indirect purchasers to sue] to prove any damages and recover, but would not itself increase the total exposure for defendants.” In addition to allowing indirect purchasers to bring claims under federal antitrust laws, the illustrative example would also mandate consolidation in one forum of all direct and indirect claims relating to the same allegations, thereby, according to the Antitrust Law Section, “eliminating the possibility of duplicative recovery” – one of the primary justifications for *Illinois Brick*.⁷⁰

The Antitrust Law Section presented this Report to a hearing of the Antitrust Modernization Commission in June 2005. That hearing brought together representatives of all interested parties and seemed to produce consensus around the example in the Report. The example in the Report attempts to strike a workable balance between the goals of deterring anticompetitive behavior and compensating victims of such behavior. There is no real metric available to tell where that balance should be set. The U.S. experience makes clear that an effective private damage regime must provide a remedy for the all victim of the overcharge even where that victim is an indirect purchaser. Procedural and analytical tools for addressing the

⁶⁹ A full copy of the August 2004 Report is available at <http://www.abanet.org/antitrust/comments/2004/RemediesReportCouncil.doc>.

⁷⁰ On June 27, 2005, the Antitrust Modernization Commission held hearings in Washington, D.C. regarding potential changes to *Illinois Brick* and its progeny. The 2004 ABA Report was discussed at length and is memorialized at pp. 182-186 of the transcript of that hearing, available at http://www.amc.gov/commission_hearings/pdf/RevisedHearingTranscript050627.pdf. Interestingly, while the testifying participants did not adopt the example in its entirety, the testimony suggests that each of the participants was amenable to modifying *Illinois Brick* in some of the ways proposed by the ABA. This testimony further exposes the uncertainties surrounding the future of the *Illinois Brick* rule.

complexity of allocation of damages through the distribution chain may not be perfect, but they are improving.

For example, at the Antitrust Modernization Commission hearing, one panelist suggested that the consolidated trial could efficiently be managed in the following way: (1) a first phase in which there is a liability determination as to all actions; (2) a second phase in which the aggregate overcharge is determined (this phase could be combined with the first phase at the discretion of the court); and (3) a third phase, presided over by a special master or magistrate, to address the allocation of damages among the various plaintiffs.⁷¹ Pass-on would be available among the plaintiffs but would only be considered during the final phase to allocate damages. Defensive pass-on would not be available to or needed by the defendant because the second phase would determine the aggregate amount of damages.⁷² Damages would be allocated according to indirect purchasers' success in establishing that direct purchasers passed-on the overcharge.

V. CLASS ACTIONS

This section of these comments responds to the issues raised by Question H of the Green Paper regarding potential means for bringing so-called “collective actions” and protecting consumer interests. The EC Green Paper posed two related questions in this regard: “Should special procedures be available for bringing collective actions and protecting consumer interests? If so, how could such procedures be framed?”

⁷¹ See Prepared Remarks of Professor Andrew I. Gavil, before the Antitrust Modernization Commission, June 27, 2005, *available at* http://www.amc.gov/commission_hearings/pdf/Gavil_Statement_corrected_6.27.05_version_with_app.pdf.

⁷² Allocation of damages could become easier through allocated settlements.

For the reasons discussed more fully below, the Sections recommend careful consideration of procedures to make available the possibility of bringing collective actions in appropriate circumstances. Because the most analogous procedure in the United States for providing damages to a collection of injured plaintiffs is the class action, and because the following analysis suggests that many, if not all, of the issues that are addressed in the United States by the various class action rules and procedures will likely have to be addressed in order to provide for any damages actions to a collection of plaintiffs, this section includes: (1) a background of the United States class action, (2) a discussion of the benefits and disadvantages of the United States class action, and (3) several recommendations regarding procedures for collective actions.

A. **Background Regarding U.S. Class Actions**

In the United States, class actions are the procedural device by which individuals or entities can pursue damages, in a representational capacity, on behalf of all similarly situated claimants.⁷³ The representatives are known as named plaintiffs, and the remainder of the similarly situated claimants are known as absent class members. Typically, only the named plaintiffs and the named plaintiffs' attorneys are actively involved in the litigation. Absent class members are often unaware of the existence of the class action litigation until they receive notice of the litigation after the presiding court has made an affirmative determination (or "certifies") that there is a class of similarly situated claimants whose claims would best be adjudicated as a class. After receiving notice, absent class members usually have the opportunity to opt-out of the litigation. Assuming that an absent class member does not choose to opt out of the class

⁷³ In the United States, associations are sometimes allowed to pursue injunctive relief on behalf of their members but associational standing is not recognized for the purposes of pursuing damages awards for the members or in any representational capacity.

upon receiving notice of the existence of the class action, the case will continue to be litigated on behalf of that absent class member by the named class representatives and their attorneys with very little participation in the case by the absent class member. Once a determination of liability is rendered, whether through resolution of pre-trial motions, settlement or trial verdict, each and every class member is bound by that determination unless the class member has opted out.

Accordingly, because it is critically important within the U.S. system that there is a judicial finding that the rights of the absent class members are fairly represented by the class representatives, the United States has created substantive and procedural requirements that must be met before the class representatives are permitted to represent absent class members in damages actions. In order fairly and equitably to provide representatives of a class with the right to pursue damages on behalf of each and every class member, four basic requirements must be met: (1) the class is so numerous as to render joinder of each of the class members in one action impracticable, (2) there are questions of law or fact common to the class as a whole, (3) the claims of the class representative(s) are typical of the claims of the unnamed class members, and (4) the class representatives and their attorneys will fairly and adequately represent the interests of all of the class members, including the unnamed class members.⁷⁴

In addition, if damages are being sought by the class, the class representative must also demonstrate that common questions of law or fact predominate over questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. In order to determine whether a proposed class satisfies these requirements, U.S. courts inquire into (1) the interests of individual class members

⁷⁴ Fed. R. Civ. P. 23(a).

in controlling their own disputes, (2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class, (3) the desirability or undesirability of concentrating the litigation of the individuals' claims in one particular forum, and (4) the difficulties likely to be encountered in the management of the class action, including calculation of damages on a class wide-basis.⁷⁵ The courts are instructed to answer these questions as soon as is practicable during the litigation, and although the courts do not decide the ultimate merits of the case at the class certification stage, the courts may probe beyond the pleadings and consider the types of evidence required and how the case actually would be tried if it were to proceed as a class action.⁷⁶

It is likely that in order for any judicial body to allow for collective damages actions to be pursued by a representative, some if not all of the above issues will have to be analyzed to ensure that the interests of the collective are aligned and are being adequately protected by the representatives. Without considering such issues, it might not be possible for a court to determine whether the proposed representative has similar interests as those entities it purports to represent, or whether there are internal conflicts among entities purportedly represented, or whether the alleged damages could be quantified in any way other than through individual claims by each entity. Any system for collective representation that can bind all members of a class of claimants should provide for an active role by the court to ensure that the interests of the absent members are protected. Regardless of the process for handling representative claims, the inquiries that the U.S. courts engage in as part of the class action

⁷⁵ Fed. R. Civ. P. 23(b)(3).

⁷⁶ U.S. courts have the discretion to order limited discovery to proceed on class certification issues alone, prior to the full discovery that would ordinarily be conducted regarding liability and damages. Since discovery is the subject of Section I, we do no more than mention here the option of bifurcating class discovery from the remaining discovery.

process can be valuable in protecting the interests of class members who can be bound by the outcome.

B. Benefits and Disadvantages of the U.S. Class Action

Proponents of class action litigation maintain that the principal benefit of collective actions is to provide access to the courts to individuals or entities that have suffered small enough individual losses that it would not be economically efficient for each individually to pursue his or her claims against the defendant. Without the class action device, these individuals might not undertake antitrust litigation because it would be too expensive in relation to their potential recovery. The class action device gives these plaintiffs a framework within which to defray the costs imposed on any individual class member, and it also gives the class the opportunity to litigate collectively against a defendant, which might have significantly more litigation resources at its disposal. Once a class is certified, the class represents the aggregate claims of its members and therefore has increased leverage to negotiate with the defendant.

Supporters of class action litigation argue that the threat of class action liability serves the public interest by promoting deterrence. They maintain that, where there is a class action procedure, an antitrust infringer cannot rest in the belief that the anticompetitive effects of its conduct are so diffuse that no one would sue for damages. Class action advocates regard the device as an important element of accountability for wrongdoers.

There may be some advantages to class action litigation from a defendant's perspective if one assumes that damage litigation is inevitable. For example, the class action device can allow for a complete and final adjudication in one forum of all claims by all class members. Except for class members that opt to be excluded, all class members are bound by the

final judicial determination as to liability and, if liability is found, as to the amount of damages or other remedy awarded. This can facilitate settlements if the defendant can settle knowing that it will not face additional damages from unnamed class members for the same conduct. It should be noted, however, that significant numbers of claimants might elect to be excluded from the class – particularly when the class members are large commercial purchasers who wish to control their own litigation – and this leaves defendants to address their claims separately.

The resolution of multiple claims in a single forum can promote judicial economy if the alternative were individual litigation in multiple forums. If the individual plaintiffs were to pursue their claims separately, adjudicating similar claims in multiple jurisdictions could be an inefficient use of scarce judicial resources. In addition, multiple litigations before different jurists of similar claims could result in inconsistent results, which could undermine public confidence in the judicial system or lead to forum shopping.

To protect against abuse of the class action device by counsel, U.S. courts must approve all class action claims that settle prior to verdict. In the approval process, the courts invite comment from any class member that wishes to comment, whether named or unnamed. The main purpose of this inquiry is to determine whether the settlement and the distribution among the class members are fair and adequate. Courts also make a determination of the fairness of the attorneys' fees for the named plaintiffs' attorneys, which are typically paid out of the class' settlement fund.⁷⁷

⁷⁷ It can be argued that the potential for attorneys' fees for class counsel to be calculated as a percentage of the amount of damages recovered on behalf of the entire class is a benefit of the class action device because it encourages skilled and experienced counsel to accept a representation that he might not have otherwise accepted and to litigate it vigorously, not only to protect the interests of his or her clients, but to maximize

The Commission has expressed an interest in facilitating the enforcement of individuals' legal rights as a means of "bringing European citizens and their associations closer to European laws and policies."⁷⁸ The U.S. class action device provides economic incentives to counsel to detect, report, and pursue conduct that violates the antitrust laws even if individual harms might be insufficient to encourage individual action. Proponents of class action litigation maintain that this increases the likelihood of detection of wrongdoing and compensation of victims. Proponents also argue that their actions complement the scarce government resources that are available for this effort.

The class action device has been the subject of extensive criticism in the United States. There is the potential for abuse by class representatives and attorneys who can exploit the leverage they gain from class actions to extract settlements, not necessarily solely because of the merits of the underlying claims but because of the size of the defendants' potential exposure to an entire class of claimants.

From the defendant's perspective, a significant disadvantage of class actions is that the litigation is controlled by class action attorneys whose objective is to maximize the damage award on behalf of the entire class and the fee award for counsel. In individual litigation, by contrast, the plaintiff typically will take into consideration such factors as commercial relationships between the plaintiff and the defendant and the possible effects on the industry of a ruinous damage award. These factors tend not to enter into the analysis when

his or her own eventual attorney fee award. The issue of attorneys' fees is complex and controversial and is often argued to be one of the most significant problems with the U.S. class action.

⁷⁸ Working Paper at ¶ 194.

dealing with class action attorneys, as the class representatives typically do not constrain the decisions of the class action attorneys.

Another important disadvantage from the defendant's perspective is the difficulty it faces in obtaining discovery from absent class members, which might be relevant to damages and certain defenses.

Another criticism of class actions is that absent class members may be inadequately represented by the class representatives, particularly in damages class actions. Because the U.S. system is an opt-out system, unless a class member opts out of the class, the class member is bound by the resolution of the class claims. Thus, class members are highly reliant on attorneys they do not even know. Those attorneys might be more interested in a quick financial gain for themselves than they are in the long-term interest of class members. Moreover, notice must be provided to class members but there is usually no perfect way to do this. Consequently, some class members do not even learn of the proceedings in which they can be bound by a decision.

Although class actions can provide some significant judicial efficiencies, they can also pose to the court significant case management difficulties, including for example, the need to adjudicate the appropriateness of class certification. An individual court may be called upon to apply the laws of multiple jurisdictions, or in certain instances, to make a determination about which jurisdiction's law should govern. And, although a prerequisite to class certification is a finding that the damages allegedly suffered by the putative class members can be determined on a class-wide basis, the determination of those damages may be complicated by the existence of multiple plaintiff classes. Even once class damages are determined, there can be a real challenge

in allocating the damages among class members and in supervising the distribution among class members.

C. **Lessons Learned from the U.S. Experience with Class Actions**

If the Commission were to encourage collective actions, we would suggest consideration of several of the procedural devices that have been adopted in the United States to protect against abuses and to safeguard the interests of the absent class members:

1. *Criteria for Collective Actions.* As discussed above, the Federal Rules of Civil Procedure contain well-defined criteria for when an action can proceed as a class action. For example, there must be numerous claimants. There must be common issues affecting their claims. The representative plaintiffs and their counsel must adequately represent the interests of the class. The common issues must predominate over the individual issues. These criteria play a critical role in separating the cases that benefit from class treatment from those in which class actions would be inefficient or unfair to the parties. Judicial oversight and enforcement of such criteria is an important check against unwarranted collective actions that might serve only to further the financial interests of the attorneys filing them.
2. *Interlocutory Appeals.* In the United States, the rules allow class certification rulings to be appealed prior to final judgment to avoid the unnecessary expenditure of resources and to reduce the risk that an erroneous class certification decision will coerce an unwarranted

settlement. The Commission and the Member States may want to consider harmonization of the relevant existing appellate procedures for these same reasons.

3. *Judicial Approval of Settlements.* We would urge the Commission to consider a requirement of judicial approval of any damages settlements entered in a representative action. While the process adds a layer of litigation complexity, and can also result in some additional delay, the U.S. experience would suggest that an impartial determination of the fairness and adequacy to the class of any settlement entered into on its behalf provides a significant benefit.

4. *Discovery Bifurcation.* As mentioned above, in the United States, it is within a court's discretion to allow the parties to pursue class certification discovery before the parties are allowed to engage in full-blown merits discovery. One rationale behind this discretionary bifurcation is to minimize the burden on a defendant prior to the determination of the existence of a class. While discovery in the U.S. is more extensive than in the E.U.'s Member States, the justifications for bifurcation suggest that the Commission may want to propose procedures to allow for proceedings relevant to a determination as to whether the case can be appropriately litigated as a representative action. Not only might such procedures streamline the adjudication of the claim, they might also minimize the risk that a representative action could force a settlement or an unnecessarily

large settlement because of the sheer size of the group or the amount of the damages being pursued, as opposed to the underlying merits of the claims.

5. *Notice to Class Members.* If absent class members are to be bound by decisions of a court in a collective action, then fundamental fairness dictates that notice be given to such class members of the proceeding and the rights that they have either to participate or to opt out. Where possible, this should be done by direct means such as mailing notice to each class member for whom an address is known. Supplemental methods of notice such as publication in newspapers of general circulation or trade publications in the affected industry can also be effective. The court should play an active role in supervising the process, including approval of the form of notice and the means by which it is given.

PART II: THE INTERNATIONAL PERSPECTIVE

I. INTRODUCTION

In this part of the paper, we provide an international antitrust practitioners' perspective on the role of private enforcement and the mechanisms that support private causes of action, recognizing that some of the policy choices that have been made in the U. S. may be markedly different from the policy choices relevant in many European jurisdictions. In particular, we focus on these six aspects of the Green Paper: (1) access to evidence; (2) issues associated with fault; (3) damages; (4) representative or collective actions; (5) the passing-on defense and indirect purchaser claims; and (6) costs.

The Sections recognize that the Commission intends, through the Green Paper and any subsequent policy developments, to propose measures and mechanisms whereby it can encourage a more effective protection of Community competition law rights than is currently possible in the European Union. It is appropriate that, at the outset of this private enforcement drive, the Commission has apparently accepted that the debate on how to facilitate private enforcement needs to find a balanced approach that mitigates the unwanted social costs of encouraging private competition law litigation.⁷⁹ The Sections therefore encourage the Commission to examine further the experience of both the U.S. and Canadian private enforcement regimes to ensure that it is fully cognizant of the different and complex components of the risk / reward balance that these jurisdictions have by necessity had to achieve in encouraging claimants to enforce their rights and bring competition law cases. Examination of the Canadian experience is suggested because Canada, which did not have a history of vigorous

⁷⁹ Working Paper at ¶ 12.

private enforcement, recently amended its competition law in ways that were consistent with some aspects of the U.S. system, but not others.

II. **PRELIMINARY OBSERVATIONS**

The Green Paper addresses a variety of issues bearing on the encouragement and facilitation of private enforcement, without attempting to rank or prioritize them. Taking seriously the Commission's repeated call to "protect the rights of European consumers" by permitting them access to actions for damages, the Sections note three issues among those addressed that the Commission should consider as it seeks to facilitate consumer antitrust damages actions in the European Union. They include (1) the ability of private parties to bring collective or class action lawsuits; (2) the 'loser pays' rule inherent in most Member States' legal framework; and (3) the need for some means of funding private antitrust litigation.

A. **Collective or Class Actions**

Individual victims of violations of the EU antitrust rules claiming relatively limited or minor damages will likely pursue private actions only if they are able to bring some form of group action aggregating their claims. This need not involve importing the North American model of class action litigation but might, as Commissioner Kroes has suggested, involve "enhancing the possibility of collective actions by consumer organizations" in order to "avoid speculative lawsuits by ambulance-chasing lawyers."⁸⁰

As discussed below, at some stage the Commission may need to examine further whether the legal and cultural complexities associated, in the European mind, with class actions and indirect purchaser suits should be reviewed again to determine if the full effectiveness and

⁸⁰ *Id.* at 4.

efficiency of private enforcement in Europe can be achieved without some form of entitlement of final consumers to adjudicate antitrust claims.

B. 'The Loser Pays' Rule

Individual victims of competition law violations are also less likely to bring damages actions if faced with the possibility of having to pay the defendants' legal costs if unsuccessful. As discussed below, however deeply embedded this longstanding rule in most European legal systems,⁸¹ in the view of European attorneys and judges, this rule likely will need to be altered for consumer-oriented private damages actions to develop.

C. Contingency Fees or Litigation Funding

The North American system of contingency fees might be considered if individual consumers or their associations are to be encouraged to vindicate their rights through damages actions.

The Sections recognize that such changes as these involve, in many respects, fundamental challenges to and transformations of the prevailing legal culture in most European countries. We understand that such fundamental changes implicate much more than merely procedural rules, and accordingly, changes in rules of procedure are not going to be sufficient. Changes in ways of thinking and legal culture are also required, which may take time.

III. ACCESS TO EVIDENCE

In reviewing the Green Paper's discussion of the obstacles to private enforcement that are presented by the national procedural rules governing access to evidence – we focus our

⁸¹ As Commissioner Kroes has stated, "This is not justice!" *See* Neelie Kroes, Comm'r, Eur. Comm'n for Competition Policy, "More Private Antitrust Enforcement Through Better Access to Damages: An Invitation for an Open Debate," Speech at the conference organized by the Academy of European Law, Speech 06/158 (Mar. 9, 2006); *see also* "Damages Actions for Breaches of EU Competition Rules: Realities and Potentials," speech at the conference 'La reparation du prejudice cause par une pratique anti-concurrentielle en France et à l'étranger: bilan et perspectives', Speech 05/613 (Oct. 17, 2005).

comments in this Part to the options set out in the Green Paper on two issues. First, the need for special rules on disclosure of documentary evidence in civil actions for damages under Articles 81 and 82 EC Treaty and the form such disclosure should take (with a focus on the relevance of the Green Paper's Options 1, 2 and 3 from a North American perspective). Second, the need for special rules regarding access to documents held by a competition authority (and more specifically a discussion of Option 6 in light of the similar debate in North America). We also discuss the timing of disclosure of evidence, taking into account the current rules under certain Member States' laws.

A. **The Need for Special Rules on Inter-Partes Disclosure of Documentary Evidence**

The Green Paper describes three alternative options to facilitate the disclosure of documentary evidence (Options 1, 2 and 3). Each option differs as to the burden on the parties of the disclosure of evidence (respectively, identifying individual documents; disclosing classes of documents; and providing a list of relevant documents). Each of these three different methods of disclosure is subject to "fact pleading."

The Commission recognizes that the American system allows extensive discovery rights, often resulting in enormous costs and litigation (motions to compel, motions for protective orders, *etc.*). Perhaps it is this aspect of the American system of disclosure that Commissioner Kroes had in mind when she said that one "cannot simply 'cut and paste' American solutions into the European context."⁸²

The Canadian system is aligned with the American system. In short, plaintiffs are generally entitled to production of all documents that have a "semblance of relevance" to the

⁸² Neelie Kroes, Comm'r, Eur. Comm'n for Competition Policy, "Enhancing Actions for Damages for Breach of Competition Rules in Europe," Dinner Speech at the Harvard Club (Sept. 22, 2005).

issues in the action.⁸³ However, the cost of discovery in Canada is significantly lower as a result of the absence of third-party discovery – in general terms, a plaintiff may compel production of relevant documentation from the defendants, but a plaintiff usually requires “leave” or permission from the court to compel production of relevant documentation from third parties (e.g., from customers, other competitors, competition authorities, etc.).⁸⁴

The Sections note with interest that, as the Commission is aware and following reforms of the civil procedure rules in England and Wales in 1999, the English courts now exercise more active case management powers with a view to streamlining litigation and encouraging dispute resolution outside the court system. The UK Competition Appeal Tribunal (“CAT”) exercises even more rigorous case management control. The CAT Rules of Procedure are a hybrid of English civil procedure and the rules of the European Court of First Instance, designed to allow the CAT to dispose of cases fairly and expeditiously.

⁸³ The test for documentary discovery varies by provincial jurisdiction. But in Ontario, the general rule is that the parties are required to disclose any documents which have a “semblance of relevance” to the issues in the action. As one court described the rule: “[i]f ...” the documents have a semblance of relevancy, they should be declared producible, leaving it to the trial judge hearing the final application to make the determination of relevancy at that time.” See *Toronto Board of Education Staff Credit Union Ltd. v. Skinner*, [1984] O.J. No. 478 (H.C.J.). While the courts have stressed that the “semblance of relevancy” test does not invite unlimited production requests, its application in particular cases is very fact specific.

⁸⁴ In litigation before the federal courts in the US, a plaintiff is generally entitled to issue subpoenas which compel the production of relevant documents held by third parties. By contrast, in most Canadian jurisdictions, a plaintiff is generally required to obtain “leave” to obtain production of documents by third parties. In particular, under Rule 31.10 in Ontario, a plaintiff is required to bring a motion before the court and to establish that (i) the document is relevant to an issue in the action, and (ii) it would be unfair to require the moving party to proceed to trial without having discovery of the document. In meeting this test, the courts have held that it is not necessary to show that the documents are vital or crucial for trial preparation. Rather, the court should consider a range of factors in assessing whether the documents should be produced, including the importance of the document, whether discovery from the parties is adequate (and if not, whether the inadequacy rests with a party), whether the non-party resists production, the availability of the document from other sources and the relationship between the non-party and the parties. See, e.g., *Ontario (Attorney-General) v. Stavro* (1995), 26 O.R. (3d) 39 (C.A.).

Option 1 of the Green Paper (disclosure of identified individual documents) is the solution that appears to be the closest to the current French rules⁸⁵ and to a recently enacted German law,⁸⁶ which are summarized in the Annex at pages 1-2. Nonetheless, under existing civil law regimes governing disclosure, such as in France, the courts may in practice agree to require wider production of certain categories of documents (for example, all the invoices from a supplier) on a case-by-case basis, provided that the request is sufficiently well-grounded. Similarly, under German law, although the requirement for a party to have to refer to a certain document(s) implies that Anglo-American "fishing expeditions" cannot take place, following the procedural reforms of 2002, the German courts now have wide discretionary powers relating to disclosure.

Consequently (and on the belief that progress towards the Green Paper's goals will most likely develop by eschewing radical and adopting realistic solutions), Option 2 of the Green Paper also appears realistic in the context of existing civil law regimes as long as so-called "fishing expeditions" remain prohibited.

It may be that Option 3 (the obligation to provide parties with a list of accessible documents) is too far removed from the existing French and other civil law systems since the "fact pleading" on which it is based may not satisfy the current requirement for the plaintiff to show evidence of its allegations. A similar option was recently rejected in the debate concerning the introduction in France of a class action mechanism.⁸⁷

⁸⁵ Art. 11, 138-42 N.C.P.C.

⁸⁶ § 142 C. civ.

⁸⁷ *"Rapport sur l'action de groupe du groupe de travail présidé par Guillaume Cerutti et Marc Guillaume"* delivered to Thierry Breton, *Ministre de l'Economie et des Finances et de l'Industrie* and Pascal Clément, *Ministre de la Justice* (Dec. 16, 2005).

To the extent that the Commission considers that private enforcement – including out-of-court settlements – would be facilitated by allowing plaintiffs access to the widest possible range of documentary evidence, the discovery procedures in the Member States such as the United Kingdom and Ireland may be effective.

Under each of Options 1, 2 and 3, the Commission predicates the appropriate disclosure regime on “fact pleading,” a concept that we understand to equate to a procedure to justify discovery requests. The Green Paper does not elaborate on the notion of “fact pleading,” which would determine if and when these various disclosure options would be triggered, but merely indicates that the requesting party should “set out in detail the relevant facts of the case and present reasonably available evidence in support of its allegations.”⁸⁸

Certain civil law systems, such as those in France and Germany, do not provide for any specific rules concerning the test for requesting discovery, leaving the court a relatively wide discretion to determine whether the request is justified and whether to compel document production. Recourse to forced production of evidence in these Member States could be developed by modifying existing rules so that the courts are obliged to compel production on the basis of a precise criteria (such as a “reasonable basis for believing relevant evidence exists”), coupled with effective enforcement mechanisms to ensure compliance by the compelled party.

In addition, introducing a “fact pleading” requirement could offer an effective way of avoiding the pitfalls that North American courts have encountered and help to reduce the dissuasive costs of litigation, through a court-managed regime (see the comments below on timing of the disclosure). The requirement of “fact pleading,” as outlined in Options 1 to 3 of the Green Paper, largely corresponds to the current situation at Member State level. However in

⁸⁸ Working Paper at ¶ 90.

Germany, for example, the plaintiff needs to do more than simply provide “reasonably available evidence in support of its allegations”. Further, we understand that German law provides to some extent for the possibility of preserving evidence as discussed in Option 5 but that this is not applicable to documentary evidence.⁸⁹ Although destruction of documents can lead to prosecution, the fact that existing provisions of German law do not extend to documentary evidence may affect the intended effect of Option 5. Therefore, an obligation to preserve relevant documentary evidence would seem reasonable from a German perspective as long as this obligation is equally based on fact pleading.

In England and Wales, and only in so far as post-action disclosure is concerned, the courts have established rules governing the relationship between the requirement for fact pleading and the scope of the disclosure that have been elaborated in order to prevent so-called fishing expeditions.

B. The Need for Special Rules Regarding Access to Documents Held by a Competition Authority

Plaintiffs in the United States often seek disclosure from the defendants of materials that the defendants have provided to the competition authorities immediately upon initiation of the lawsuit, even before motions to dismiss are resolved and before the class certification issue is resolved.

In analyzing this possibility, some of the issues that we would urge the Commission to consider include: (1) whether access to the documents should be provided if a defendant is challenging the sufficiency of the allegations; and (2) the effect of any jurisdictional

⁸⁹ See Annex, pg. 3 for further information.

challenges by the defendant on the timing of any disclosure. Production of documents can result in unnecessary costs and expense if pleadings challenges are successful.

C. **Timing of the Disclosure of Evidence**

In Canada, plaintiffs are generally entitled to production of relevant documents within a reasonable time following the exchange of pleadings, and the production of documents in a large antitrust case can be an enormous burden. However, in a class proceeding, plaintiffs generally have only limited access to documentary discovery before certification.⁹⁰ As a result, since most large civil antitrust cases are now being brought by way of class proceedings, the exchange of significant productions normally occurs after certification.

In Germany, a disclosure order issued by the judge based on fact pleading is possible at any time before the last oral hearing is closed. However, a party should apply for such an order at the earliest possible stage of the proceedings in order to avoid procedural disadvantages due to delay.

From the UK perspective, in discussing the timing of the disclosure, the Green Paper may benefit from drawing a clearer distinction between pre and post-action discovery. Focusing on pre-action disclosure alone, from the perspective at least of facilitating actions for

⁹⁰ The rules and legislation governing class and representative proceedings vary across the different provinces in Canada. However, the primary jurisdiction for class action litigation is Ontario, where class proceedings are governed by the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the “CPA”). In a motion for certification under the CPA, the parties generally exchange affidavit material with selected documentary productions, and they are permitted to conduct cross-examinations with respect to such productions on the issues relating to certification (principally, the nature and scope of the alleged common issues, as opposed to the merits of the action). On their face, the provisions of the CPA do not expressly interrupt or interfere with the normal discovery process in a civil action. However, class proceedings under the CPA are actively case managed, and case management judges have generally ruled that the normal exchange of affidavits of documents should be deferred until after the determination certification. See, e.g., *Anderson v. Wilson*, (1996) 18 O.T.C. 79 (Ont.Ct.(Gen.Div.)). However, a party may move to compel the production of additional documents prior to certification, and in a number of cases, case management judges have ordered the production of additional documents, where such documents are relevant to the issues on certification (and not the merits). See, e.g., *Caputo v. Imperial Tobacco Ltd.* (1997), 148 D.L.R. (4th) 566 (Ont.Ct.(Gen.Div.)).

damages in England and Wales, the Commission might consider measures to facilitate access to evidence using a combination of Option 2 (mandatory disclosure for classes of documents by court order) with Options 4 and 5 (preservation of evidence and sanctions for destruction of the evidence).

In sum, the Sections note that a possible limited step the Commission could promote would be a compromise in European procedural law systems that, for example, places the burden on plaintiffs to justify discovery requests – perhaps by way of application to a judge – by showing probable cause or reasonable basis for believing that the relevant evidence exists. Introducing a “fact pleading” requirement would offer an effective way of avoiding some of the pitfalls that North American courts have encountered and help to reduce the dissuasive costs consequences of antitrust litigation.

Finally, active case-management of the disclosure process, which is a distinguishing feature of the Canadian procedural system and proceedings before the UK’s Competition Appeal Tribunal, is perhaps one that, over a reasonable period of time, the predominantly civil European national systems could adopt. This process would appear to strike a balance between the perception of an overly aggressive U.S. and (to a lesser extent) English law regimes and the restraining effects of the document specific civil law disclosure regimes in Europe.

IV. FAULT AND ISSUES ASSOCIATED WITH FAULT

According to the Green Paper, in 7 of the 25 Member States, fault (either in relation to the infringement or in relation to the effects of the infringement) appears to present an additional obstacle for bringing any damages actions.

In view of the fact that in the United States, Canada and the three Member States discussed herein, the issue of the plaintiff establishing fault is not an obstacle to bringing claims for damages, the Sections do not comment on Options 11, 12, and 13.

Nevertheless and in endeavoring to assist the Commission in the follow-up to the Green Paper, we set out below certain important North American considerations that ought to be borne in mind. In the Annex, we have set out a short reminder of some of the key European issues that may help the Commission consider the above three options.

A. **Injury in Fact**

Damages actions in the U.S. under Section 4 of the Clayton Act require injury, *e.g.*, there must be a violation of the Sherman Act § 1 (an agreement) that causes injury to one's business or property. Criminal conviction only requires the existence of an agreement. The U.S. Government need not establish that anyone was in fact injured. As a result, injury in fact frequently becomes a litigated issue in civil actions in the United States, even with a guilty plea in a criminal case.

In Canada, a plaintiff has a similar burden to demonstrate an injury to bring a private action under the Competition Act. In short, to bring a private action under Section 36 of the Competition Act, a plaintiff must generally demonstrate a contravention of the criminal provisions of the Act, and that the plaintiff has suffered a "loss" as a result of that contravention.

B. **Effect on Competition**

The frequency and effectiveness of private litigation in the United States and in Canada has been influenced by the substantive differences in the antitrust laws of the U.S. and Canada, particular with respect to cartels. Under § 1 of the Sherman Act, an agreement to restrain competition is *per se* illegal.

By contrast, in Canada, an agreement to restrain competition is illegal only if it has an “undue” lessening of competition. As a result, in the absence of a prior criminal conviction, a plaintiff in a conspiracy case faces a much greater evidentiary burden in seeking to prove an illegal conspiracy in Canada, relative to the U.S. As a result of this substantive difference and a number of other important factors (such as the lack of treble damages, the lack of jury trials and unfavorable cost rules), private enforcement is much less frequent in Canada.⁹¹

C. Guilty Plea

In both Canada and the United States, a private plaintiff is at liberty to bring a private action for anticompetitive conduct, whether or not there has been a prior criminal prosecution or conviction.

The policy rationale for this rule is that private plaintiffs may play an important enforcement role where public antitrust authorities have failed to act (for instance, public prosecutors may decline to prosecute cases for a range of reasons unrelated to the competitive merits of the case.

⁹¹ In general terms, private antitrust litigation is much less frequent in Canada relative to the United States, particularly where a civil plaintiff does not have the benefit of a prior criminal conviction. In explaining this trend, commentators in Canada have generally pointed to the impact of these four specific factors (the burden of establishing an “undue” economic impact in conspiracy cases, the lack of treble damages, the potential for an adverse cost award and the lack of access to a civil jury) which make the economic model for pursuing private antitrust litigation in Canada considerably less attractive and more risky for private plaintiffs. The first three factors are discussed in other Sections of these comments.

With respect to the availability of jury trials, there is a significant difference in jury practice between the United States and Canada. In the US, a civil plaintiff in a treble damage action is generally entitled to seek a trial by jury, and the possibility of a jury trial increases the uncertainty and risks of trial for corporate defendants. By contrast, in Canada, a civil plaintiff does not enjoy a similarly broad right to seek a trial by jury. In some jurisdictions, there is no right to jury trial whatsoever. See, e.g., *Federal Court Act*, R.S.C. 1985, c. F-7, s. 49. In other jurisdictions, a civil plaintiff does have a right to seek a trial by jury, but the practice is infrequent and the courts have been inclined to strike jury notices where the case raises difficult questions of law or entails complex evidence. Based on the reported case law to date, there does not appear to have been a single private action under Section 36 of the *Competition Act* that has proceeded to a trial before a jury.

In the U.S., where there has been a guilty plea by a defendant, the plea becomes prima facie evidence in a follow-on private action. However, disputes over the scope of the plea can be the subject of litigation.

In Canada, a plaintiff may also treat a guilty plea as prima facie evidence of an antitrust violation, as a result of an express statutory presumption in Section 36 of the Competition Act. Similar to the United States, the presumption is rebuttable, but in practice, it is very difficult to rebut.

V. DAMAGES

As discussed more fully in Part I, in the United States, a successful private plaintiff under § 4 of the Clayton Act is entitled to treble damages. By contrast, in Canada, a successful private plaintiff under Section 36 of the Competition Act is only entitled to single damages. Historically, criminal enforcement was the dominant means of enforcing Canada's Competition Act, and private enforcement was only added in 1976 as a recent innovation to supplement public criminal enforcement.

Given the existing criminal sanctions for anticompetitive conduct, the rationale in favor of single damages in Canada is traditionally viewed as a mix of deterrent and compensatory goals, on the reasoning that a combination of criminal fines and civil damages awards is sufficient to deter anticompetitive activity and that a treble damages award represents an unjustified windfall for an injured plaintiff.

Relying on its experience of the two juxtaposed private enforcement regimes in North America, the Sections acknowledge that selecting a damages rule is likely to prove one of the most complex issues to be tackled as the Commission develops the follow-up steps to the Green Paper. From the North American experience, and recognizing the absence of criminal

enforcement of both EC and national competition law in the majority of the Member States, we note that many commentators are likely to agree with the Commission that “...pure compensation of the loss does not always constitute a sufficient incentive for antitrust claimants to bring a case before the court.”⁹² The Sections also note with interest the following statement in the Working Paper: “In designing any system for claiming antitrust damages, the main objective must be the efficient and effective enforcement of the antitrust rules. Such a system would ideally be able to accommodate both the deterrence and the compensation aims to some degree” (emphasis supplied).⁹³

However, it is impossible to avoid the view that the U.S. perspective on damages in private antitrust litigation is so markedly divergent from established European attitudes that a significant divide in legal culture is revealed from that alone. First, treble damages have long been allowed under U.S. law – and some commentators even believe they are too low – whereas even double damages are regarded with considerable dismay by many in Europe, where compensation alone is more the norm. Second, in the U.S. there is considerable comfort with the role of private enforcement as a deterrent mechanism, and not just a compensatory one, as the United States’ use of treble damages indicates. Third, in the U.S., standards for appropriate damages calculations are strongly influenced by economic theory.

Each of these factors demonstrates just how far apart are the different systems for enforcing damages claims for antitrust violations.

While ultimately, the selection of an appropriate damage rule for Europe depends on the Commission’s policy objectives of private enforcement – namely, whether private

⁹² ¶ 112. We agree with the statement in the same paragraph that “...thought should be given to other methods of approaching damages”.

⁹³ ¶ 179.

enforcement is primarily intended to compensate victims of anticompetitive conduct or whether private enforcement is intended to supplement and reinforce public (criminal) enforcement to produce an effective deterrent – the Commission will have to take into consideration the widely divergent policy goals that drive the rationale for one form of damages over another in the different Member States.

Option 16 of the Green Paper (double damages for horizontal cartels) would not likely find a receptive legal basis in French or German law as the exclusive function of damages in these countries is generally seen as compensation.⁹⁴ In this regard, it is noteworthy that the concept of legislating for punitive damages was excluded when it was raised during the debate on the introduction of class actions in France. In Germany, the introduction of double damages was likewise discussed in the legislative process leading to the new German competition law as a means of deterring potential infringers, but was not ultimately enacted.⁹⁵

Under English law, damages are also generally awarded on a compensatory basis. Exemplary damages have been awarded in exceptional circumstances but not in the antitrust field. It is arguable, though by no means certain, that exemplary damages may be available for a breach of antitrust law in hard core cartel cases.

Germany has to a certain extent adopted an illegal gain approach in its revised competition law. According to Section 33 para. 3 of the revised German Act Against Restraints of Competition, the court can take into account the defendant's profits resulting from the infringement when estimating the (compensatory) damage. However, recovery of illegal gain that does not correspond to a damage suffered by the plaintiff is considered not in line with the

⁹⁴ See Annex, pgs. 7-8 for further information.

⁹⁵ Opinion of March 24, 2004 by the monopoly commission ("Monopolkommission") on the draft of the revised competition law, p. 40.

purposes of competition law.⁹⁶ In addition, in Germany, pre-judgment interest is awarded from the moment the damage occurs as proposed in Option 17.

In England and Wales, public policy might well accommodate a calculation of damages on the basis of illegal gain if it were shown that the profits from infringing behavior would outweigh any subsequent fines and damages (payable on the traditional, compensatory basis).

A. **The Right of Contribution**

One of the other significant differences between the U.S. and Canadian regimes of private enforcement to which the Sections wish to draw to the Commission's attention is the right of contribution.

While a defendant in a private action for conspiracy is potentially subject to joint and several liability in both Canada and the United States, there is no right of contribution in the U.S. – in other words, a minor cartel participant may be found liable for the entirety of the plaintiff's damages. This rule serves to reinforce the deterrent impact of private actions and provides a great incentive for defendants to settle, but it raises larger issues of fairness with respect to smaller defendants who had only minor roles in the alleged anticompetitive conduct.

Outside the context of hard core cartel cases, it is perhaps worth noting that when compared with the measure of damages commonly used in the US, at least in the three Member States considered here, the perception of a wide trans-Atlantic gulf in the perspectives for awarding damages may be exactly that, namely a perception that is not borne out in reality. In

⁹⁶ See comments on the Green Paper issued by the German BRDrucks 12/06, pg. 7, where according to the Bundesrats, the profit made by the defendant should therefore only be a tool for calculating the damage suffered by the plaintiff in cases where other instruments of calculating such damage (such as the hypothetical market price) are difficult to establish.

fact, basing a recovery on the plaintiff's loss (rather than on an illegal gain) in the European context would appear to find considerable support from the North American experience.

VI. DEFENDING CONSUMERS' INTERESTS – CLASS ACTIONS

The Commission observes in the Green Paper that if private enforcement is to be effective in advancing consumer interests, then consumers must have access to some form of representative or collective procedure to bring private actions. Otherwise, to borrow the Commission's words, "[i]t will be very unlikely ... if not impossible, that consumers and purchasers with small claims will bring an action for damages for breach of antitrust law."⁹⁷

The availability of some form of collective procedure for the adjudication of private antitrust claims may offer an expedient, efficient, and cost-effective alternative to a multiplicity of individual trials in many cases – particularly in cases that involve hundreds (if not thousands) of individual plaintiffs.

In the Green Paper, the Commission has sought input on the nature and form of the collective procedure that should be adopted within the EU. In particular, the Commission has solicited submission on two alternative procedural options: (1) the creation of a special cause of action for consumer associations (Option 25), or (2) the creation of a special provision for collective action by groups of purchasers other than final purchasers (Option 26).

Based on the North American experience with class actions described in Part I, and considering the existing legal mechanisms within the Member States for collective relief, the Commission may wish to explore a regime of representative or collective actions for purchasers rather than create a novel cause of action for the benefit of consumer groups. In other words, a procedural regime consistent with the model of Option 26 may be the most effective means of

⁹⁷ Green Paper, section 2.5, pg. 8.

defending consumer interests. On the other hand, while there are practical difficulties and economic complexities associated with indirect purchaser claims, a procedural regime for adjudicating antitrust claims that denies any form of relief to an entire class of final consumers may ultimately prove inconsistent with the Commission's objectives underpinning the Green Paper.

The Sections recognize that, given the Commission's starting point of the 'totally underdeveloped' status of private enforcement in Europe and the need to take into account the existing rules and historical approaches relating to representative actions in the Member States, the initial emphasis of any move to protect consumer interests emerging from the Green Paper consultation (and thus contributing towards developing a general culture of private enforcement in the EU) may justify the focus suggested in the Working Paper at paragraph 180.

Class actions have been a feature of the U.S. legal system for many years, particularly since the adoption of the modern version of Rule 23 of the Federal Rules of Civil Procedure in 1966. As discussed more fully in Part I, under Rule 23, a proposed class action must meet a number of requirements in order to be "certified" to proceed before the federal courts. In addition, most U.S. state court systems have also adopted class actions rules.

By contrast, the introduction of class actions has been a relatively recent innovation to Canadian legal system. While a number of provinces in Canada have had traditional procedural rules that permitted representative actions, the courts historically interpreted these rules in a narrow and inflexible manner, which generally precluded the equivalent of class actions.⁹⁸ However, in response (in part) to the effectiveness of class actions

⁹⁸ See, e.g., the Supreme Court of Canada's ruling in *Naken v. General Motors of Canada Ltd.*, [1983] 1 S.C.R. 72.

– in terms of a mechanism for handling large civil claims compared to the alternative of managing thousands of individual trials in a large antitrust case – the provinces gradually introduced modern class action legislation in the 1990s with a view to expanding “access to justice” to civil litigants.⁹⁹ While there remain a small number of provinces in Canada that have not yet formally introduced class action legislation, the Supreme Court issued an important ruling in 2000 which held that provincial rules of procedure which provide for representative actions are sufficiently flexible to accommodate the equivalent of class actions.¹⁰⁰ The result of this decision effectively permits the equivalent of modern, case-managed class actions across Canada.

The test for certifying a class action in Canada varies by province, but for the most part, the requirements for certification are generally similar to Rule 23, although generally they are applied in a more liberal and flexible manner than in the United States. In particular, in most jurisdictions in Canada, the focus for certification is on establishing (i) a viable cause of action; (ii) an identifiable class; (iii) common issues of fact or law; (iv) whether a class action is the preferable procedure under the circumstances; (v) whether the representative plaintiff(s) adequately represents the class and does not have interests in conflict with other class members; and (vi) the existence of adequate class counsel with a proper and workable trial plan for conducting the litigation. In marked contrast to the United States, plaintiffs in Canada are not required to demonstrate a “predominance” of common issues over individual issues of fact or law.

⁹⁹ Ontario was the first common law province to introduce class actions legislation in 1992, and Ontario was followed shortly thereafter by British Columbia in 1995. Class action legislation has since been adopted in Alberta, Saskatchewan, Manitoba, Newfoundland, as well as in the rules for the Federal Court.

¹⁰⁰ *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534.

There are divergent views as to whether class actions in the United States have generally been an effective means of prosecuting claims involving consumer harm in antitrust cases. While some commentators have expressed concerns about the proliferation of class actions and their consequences, other would argue that many of these concerns relate to the impact of damage awards, costs and legal fees in the context of class actions. These issues are discussed more fully in Part I of these comments.

The effectiveness of class actions in Canada as a procedural vehicle in remedying consumer harm remains to be determined, largely because of the relatively recent adoption of class actions legislation across Canada. While there have been a number of large class action settlements in the context of cases involving prior convictions, only two antitrust class actions have proceeded to a contested certification motion before the courts, and certification was denied in both instances.¹⁰¹

Moreover, the Canadian courts have declined to adopt a blanket rule barring indirect purchaser claims similar to the *Illinois Brick* rule in the United States. As such, while indirect purchasers arguably have greater opportunities to obtain compensation for anticompetitive harm in the Canadian system than under at least the federal system in the U.S., the complexities of dealing with indirect purchaser claims continue to pose a significant challenge for litigants, experts, and the courts.

The U.S. and Canadian legal systems generally do not recognize a special cause of action for consumer associations beyond the existing causes of action for individuals and companies who have suffered a direct harm from anticompetitive conduct. To date, the antitrust

¹⁰¹ *Chadha v. Bayer Inc.* (1999), 45 O.R. (3d) 29 (S.C.J.), reversed (2001), 54 O.R. (3d) 520 (Div.Ct.), affirmed (2003), 63 O.R. (3d) 22 (C.A.), additional reasons (April 8, 2003), leave denied [2003] 2 S.C.R. vi.; *Price v. Panasonic Canada Inc.*, [2000] O.J. No. 3123 (S.C.J.).

community in North America has generally not raised or pursued the adoption of such a special cause of action, largely in light of the existing class action legislation in the United States and Canada.

However, consumer associations may still play an important role in implementing creative remedies for redressing anticompetitive harm. For instance, in some of the recent class action settlements in Canada, the courts have approved “*cy-près*” settlement payments through consumer associations, as an expedient alternative to the performance of thousands of complex individual damages calculations and awards for the benefit of indirect purchasers.¹⁰² Similarly, in a recent settlement of a class action case in the United States, the class settlement funds were donated to charity because the named parties and the court realized that there was no practical way to pay minute damages claims to the individual members of the class.¹⁰³

Recognizing the Commission’s position that consumers must have access to some form of representative or collective procedure if private enforcement is to be effective, the Commission might wish to pursue a procedural regime that generally follows Option 26 (a special provision for collective action by groups of purchasers), as opposed to Option 25 (a special cause of action for consumer associations) because consumer groups and groups of final purchasers separately represented do not always share the same or even similar interests to act.

Implementation of class actions in the various Member States will require close and careful examination. A “*carte blanche*” adoption of the U.S. or Canadian class action regime in the Member States does not appear desirable, likely, or feasible. Rather, the introduction of

¹⁰² See, e.g., *Ford v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.J.).

¹⁰³ See *Carbon Fiber Cases I, II and III*, JCCP Nos. 4212, 4216, 4222, Order, Dec. 20, 2005 (Super. Ct. Cal., San Fran.) (distributing settlement proceeds to “charitable organizations . . . representative of the interests of indirect purchasers of Carbon Fiber . . . due to . . . the high cost of processing claims and making direct cash distributions to many thousands of potential claimants relative to the average likely award made to those claimants.”).

collective forms of procedural relief in the Member States likely must be implemented in a way that reflects the unique legal culture within each country, the historical and institutional framework for prosecuting representative actions in national courts, as well as the surrounding substantive rules relating to damages, costs, legal fees, and (perhaps most importantly) the treatment of indirect purchasers.

For the Commission's reference, the Annex provides a summary of the current state of collective proceedings and class actions in England and Wales, Germany, and France.

VII. PASS-ON DEFENSE/INDIRECT PURCHASER STANDING

As discussed above in Part I, and as the Commission is aware, under U.S. federal law, defendants are barred by the *Hanover Shoe* rule from asserting a passing-on defense against direct purchasers, and under the *Illinois Brick* rule, indirect purchaser damages actions are prohibited. Most U.S. states have either passed *Illinois Brick* repealer statutes allowing indirect purchasers to pursue damages claims under state antitrust laws, or otherwise permit indirect purchasers to recover under consumer fraud or unfair trade statutes. This leaves open the possibility, in theory at least, that defendants could be liable to direct purchasers for treble the alleged overcharges under federal law, and liable to indirect purchasers for treble the same alleged overcharges under state laws.

As noted above, Canada's courts, in contrast, have to date declined to adopt a blanket rule barring indirect purchaser claims or the passing-on defense.¹⁰⁴ As a result, most

¹⁰⁴ The leading case which has considered the potential application of *Illinois Brick* and *Hanover Shoe* in Canada is *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.). In *Chadha*, following two lower court decisions, the Ontario Court of Appeal denied certification to an indirect purchaser claim brought on behalf of individual home purchasers who alleged a price-fixing conspiracy by several manufacturers of iron oxide (an ingredient in making bricks). In that case, the motions judge declined to adopt *Hanover Shoe* and *Illinois Brick*, on the basis that these decisions "are plainly not binding" on Canadian courts, and "are based significantly on policy considerations relating to the enforcement of American antitrust laws [which] may well differ from the values underlying Canadian competition law". Unfortunately, the motions judges and

antitrust class actions will now seek to certify a class on behalf of direct and indirect purchasers in Canada. However, as a result of recent Canadian judicial decisions, the courts have set a high threshold for certification of an indirect purchaser claim.¹⁰⁵

Since one of the principal reasons for encouraging private antitrust enforcement in the EU is redressing the injury to victims, and especially consumers, it would appear that some remedy for indirect purchasers is inevitable.¹⁰⁶ Both the *Courage* decision and numerous statements by Commissioners Monti and Kroes make this clear.

Assuming, therefore, that some cause of action will be allowed for indirect purchasers in the EU, a number of difficult issues remain. The breadth of the definition of “indirect purchaser,” and the related question of how closely linked to an antitrust violation an alleged victim must be in order to have standing to sue will prove highly contentious and can, as

the subsequent appellate courts did not actually articulate what those different policy considerations and value judgements were. But in a subsequent case in 2005 relating to the global bulk vitamins conspiracy, a judge of the Ontario Superior Court of Justice criticised the rules of *Hanover Shoe* and *Illinois Brick* as providing a windfall to direct purchasers and leaving injury to indirect purchasers unredressed. See *Vitapharm Canada Ltd. v. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1118 (Ont.Sup.Ct.).

¹⁰⁵ In *Chadha*, the Ontario Court of Appeal held that indirect purchasers are entitled to seek certification of a private action under Section 36. However, the Court rejected certification on the facts of the case, on the basis that the plaintiffs had failed to establish a common issue with respect to liability, since the plaintiffs had failed to adduce sufficient evidence that the indirect purchasers of iron oxide had experienced a common “loss” under Section 36 (i.e., a loss that was common to all members, and which had not been absorbed through the distribution chain). In its reasons, the Court offered some guidance as to the sort of evidence that would be required to establish a class-wide loss, and it left open the possibility that indirect purchaser claims might be certified in other cases on the appropriate evidence. But in practice, most commentators are of the view that the Court in *Chadha* set a relatively high standard for certification – given the complexities of evidence relating to the absorption of an overcharge through the distribution chain, it will remain difficult for future plaintiffs to establish that an entire class (or sub-class) of indirect purchasers experienced a loss.

¹⁰⁶ We have however noted the Commission’s suggestion (as expressed tangentially at the conference on March 09, 2006) that in striving to construct a private enforcement system that both deters and compensates to some degree, the immediate emphasis in the follow-up to the Green Paper should be placed on removing those obstacles that currently prevent direct purchasers from pursuing their remedies in damages for violations of the EC antitrust rules.

in the U.S., potentially consume considerable judicial resources. Accordingly, these issues merit careful attention, and if possible, clear guidance from the Commission.

One critical issue is how far indirect purchaser rights of action should extend. Should the right of action be limited to indirect purchasers of only the actual product that was the subject of the anticompetitive activity? Or should it include purchasers of derivative products, for example other products containing the overcharged product as an ingredient? For example, if flour manufacturers conspire to fix the price of flour, should purchasers of bread and donuts (which include the price-fixed flour) have a right of action? In many other cases, it is not at all clear what should count as a “derivative product.”

The following example is illustrative. If jet-engine manufacturers fix the price of aircraft engines, there are a variety of putative “indirect purchasers”: (1) purchasers of the engines not from the manufacturers but from intermediaries (distributors) — these are the most clear, uncontested indirect purchasers (but note that these are very often at some remove from ultimate consumers); (2) purchasers of aircraft on which the engines have been mounted by the manufacturers who bought the engines — “ingredient” indirect purchasers; (3) airline passengers whose tickets have arguably cost more due to the overcharges on the engines — arguably “derivative” purchasers. Should all these be deemed “indirect purchasers” and have the right at least to argue they should have standing to sue the engine price-fixers based on injury in fact?

Given the complexity and uncertainty inherent in these types of cases, the Commission should consider whether indirect purchaser standing guidelines should be adopted or statutory limits be recommended. Indeed, several recent court decisions in the U.S. have imposed limitations when the alleged injury is several steps and products removed from the

alleged anticompetitive activity.¹⁰⁷ But this calls into question the very purpose of permitting indirect actions in the first place, *i.e.*, to give injured consumers a right to relief that private enforcement is meant to provide.

At the end of the day, one source of real concern in this area is the prospect of multiple damage awards leading to more liability than was contemplated under the system (whether it provides for single, double, or treble damages). We note that the illustrative example set forth in Part I, which has not been adopted in the United States, might be one way to avoid this problem.

VIII. COSTS

The degree to which costs affect a decision of whether or not to litigate will depend on the potential amount of the costs involved. Rules relating to cost recovery – the application of the ‘loser pays’ principle, the proportion of the actual costs incurred which are recoverable, *etc.* – will, as noted in the Working Paper, contribute to the calculation of the overall costs exposure. It seems appropriate, therefore, to review rules relating to costs recovery as noted in Option 27.

Certainly, the ultimate decision of whether or not to bring a case is a function of several features of the litigation system quite apart from the rules regulating costs recovery (*e.g.*, the absolute cost determined by the fees charged in the particular national system (both by the Courts and by lawyers and other advisers) and the length and complexity of the case). The relative cost depends on the financial strength of the party paying.

¹⁰⁷ See, *e.g.*, *Crouch v. Crompton Corp. et al.*, Nos. 02 CVS 4375, 03 CVS 2514, 2004 WL 2414027 (N.C. Super. Ct. Oct. 28, 2004).

In any event, costs will be a significant factor in deciding whether to bring an action, for example, in a jurisdiction with wide discovery rules and high legal fees in the local market. The Sections make these general observations to illustrate that the rules regulating cost recovery must not be viewed in isolation but should be examined in light of the features of the relevant legal system as a whole.

With these comments in mind, we make the following additional observations drawn from our experience of North American private enforcement of antitrust laws. In the United States, a successful plaintiff is generally entitled to recover its costs under §4 of the Clayton Act, but there is no similar provision for a prevailing defendant. In Canada, a successful plaintiff may similarly seek to recover its costs under Section 36 of the Competition Act, and an unsuccessful plaintiff under Section 36 is subject to the ‘loser pays’ costs rule prevalent in private litigation in Europe.

A number of Canadian commentators have criticized the ‘loser pays’ rule, on the ground that it is a significant disincentive to pursuing private actions for anticompetitive conduct. So far, this cost rule has been defended in Canada on the basis that it deters frivolous actions and that the defendants should be equally entitled to recover their costs if they are successful on the merits.

The Sections note the Commission’s enthusiasm for promoting litigation by consumers.¹⁰⁸ Individual victims of competition law violations are most likely to be unwilling to bring damages actions if faced with the possibility of having to pay the defendants’ legal costs if unsuccessful. Thus, any national rule along ‘loser pays’ lines should be considered as potentially affecting the ability of consumer-oriented private damages actions to develop.

¹⁰⁸ For example, Neelie Kroes Speech 05/533 (Sept. 22, 2005), pg. 2.

Although a form of ‘loser pays’ rule is prevalent throughout Europe, the precise impact varies from Member State to Member State, depending on the costs of litigation and the proportion of the costs recoverable in practice. In France, for example, the ‘loser pays’ principle does not have a significant impact in practice, since the amount ordered by courts to compensate the winner for attorneys’ fees (under Article 700 of the New Civil Code of Procedure) is generally low and is far from representing the amount actually paid by the parties.

In England, by contrast, the costs of litigation are considerable, and the loser pays principle applies and does, therefore, operate as a significant barrier to private antitrust litigation (indeed, to many forms of consumer litigation).

In light of the above, the Commission might wish to consider the following alternatives:

- A possible judicial determination at the outset to suspend the ‘loser pays’ rule, on a case-by-case basis. (Though note the possible prejudicial effect of such a threshold ruling, and thus the likely judicial reluctance to rule in this way).
- Lifting the bar on contingency fee arrangements in most Member States. (Though noting that this, again, may require cultural change.)

In addition, any amendment to the rules relating to costs recovery should be considered in light of other features that are adopted to facilitate or encourage private antitrust damages claims. Moreover, the present rules regulating cost recovery may serve a useful social purpose in discouraging frivolous or vexatious litigation. This is, of course, the rationale behind the ‘loser pays’ principle. If the ‘loser pays’ principle is to be replaced, some alternative sanction on unmeritorious claimants might be well appropriate.

Finally, we would welcome further clarity regarding Option 27 in the Green Paper (limitation of the cost exposure of the claimant). We understand, from the discussions at the ERA conference in Brussels on March 9, 2005¹⁰⁹ that, at least initially, the Commission envisaged a limitation covering only court costs and not extending to attorneys' fees.

For the reasons summarized above, such a narrow limitation of claimants' costs exposure might have a very limited effect in facilitating antitrust damages actions.

CONCLUSION

The Sections appreciate the opportunity to comment on these important issues. We hope that our insights are useful to the deliberations that lie ahead. The Sections share the view that private damage actions are an integral part of an effective competition law enforcement regime and that, structured properly, they can advance the goals of deterrence and compensation. We look forward to continuing this dialogue and are available to discuss our comments with the Commission if that should be desired.

¹⁰⁹ Conference organized by the Academy of European Law (in conjunction with DG Competition) in Brussels.

Annex

Summary of certain procedural rules in France, Germany and England & Wales relevant to the comments

ACCESS TO EVIDENCE

Issue A: The need for special rules on *inter-partes* disclosure of documentary evidence

Burden of disclosure of the evidence

Options 1, 2 and 3

France:

Under French procedural law, a party can request the court to compel production of any piece of evidence by the other party and by third parties. When the production of a document is ordered by a court, the party subject to the request must comply, unless it has a legitimate reason not to do so.

According to the case law, the term “third party” includes both private entities and public bodies. If a summoned party refuses to provide the document(s), the court can take the refusal into account in its evaluation of the evidence, i.e. the court may consider that the content of the document as alleged by the requesting party is considered to be proved.

England & Wales:

The Sections note that under English law, disclosure is relatively broad, particularly once the action has started. Such disclosure is made on the ‘standard’ basis which includes all documents on which the party relies, which adversely affect or support that, or another, party’s case, or as required by a practice direction.

However, the Sections would emphasise the importance of distinguishing between depositions and documentary disclosure. The former is not available under English law.

Non-party disclosure is also available, where the party seeking it can demonstrate that it is necessary to dispose fairly of the claim, or save costs, and either support the applicant’s case or adversely affect that of another party.

Under English law, the breadth of disclosure produces a significant burden for the parties involved. In antitrust cases, this burden often falls heavily on the claimant in order to show causation and loss. For defendants, there will be a considerable burden where they have to disclose documents relating to liability. However, this will not generally apply in follow-on actions before the specialist competition law tribunal (the Competition Appeal Tribunal or CAT), where liability has already been established (see below).

Germany:

The Sections understand that since 2002, the procedural rules in Germany for the production of documents have changed substantially. Previously, the parties were responsible for delivering the necessary evidence to the Court.

Section 142 of the Civil Procedure Code now allows the court to order a party, or even a third party, to produce any document(s) to which one party has referred. This order by the court can be issued with or without a prior application of a party. If a party summoned to present a document refuses to submit the document, the court can preclude the party from relying on connected allegations, always assuming that the refusing party has the burden of proof.

The court can take the refusal into account in its evaluation of the evidence, which might lead to the result that the character and content of the documents as alleged by the requesting party are considered to be proved.

While a party to the proceedings cannot be forced by means of an administrative fine to comply with an order for disclosure, the court can enforce its order against a third party by means of an administrative fine of between €uro 5.00 and €uro 1,000, arrest or even imprisonment up to an absolute maximum of six months.

Timing of the disclosure of the evidence

France:

The Sections note that the French rules of procedure allow forced production of evidence at any time during the litigation. However, as forced production requires a decision of the court, in practice parties seek to compel production only if they think they have a sufficiently strong case to convince the court that this is necessary.

A request for the production of documents may also be made before any legal action on the merits has been initiated in order to protect or establish proof of a specific fact, but provided that the resolution of the claim will depend on this specific fact.

England & Wales:

The Sections also note that in the UK, disclosure is not generally available for interlocutory proceedings (e.g. a strike out application) or for jurisdictional challenges.

Pre-action disclosure is available, but on a much more limited basis than disclosure during a pending action.¹ The applicant must be able to demonstrate, with supporting evidence that such disclosure is desirable because it will either dispose fairly of anticipated proceedings, help resolve the dispute without proceedings, or save costs.

Germany:

The Sections note that in Germany a disclosure order issued by the judge is possible at any time before the last oral hearing is closed.

A party may also, during or before court proceedings, apply for an order to secure evidence by inspection or examination of a witness or experts, if the opponent agrees or if it is to be feared that the evidence could be lost or access made more difficult. The Sections are informed that under German law, before filing a claim, a party may also apply for a written expert opinion if the party has a legal interest to determine the status of a person or an item, the causation of personal or material damages or the costs of remedy of defects.

However, these provisions may not have a significant effect on damages claims in the competition context as they are not applicable to documentary evidence.

Issue B: Need for special rules regarding access to documents held by a competition authority

Options 6 and 7

Germany:

The German courts may request the submission of documents and official information from the Federal Cartel Office either on their own initiative or upon application by a party. The Federal Cartel Office is generally obliged to provide administrative assistance to the German courts.

An information request can also be directed to foreign competition authorities by means of legal assistance and under the general regulations of international legal assistance.

The revised German Act Against Restraints of Competition ("GWB") has also incorporated EU antitrust law provisions on cooperation between the civil courts and the European Commission. Civil courts ruling on antitrust actions may now ask the Commission for information it has gathered with regard to the conduct that is the object of the suit.

The Sections are aware that the Federal Cartel Office itself has the discretionary power to allow third parties who have a considerable interest in its decision to participate in the proceedings and, on application, to grant third-party access to its files. As potential plaintiffs have a considerable interest due to the binding effect of the decision of the Federal Cartel Office on civil courts, they might well apply for to participate in the proceedings and to access the files.

However, the Sections understand that the Federal Cartel Office will deny access to the files to third parties if this might prejudice the confidentiality of personal or business information. The Sections would submit that the effectiveness of the Commission's and the *Bundeskartellamt's* leniency program should provide a good reason for denying access to the files to third parties.

FAULT

The requirement of fault in France

The Sections understand that under French law, a civil liability claim requires proof of: (1) fault of the defendant, (2) damage suffered by the plaintiff and (3) a causal link between the fault and the damage suffered by the plaintiff.

However, the Sections note that as confirmed in the Working Paper (§101), in France any breach of law and, in particular, a breach of competition law constitutes in itself a fault. In other words, the French system is similar to the one described in Option 11 of the Green Paper. Even then, the plaintiff still needs to prove damage and the existence of a causal link.

The requirement of fault in England & Wales

Under English law, the Sections understand that a civil claim would generally be brought as an action for breach of statutory duty, which is understood to impose strict liability. Thus, no proof of fault is required. However, the plaintiff will be required to prove causation and loss.

In England, absent a Decision of the Commission or the national competition authority, proof of liability would entail proof of all elements of Articles 81 or 82 EC Treaty (as the case may be).

The requirement of fault in Germany

The Sections can confirm that under German law, a damages claim based on an infringement of competition law needs to imply fault in relation to the violation of national or EC competition law. Fault means intentional or negligent infringement. The fact of the infringement constitutes a presumption of fault according to prevailing case law.

However, the presumption of fault is rebuttable, as canvassed in Option 13 of the Green Paper.

The Sections are aware that a German civil court is bound by final decisions on the infringement of competition law adopted by the Federal Cartel Office, the European Commission and even the national competition authorities in other Member States (“NCAs”). However, the Sections note the apparently wide-ranging binding effects of these decisions are limited to the infringement itself.

Thus, the Sections understand that as far as the decisions of the other NCAs contain statements (for example) on any supra-profits earned by the defendants or the quantum of damages caused by the cartel, these findings would not be binding. To avoid depriving the plaintiffs of the benefits of these binding effects of these decisions by virtue of the operation of the time-bar rules, in Germany the limitation period for private damages claims is suspended from the date proceedings are instituted by the NCAs until six months after a legally binding decision has been issued.

The Sections note that this situation has (directly) inspired Option 36 of the Green Paper.

The binding effect on German civil courts of NCAs' decisions goes further than Option 8 in the Green Paper. This is a completely new approach as generally decisions of foreign administrations are not even executable in Germany.

Furthermore, section 33(4) GWB does not even require that the foreign decisions must comply with the basic procedural and constitutional rights such as the right to be heard or the *ordre public* reservation that the recognition of foreign judgements must normally satisfy. According to some German legal experts, it is therefore arguable that the binding effect on German civil courts of decisions adopted by NCAs must still be interpreted in a way that ensures the defendant's procedural and constitutional rights are protected.

Nevertheless it would appear to the Sections that the new GWB makes it much easier for plaintiffs to sue infringers of competition law in Germany.

From a North American perspective and subject to issues of Regulation 44/2001, the Sections would suggest that the new GWB could result in Germany becoming the jurisdiction of choice for competition damages claims in the EU.

DAMAGES

Options 14, 15, 16 and 17

France:

From a French perspective, public enforcement and private enforcement have very different goals: public enforcement (by the European Commission, NCAs or by criminal courts in relation to certain antitrust offences) aims at repairing harm done to society as a whole. It uses deterrence as a means to stop violations.

In France private enforcement aims at compensating a victim for the loss suffered. Even if the Commission's ultimate goal is for private enforcement to become in practice a supplement to public enforcement, the Sections recognise the views of the French member of the working group that offering such victims the prospect of more than compensation for the loss they have suffered would bend too far the underlying principles of private actions in French courts, as they would lead to "unjust enrichment".

England & Wales:

The position under English law is broadly similar to that in France. However, the English courts have on rare occasions awarded exemplary damages, thereby exceeding a purely compensatory measure.

Germany:

The Sections understand that under German law, in general, the plaintiff can claim only for the loss actually suffered. The exclusive function of damages is thus seen as compensation. The compensation includes damages for injury suffered within Germany and abroad and is not limited. Consequently, fines imposed by NCAs are not taken into account when settling damages as this would hinder the injured person's entitlement to full compensation.

In Germany, sanctions aimed at punishment and deterrence can, in general, only be imposed in criminal proceedings, where special procedural rights for the accused based on explicit criminal statutes required by the German Constitution prevail. Punitive damages are forbidden under German constitutional law.

Due to this, a German Higher Regional Court (OLG Koblenz, decision of 27 June 2005 12 VA 2/04) has recently rejected even the notification to a German defendant of a US class action claim for treble damages based on the Clayton Act.

Consequently, by definition German civil law does not provide for any kind of non-compensatory or extraordinary damages. However, the Sections are informed that certain causes of action exist that provide for the award of damages where the courts may consider non-compensatory aspects among others when calculating the final amount of damages.

According to the new GWB this is particularly the case in anti-trust litigation where damages can be awarded with reference to the illegal gain made by the infringer. This new provision is intended to facilitate the enforcement of damages claims, especially in cases where the assessment of a hypothetical market price as a basis for the calculation of damages proves difficult.

The right of contribution under English law

English law has a principle of joint and several liability. Unlike the US position, English law also allows contribution claims. Theoretically then, a minor participant can recover a proportionate share from major participants in anticompetitive behaviour. However, it is not clear whether the courts would endorse this approach. The Sections are informed that public policy (*ex turpi causa*) may militate against it. The position is untested.

The right of contribution under French law

According to the working group members, under French law, the plaintiff may sue any and all of the parties to an anticompetitive practice who may be held jointly and severally liable as long as the court considers that each of them has actually participated to the anticompetitive practice. This joint and several liability allows the plaintiff to recover all the damages from any of the participants.

Any party that is thus required to pay damages then has the right to take proceedings against the other participants in order to obtain from each of them their contribution to the damages paid.

While French law thus admits a right of contribution, the Sections understand that enforcing such a right might be difficult. This is because: (1) it may be difficult for the court before which the contribution claim is brought to identify the amount of the contribution of each party; and (2) some of the parties may be insolvent.

Existing French law would appear, in the Sections' view, to be most akin to the proposal set out in Option 30 of the Green Paper (removal of joint liability for the leniency applicant). For example, in civil actions brought in connection with criminal law cases, the court may consider, depending on the gravity of the fault committed by each of the participants to a given practice, that one is guilty of a less serious misdemeanour than the others and should not, therefore, be held jointly and severally liable, but rather liable up to his own contribution. The other parties may, however, be held jointly and severally liable.

The right of contribution under German law

The Sections are informed that under German law the plaintiff is free to sue any one of several infringers of competition law who are jointly and severally liable for the entire loss.

Thus any member of a cartel can be sued for the full amount of damage the plaintiff has suffered, regardless of the responsibility of the co-conspirators within the cartel.

As in several other Member States, the defendant ordered to pay the full amount of damages can, in a further litigation, seek contribution from the other defendants of the portion of their respective shares of the damages. Thus, the defendant(s) in the main damages action will often send a third party notice to the other members of the cartel. The purpose of the third party notice is to request that the third party should intervene to assist the defendant to influence the outcome of the main action in the third party's best interests. Accordingly, the outcome of the main proceedings as regards the findings of facts and clarifications of legal issues also apply to the third-party proceedings, thus avoiding contradictory decisions.

The Sections note, however, that under German law, participation in leniency programmes is not taken into account when the court rules on the allocation of damages between the different cartel members. The court's decision is based only on the individual cartel member's responsibility for breach of the competition law. For example, a co-conspirator that did not play a significant role in the cartel and was not a leader will normally be liable for a smaller share of the damages than the leader of the cartel. If no special responsibility can be proven, then the damages are shared equally between the cartel members.

The Sections would therefore suggest that from the perspective of German law as well, limiting the liability of a leniency candidate (as proposed in Options 29 and 30) would appear workable.

The right of contribution under English law

Under English law, leniency applicants do not benefit from any protection including rights of contribution in private actions.

DEFENDING CONSUMER INTERESTS – CLASS ACTIONS

Options 25 and 26

England & Wales:

Under English law, there is currently nothing quite like US class certification. However, and as the Commission is aware there are mechanisms for groups to bring common claims, either by a group action with multiple claims which give rise to a common or related issue of fact or law.

It is also possible to bring a representative action where more than one party has the same interest in a claim. In antitrust cases, there are also specific rules for specified bodies to bring consumer claims before the CAT.

Germany:

The Sections are informed that under German law, US style class actions for final consumers or others are not permitted.

However, collective actions for injunctions by certain associations are available pursuant to section 34a GWB. These associations may include private associations of companies, Chambers of Industry and Commerce as well as craft guilds whose members' interests are affected by the antitrust violation. The associations may bring an action for recovery of any additional profits gained by the infringer.

The aim of the law was to provide a private enforcement remedy for antitrust law violations that cause only minor individual harm, but great overall harm. The prototype for such antitrust law violations is price fixing. However, for such actions to succeed it is necessary to prove that the violation was intentional.

A further disincentive to bringing such actions is that any additional profits recovered over and above those subject to the penalties imposed by the Bundeskartellamt do not inure to the benefit of these associations but must be passed on to the Federal Treasury.

Therefore, at least in Germany the Sections recognise that the introduction of a special procedure for bringing consumer actions and protecting consumer interests as proposed in Option 26 of the Green Paper might improve the overall conditions of claims for damages for violations of EU antitrust law.

Such a special claim procedure for mass damages would not be completely new in German law as the *Capital Investors Model Proceedings Act* that came into force on November 01, 2005 has created a new litigation procedure to facilitate the collective enforcement of claims by investors. The new Act introduces the concept of model proceedings in which questions of fact or law that arise in a number of similar proceedings can be determined with binding effect for those other proceedings. All costs are shared by the claimants and, as an exception to the normal rule, there is no need to make an advance payment on additional costs such as fees of a court-appointed expert.

France:

There is no mechanism similar to the US type class action in France. Some limited mechanisms exist though to allow the representation of several consumers. In particular, certain approved consumer associations may file an action on behalf of at least two consumers with a view to obtain damages for the individual loss suffered by each of the plaintiffs as a consequence of the conduct of a professional (“*action en représentation conjointe*” - joint representation action).¹

This type of action is fairly rare in practice since it must fulfil strict requirements (in particular, the action is only open to approved consumer associations, the consumer association filing the claim must be duly empowered by the consumers it represents, damages may only be awarded to compensate individual losses).

A debate took place in 2005 to discuss the opportunity to introduce a broader class action mechanism in France in the consumer law field and possibly in other fields such as competition law. This proposal encountered strong resistance and has not resulted in any reform so far.

¹ Consumer Code, Art. L422-1.

PASS-ON DEFENSE / INDIRECT PURCHASER STANDING

The case for the Passing-On Defense

The passing-on defense in France

The whole issue of whether the passing-on defense operates under French law is still untested in the antitrust field (the few legal actions concern contract disputes where parties ask the Court for injunctive relief or a declaration that a contract is null and void).

However the Sections understand that at least in principle, French law does provide a basis for the defense since an award of damages must compensate for the injury actually suffered by the plaintiff. This stems from the underlying principle that the purpose of private actions is to compensate for a loss, not to act as a deterrent. Direct purchasers in France may thus have difficulty showing the existence of an injury.

In France, indirect purchasers may file a claim provided that they demonstrate that they have suffered a direct injury as a result of the anti-competitive conduct. Nevertheless, such actions are invariably confronted with the problem of showing the causal link between the anti-competitive violation and the injury suffered.

The passing-on defense in England

There is yet no English case law which has decided on the issue of whether the passing-on defense applies. Nevertheless, the Sections would suggest that the better view appears to be that the passing-on defense is likely to be available under English law.

The passing-on defense in Germany

The Sections understand that under the previous German competition law, some courts have indicated that they would take the 'passing-on' defense into account while other courts have expressed doubts as to its availability. The German Federal Court of Justice has not yet considered this issue.

As the Commission is aware, the new section 33(3) GWB states that damages caused by over-priced items or services are not excluded by the fact that these items or services have been resold. However, there is some uncertainty whether this means that the passing-on defense is completely excluded or that the plaintiff's mitigation of loss by benefits received can be only accepted under very narrowly defined conditions and not in general.

The Sections' view is that it would be justified to interpret section 33(3) GWB in a way that allows the court to take the concept of the 'passing-on' defense into consideration. This would also be in line with the general compensation concept of German damages law that does not allow any unjust enrichment of injured persons.

However, the defendant would have to prove in detail that the plaintiff had not suffered a loss due to the passing on as outlined in Option 21 of the Green Paper. As the passing-on defense is possible, but the burden of proof lies with the defendant, the Sections would suggest that German law seems to offer a reasonable compromise between the deterrent effect of private enforcement of infringement of competition law and the avoidance of "windfall profits" for plaintiffs that have not suffered any loss.

Indirect purchaser standing under English law

Under English law, the Sections expect that the law will evolve to allow indirect purchasers to have a right of action provided they did not themselves pass on the overcharge to their customers, but the position is yet to be determined.

In England the scope of the concept of the "indirect purchaser" has yet to be determined by the courts.

Indirect purchaser standing under German law

In Germany, the Sections understand that the range of standing for bringing antitrust claims has been considerably widened by the new section 33(1) GWB. Under the revised act, anyone "affected" by a violation of antitrust law has standing to sue.

In previous court decisions, actions for damages against participants in the international vitamins cartel and the ready-mix concrete cartel were dismissed only on the grounds that the plaintiffs were not part of a group whose protection was the purpose of the infringed provision of competition law.

The courts required that the plaintiffs formed part of a defined group of persons against whom the infringement was specifically directed and with the objective of worsening that group's situation. However, other courts ruled that it was not necessary for the cartelist's activity to be specifically directed against the plaintiff.

The new German law was intended to clarify that the principle of the protective purpose of the infringed law must not be interpreted restrictively and to bring German law in line with the *Courage* decision of the European Court of Justice.

Therefore, in theory the indirect purchaser and even the final consumer are entitled to claim damages under German law, provided they have suffered damage as a result of the infringement, the damage has been adequately caused and they can be seen as "affected" in the sense of section 33(1) GWB.

To-date, the Sections are not aware of any case-law where the German courts have either awarded (or refused) damages other than to direct customers of the defendants.

The Sections will watch with interest to see how the German courts will interpret the European Court of Justice's ruling in *Courage –v– Crehan* and in particular how, in the application of the new section 33(1) GWB, those courts will deal with the complex legal and econometric problems associated with pursuing indirect purchaser actions summarised in the Working Paper.

COSTS

Option 27

Costs and rules regulating their recovery

The comments contain summaries of the laws relating to the recovery of costs in France and the England & Wales (see pages []) that are not repeated here.

German law

According to the general rule in Section 91(1) of the German Civil Procedure Code, the losing party has to bear the costs of the litigation. Where the plaintiff partly wins and partly loses its case, the costs will be allocated in proportion to the relative degrees of success and loss.

As far as the lawyers' fees are concerned, the Sections note that the unsuccessful party is only liable to pay the opposing lawyer's statutory fees as set by the Code of Lawyers' Fees and not any higher level of fees which the opponent may have agreed to pay to his lawyer.

The costs in a private enforcement action depend neither on the procedural status of the parties nor on the gravity of infringement, but only on the value in dispute and the procedural stages at which the costs were incurred (for example. oral hearing, taking of evidence). The higher the value in dispute, the higher the costs, but the relationship is not linear; costs decrease in proportion to the value of the claim as claim values increase.

Likely European responses to other means of reducing costs exposure

The comments contain summaries of the likely responses to other means of reducing costs exposure in France and in England & Wales (pages []) that are not repeated here.

German law

In Germany it is possible for potential plaintiffs who want to spare themselves the costs risks associated with complex litigation to turn to litigation funding companies and thus also avoid the bar on German lawyers acting under contingency fee arrangements. These financing companies usually receive approximately 20% - 30% of the award for taking on the risk of litigation.

In view of the binding effect of decisions of cartel authorities (see Section 33(4) GWB summarised above) and the possibility of reducing the amount in dispute offered by section 89a GWB, the Sections would suggest from a North American perspective that such financing companies might be particularly interested in financing private damages claims for EU antitrust law violations at least in follow-on actions.