Cartel & Criminal Practice

Committee Newsletter

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ABA SECTION OF ANTITRUST LAW

Promoting Competition Protecting Consumers

IN THIS ISSUE[i]

Message from the Co-Chairs

by Douglas M. Tween & A. Paul Victor

The Cartel and Criminal Practice Committee is pleased to publish our first newsletter for the 2012-13 year with a brand new design. On behalf of the Committee, we extend our warmest thanks to Deborah Morgan and Austin Groothuis at the ABA Antitrust Section for helping the Committee design a more reader-friendly format. We also thank our newsletter editors, Jennifer Dixton and Shimica Gaskins, for their work on the Fall edition, and we thank Michael Amberg and Jeffrey Martino for assisting Jennifer and Shimica. We also welcome Jeffrey Martino as a new newsletter editor. Once again this edition of the newsletter offers timely and informative articles touching on both international and domestic topics. Brian Strange, Keith Butler, and John Ceglia write about developments in private follow-on actions from competition law enforcement in Europe, with a particular focus on follow-on actions in the U.K. Cecil Saehoon Chung and Sung Bom Park discuss *per se* illegality and the *Noerr-Pennington* Doctrine in Korea. Finally, Eric Enson offers practical guidance regarding steps an attorney should take in responding to a grand jury subpoena. We thank all of our authors for their articles.

We are also pleased to refer Committee members to our continuing teleconference series "Navigating the Globe: Cartel Enforcement Around the World," co-sponsored by the International Committee. This series provides an overview of cartel enforcement in different jurisdictions around the world, including a summary of the jurisdiction's cartel laws, investigative processes, leniency programs, and recent developments. Our journey around the globe began in Canada, and continued with chapters on cartel enforcement in the United Kingdom, Ireland, Japan, the European Union, Korea, and most recently Taiwan, Singapore and India. Future chapters will focus on China, Russia/Ukraine, Brazil, France, and Australia/New Zealand. Past audio recordings of these programs are available on the Committee's Page on the Antitrust Section's website. We also invite you to join the Cartel and Criminal Practice Committee for our quarterly update on recent developments in criminal antitrust law. This new program series is an excellent opportunity to learn about recent developments in criminal antitrust law that may impact your clients, company, or litigation strategy. See page 30 for details.

Competition Law Damage Recovery Actions: A Status Report on Europe and the United Kingdom

by Brian Strange, Keith Butler, and John Ceglia[1]

Keith Butler

Brian Strange

Introduction

The United States is widely considered to be the most favorable jurisdiction in the world for plaintiffs seeking redress for competition law violations. For a variety of reasons, Europe has not been so hospitable.

This Article examines some of the main reasons for this disparity and takes a focused look at developments in the United Kingdom, the European Union (EU) Member State that we believe is most likely to emerge as a leader in offering a viable forum for victims of competition law violations.

John Ceglia

U.S. courts offer plaintiffs a viable forum for private antitrust[2] damage recovery actions for a variety of reasons, some deriving from substantive competition law and some from the U.S. procedural framework, which offers, *inter alia*, a robust class action regime and favorable litigation funding options. Historically, competition law victims in Europe have not enjoyed the same access to justice as their American counterparts. But as many have observed, that may be changing, albeit slowly. U.S. and EU competition laws are "converging,"[3] and the EU and many EU Member States have begun to take a closer look at the U.S. class action, or "collective redress,"[4] system and consider reforms.[5] Access to EU-level legal

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[1] Mr. Strange is the Managing Partner of Strange & Carpenter in Los Angeles, California; Mr. Butler is a Member of the firm and Head of the Antitrust Practice; Mr. Ceglia is a law clerk. They wish to thank Marc Barennes and Gunnar Wolf for helpful comments on earlier drafts.

[2] Competition law in the United States is still widely referred to as "antitrust law." For the sake of simplicity and consistency, hereafter we will use the term "competition law," which is the predominant nomenclature in Europe and the United Kingdom.

[3] J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, Convergence and Comity: Still Improbable? 1, 6 (June 10, 2010) ("On previous occasions when I've been asked to discuss the prospects of convergence and comity between the United States and Europe I've been pretty dour. . . . But we are now in 2010, and my views are different today than they have been. I now suggest that these barriers are either dissipating or that they are lower than I had thought."), *available at*

institutions is out of reach for private plaintiffs, but meaningful access to Member State courts, particularly in the United Kingdom, is not. In what follows, we look at private damage recovery actions in Europe and offer an evaluation of the state of play in the United Kingdom. In doing so, we measure aspects of the U.K. procedural and substantive legal framework against certain corresponding features of the U.S. system that have had the greatest impact in creating incentives for plaintiffs to bring competition law cases in the United States.

Recent proposals within the EU and several Member States portend improved collective redress systems in the future . . .

Private Competition Law Actions in Europe

The European Union operates under a two-tiered system in the competition law context—EU laws applicable in the twenty-seven Member States[6] and laws of individual Member States. Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) respectively prohibit agreements to engage in or abuse of a dominant position that affects competition and trade

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http://www.ftc.gov/speeches/rosch/100710transatlanticremarks.pdf; Randolph W. Tritell, *International Antitrust Convergence: A Positive View*, ANTITRUST (Summer 2005), www.ftc.gov/bc/international/docs/tritellpostiveview.pdf ("Given the role of the United States and the European Union in the world economy and the prominence of their competition enforcement regimes, there is an understandable focus in the business and competition communities on antitrust convergence between the U.S. agencies and the European Commission.").

[4] Class actions were first introduced in 1849 when New York and California codified the Field codes. Paolo Buccirossi et al., *Collective Redress in Antitrust*, European Parliament's Committee on Economic and Monetary Affairs 34 (June 12, 2012). European class action systems are most frequently referred to as "collective redress schemes." Collective redress is any "mechanism that 'may accomplish the termination or prevention of unlawful business practices which affect a multitude of claimants . . . or the compensation for the harm caused by such illegal practices." *Id.* at 15 (citing EUROPEAN COMMISSION, PUBLIC CONSULTATION: TOWARDS A COHERENT EUROPEAN APPROACH TO COLLECTIVE REDRESS 3 (Feb. 4, 2011), *available at* http://ec.europa.eu/justice/news/consulting_public/0054/ConsultationpaperCollectiveredress4February2011.pdf).

[5] "[The United States] represents a natural point of reference and an important benchmark to assess the potential implications of changes to the EU [collective redress] system." *Id.*; *Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM (2005) 672 final (Dec. 19, 2005), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0672:FIN:EN:PDF; *Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM (2008) 165 final (Apr. 2, 2008) [hereinafter *White Paper*], *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0165:FIN:EN:PDF; *Private Actions in Competition Law: A Consultation on Options for Reform*, DEP'T FOR BUSINESS INNOVATION & SKILLS (Apr. 2012), http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/p/12-742-private-actions-in-competition-law-consultation.pdf [hereinafter BIS Consultation]; *see also A Competition Regime for Growth: A Consultation on Options for Reform*, DEP'T FOR BUSINESS INNOVATION & SKILLS (Mar. 2011) (detailing previous proposals to reform the United Kingdom's public enforcement regime), *available at* http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/11-657-competition-regime-for-growth-consultation.pdf; Till Schreiber, *Private Antitrust Litigation in the European Union*, CARTEL DAMAGE CLAIMS GRP., http://www.carteldamageclaims.com/100913%20Article_Till%20Schreiber_ABA_Autumn%202010%20(2).pdf (describing recent proposals to amend EU-level competition laws and examining current legal barriers from a claimant's perspective).

[6] In July 2013, Croatia will join the EU and become the 28th EU Member State.

among the Member States.[7] The European Commission has authority to investigate and punish these anticompetitive practices.[8] If anticompetitive behavior affecting trade between Member States is found, the European Commission will issue a decision finding an infringement and impose fines. However, the European Commission has no authority to hear claims brought by private parties and there remains no European-wide forum for private damages actions.

All European Commission decisions may be appealed—first to the General Court of the European Union[9] (on both factual and legal aspects) and then to the Court of Justice of the European Union (on legal issues only). These courts, both located in Luxembourg, control the legality of the decisions adopted by the European Commission and may annul, reduce, or increase the financial penalties levied by the European Commission.[10]

Pursuant to Articles 5 and 6 of Regulation 1/2003, Member State competition authorities and courts have the authority to apply Articles 101 and 102 of the TFEU. In its landmark 2001 decision in *Courage v. Crehan*,[11] the Court of Justice of the European Union ruled that Member State national courts had power to grant damages for EU competition law infringements. The Court of Justice even insisted that the "full effectiveness of [TFEU Article 101] and, in particular, the practical effect of the prohibition laid down in [TFEU Article 101(1)] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition."[12] Under Article 16(1) of Regulation 1/2003, any European Commission decision finding anti-competitive behavior is binding in all Member State courts and represents a non-rebuttable presumption concerning the existence of an infringement of competition law.[13] In practice, however, this may not be so clear cut; there are issues as to who is bound by these decisions, as well as their scope. Moreover, the European Commission does not give access to its files once it has fined a cartel infringer, so it is difficult in many jurisdictions for private plaintiffs to obtain the documentary evidence necessary to prosecute a follow-on case.[14]

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[7] Articles 101 and 102 were formerly Articles 81 and 82.

[8] Pursuant to EU case law, this requirement may be met even if the anticompetitive behavior in question affected only one Member State or one significant region in a Member State. In accordance with the principle of subsidiary, the European Commission takes action against anticompetitive behavior when it is deemed better placed than national authorities. In practice, it often acts in cases where at least three Member States are concerned by the anticompetitive behavior.

[9] The General Court was previously the Court of First Instance. *See* Treaty on the Functioning of the European Union, art. 256, May 9, 2008, 2008 O.J. (C 115) 47 (EC).

[10] European Commission, *Competition*, http://ec.europa.eu/competition/cartels/overview/faqs_en.html (last updated Apr. 16, 2012). The EU courts have never increased the fine imposed by the European Commission but only annulled or reduced it. This is because, in essence, under the EU system of repartition of powers, it is for the European Commission to determine EU competition policy and, in that context, what fines are to be considered a sufficient deterrent.

[11] Courage v. Crehan, ECR I_06297, C-453/99, ¶ 31 (2001) ("Community law does not preclude national law from denying a party who is found to bear significant responsibility for the distortion of competition the right to obtain damages from the other contracting party. Under a principle which is recognised in most of the legal systems of the Member States and which the Court has applied in the past . . . a litigant should not profit from his own unlawful conduct, where this is proven.").

[12] *Id.* ¶ 26.

[13] Council Regulation 1/2003, art. 16(1), 2003 O.J. (L 1) 1 (EC); Buccirossi et al., *supra* note 4, at 24.

[14] A primary reason for the European Commission's position in this regard is that leniency applicants would be disproportionately exposed to private damages actions because as cooperators the corporate statements (e.g., admissions, etc.) they must give as part of their leniency application may be used as direct evidence against them in private actions. In view of

At present, no EU Member State permits U.S.-style opt-out class action lawsuits.[15] Eleven EU Member States provide no mechanism for collective damages recovery.[16] However, sixteen Member States do permit varying forms of collective actions,[17] which can be grouped into three general categories: (1) group actions, (2) representative collective actions, and (3) test cases.[18] Group actions involve an "exactly defined category of persons [that bring] an action to enforce their individual claims together, in one procedure, in accordance with specific rules designed for such purpose."[19] Representative actions offer individual claimants, authorized organizations, or state authorities the ability to introduce an action seeking damages for a group of injured persons who are not part of the proceedings.[20] Test cases—which exist only in Austria and Germany—allow parties to determine common issues of law and fact in a single test case.[21]

Recent proposals within the EU and several Member States portend improved collective redress systems in the future,[22] but at present, the overall climate remains difficult for claimants amid a lack of formal collective redress systems and a dearth of economic incentives for attorneys to bring claims. Additionally, the labyrinth of different procedural systems and options for litigation financing in the EU inhibit successful collective actions. Moreover, nearly every European jurisdiction follows the predominant "loser pays" rule.[23] Many view this rule as preventing frivolous or non-meritorious claims, while others argue that it deters meritorious claims by creating excessive risk for claimants.

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considerations of this type, courts at the EU and national levels have reached contradictory results regarding whether such access should be granted.

[15] "Only the Netherlands has introduced a collective action that resembles a US type class action, in that the judgment rendered will be binding on all members of the class who have not opted out." Jules Stuyck et al., *An Analysis and Evaluation of Alternative Means of Consumer Redress Other than Redress Through Ordinary Judicial Proceedings* 261 (Jan. 17, 2007) [hereinafter *Alternative Means of Consumer Redress*], *available at* http://ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf.

[16] The EU Member States with no available collective procedure for damages are: Belgium, Cyprus, the Czech Republic, Estonia, Ireland, Latvia, Luxembourg, Malta, Romania, Slovakia, and Slovenia. *Id.* at 270–71.

[17] The sixteen EU Member States with some form of collective action system include Austria, Bulgaria, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Lithuania, the Netherlands, Poland, Portugal, Spain, Sweden, and the United Kingdom. *Id.*

[18] The *Alternative Means of Consumer Redress* report, *supra* note 15, originally developed these three distinctions.

[19] *Id.* at 261. Group actions are available in Lithuania, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom. *Id.* at 270–71.

[20] *Id.* at 261. Eight EU jurisdictions allow representative actions (Austria, Denmark, France, Germany, Lithuania, the Netherlands, Sweden, and the United Kingdom). *Id.* at 270–71.

[21] *Id.* at 262.

[22] For instance, in France, the Minister of Justice followed up on newly-elected President Francois Hollande's promise during the presidential campaign and announced in June 2012 that legislation authorizing class actions would be proposed for adoption to the Parliament in 2013. Julie de la Brosse, *Class Actions: Pourquoi ça Bloque en France*, L'EXPANSION, June 22, 2012, http://lexpansion.lexpress.fr/entreprise/faut-il-introduire-les-class-actions-en-france_306581.html.

[23] The exception is Luxembourg, which has adopted the "American rule" requiring each party to bear his or her own legal costs. *See* Stefano M. Grace, *Strengthening Investor Confidence in Europe: U.S.-Style Securities Class Actions and the* Ac-Quis Communautaire, 15 J. TRANS. L. & POL'Y 281, 289 (2006). Additionally, the Netherlands generally follows the American rule, but the court retains discretion to apportion fees differently. *Id.* at 289 n.49.

Private Competition Law Actions in the United Kingdom

Among European jurisdictions striving to balance the competing perspectives on private competition law damage recovery actions, the United Kingdom,[24] in our judgment, is the most promising forum[25] for such actions. The United Kingdom permits private actions to enforce "follow-on" and "stand-alone" competition law claims.[26] Those claims may be heard in one of two venues: the Competition Appeal Tribunal (CAT) or the High Court.[27] First, a claimant may bring suit before the CAT—a specialized competition court that is vested with jurisdiction to hear private follow-on competition law damages claims.[28] The CAT offers claimants liberalized procedural rules and does not follow the traditional European "loser-pays" rule regarding attorney fees and court costs. Because the CAT remains relatively new, the full impact of the new court remains unclear.[29] Second, and alternatively, claimants with either follow-on or stand-alone claims may elect to bring private enforcement actions before the High Court,[30] which requires adherence to the less-flexible Civil Procedure Rules.[31]

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[24] All references to the United Kingdom refer specifically to England and Wales. Northern Ireland and Scotland have different rules that make these jurisdictions less friendly to claimants. For a brief summary of the jurisdictional differences within the United Kingdom, see Mark Clough & Arundel McDougall, *United Kingdom* 1–2 [hereinafter Clough & McDougall, *United Kingdom*], *available at* http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/united_kingdom_en.pdf. However, the Competition Appeal Tribunal has jurisdiction throughout the United Kingdom. *Id.* at 2.

[25] As an indication of the United Kingdom's new popularity, U.S. firms have begun to open offices in London in anticipation of a coming wave of collective redress cases. *See* Alexia Garamfalvi, *U.S. Firms Prepare for European Class Actions*, LEGAL TIMES, June 25, 2007 (describing two U.S.-based law firms'—Cohen, Milstein, Hausfeld & Toll (now Hausfeld LLP) and Howrey LLP (now defunct)—recent relocations to London); *see also* Norton Rose, *Competition Litigation in the UK*, *available at* www.nortonrose.com/files/competitition-litigation-brochure-november-2011-33811.pdf.

[26] Follow-on suits are based on a finding by a competition authority (generally the European Commission or the U.K.'s Office of Fair Trading) of a competition law violation; stand-alone suits are not.

[27] Claims may subsequently be transferred from the CAT to the High Court under certain circumstances.

[28] The CAT is unique to the United Kingdom and has jurisdiction throughout the country (including in Scotland and Northern Ireland). Clough & McDougall, *United Kingdom*, *supra* note 24, at 2. The CAT is currently composed of twenty Chairmen (including one President) and nineteen "ordinary" Members. *Personnel*, COMPETITION APPEAL TRIBUNAL, http://www.catribunal.org.uk/246/Personnel.html (last visited Sept. 5, 2012). All cases are heard before three-person panels, each with one Chairman (or the President) and two ordinary Members. *Appointment of New Members*, COMPETITION APPEAL TRIBUNAL, http://www.catribunal.org.uk/247-6909/Appointment-of-New-Members.html (last visited Sept. 5, 2012). The Lord Chancellor appoints the President and Chairmen, while the Secretary of State appoints all ordinary Members. Enterprise Act, 2002, c. 40, § 12(2) (Eng.). Nearly all of the Chairmen, including the President, are also Justices of the Chancery Division of the High Court (only three are members of other courts or distinguished lawyers in the field). *Personnel*, *supra.* Ordinary Members "are selected for their expertise in law, business, accountancy, economics and other related fields," and serve four-year terms (renewable for one additional four-year term). *Appointment of New Members*, *supra.*

[29] Elizabeth Morony & Anna Morfey, *England & Wales*, *in* PRIVATE ANTITRUST LITIGATION IN 27 JURISDICTIONS WORLDWIDE 40, 40 (Samantha Mobley ed., 2011). "[T]he CAT's popularity has not been what one might have expected, and claimants have tended to favour the High Court as the forum in which to issue proceedings." *Id.* This is likely due to the limited jurisdiction granted to the CAT by the 2002 Enterprise Act, which restricts the CAT's jurisdiction to only follow-on damages claims. *Id.*; *see also* Enterprise Act, 2002, c. 40, §§ 12–21 (Eng.). Additionally, unlike in actions before the High Court, follow-on actions cannot be brought before the CAT without its approval if the underlying infringement determination is under appeal. Morony & Morfey, *supra*, at 41.

[30] The U.K. High Court of Justice, often referred to simply as the High Court, is the court of first instance for nearly all high value or high importance matters. Claims arising under competition law must be brought before the High Court Chancery

Though, for reasons of space, a full comparison of the U.K. regime to those in other Member States cannot be addressed in this Article, we assess here the extent to which the United Kingdom offers competition law claimants a hospitable forum by examining the U.K. system along some of the dimensions of the U.S. system that have had the greatest impact in creating incentives for competition law plaintiffs to pursue actions. These include: the availability of discovery, the nature of financial incentives, the extent of jurisdictional reach, the impact of standing and pass-through rules, and the availability of opt-out collective redress.[32] While the United Kingdom does not offer the claimant-friendly forum that the United States does, we believe it is the most viable forum the EU has to offer at the moment, and the situation may be improving.

Broad disclosure obligations make U.K. courts attractive to claimants, especially in comparison to other EU Member State jurisdictions.

Liberal Discovery

The U.S. Federal Rules of Civil Procedure afford plaintiffs with significant discovery rights. While criticized by some as permitting unlimited "fishing expeditions" for evidence, the broad nature of U.S. discovery rules supply "significant incentives for plaintiffs to file damages suits."[33]

Broad disclosure obligations make U.K. courts attractive to claimants, especially in comparison to other EU Member State jurisdictions. U.K. litigants are required to disclose not only those documents on which they will rely,

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Division. Anthony Maton & Scott Campbell, *Introduction*, *in* PRIVATE ANTITRUST LITIGATION IN 27 JURISDICTIONS WORLDWIDE 3, 3 (Samantha Mobley ed., 2011).

[31] Civil Procedure Rule (CPR) 30.8.

[32] There are other features that, for reasons of space, we do not discuss here. For example, private plaintiffs in the United States benefit from robust government enforcement, which creates numerous opportunities for follow-on private competition lawsuits. Public enforcement in Europe by the European Commission and in the United Kingdom by the Office of Fair Trading (OFT) provide a similar impetus. For example, during the first six months of 2012, the European Commission initiated twenty-nine investigations and decided four cartel cases. Directorate Gen. for Competition, European Comm'n, Cartel Statistics 4–5 (2009), *available at* http:// ec.europa.eu/competition/cartels/statistics/statistics.pdf. In 2011, the European Commission undertook fourteen investigations and decided four cartel cases. *Id.* The U.K. OFT opened fifty-nine new investigations and made sixteen determinations between 2004 and 2012. *Commission—Competition*, EUROPEAN COMPETITION NETWORK, http://ec.europa.eu/competition/ecn/statistics.html (last visited Sept. 14, 2012).

[33] Eric McCarthy, Allyson Maltas, Matteo Bay & Javier Ruiz-Calzado, *Litigation Culture Versus Enforcement Culture: A Comparison of US and EU Plaintiff Recovery Actions in Antitrust Cases*, *in* THE ANTITRUST REVIEW OF THE AMERICAS 2007, at 38, 38; *see also* Marc A. Sittenreich, *The Rocky Path for Private Directors General: Procedure, Politics, and the Uncertain Future of EU Antitrust Damages Actions*, 78 FORDHAM L. REV. 2701, 2712 n.70 (2010) (citing *In re* Auto. Refinishing Paint Antitrust Litig., MDL No. 1426, 2004 U.S. Dist. LEXIS 29160, at *8 (E.D. Pa. Oct. 29, 2004) ("Broad discovery is permitted because direct evidence of an anticompetitive conspiracy is often difficult to obtain, and the existence of a conspiracy frequently can be established only through circumstantial evidence, such as business documents and other records.")).

but also documents that could harm their case and assist the other side.[34] French law, by contrast, provides, with several narrow exceptions, no general disclosure obligations on litigating parties.[35]

Cases brought before the High Court are governed under Civil Procedure Rule Part 31, which allows for three forms of disclosure—(1) "standard" disclosure, (2) "specific" disclosure, and (3) "pre-action" disclosure.[36] Standard disclosure occurs after a complaint and answer are filed and calls for disclosing any evidence within the party's control that was relied on in the filings. A party is required to disclose any evidence that may support or adversely affect their own or their adversary's case.[37] Parties must also produce a privilege log. Following standard disclosure, a party may seek additional specific disclosure from other parties to the action or from non-parties.[38] Finally, any party may seek limited pre-action disclosure from non-parties that may be likely to become a party to the present or subsequent litigation at a future date.[39]

The broad Civil Procedure Rule provisions applicable before the High Court do not apply to cases brought before the CAT.[40] In practice, however, the CAT has full authority to order any disclosure it deems necessary to determine the ultimate matter before the tribunal and typically orders discovery consistent with standard disclosure under the Civil Procedure Rules.[41] The tribunal generally maintains traditional limits on discovery of privileged documents. Moreover, a party may request specifically identified evidence from an opposing party and the tribunal may order the discovery at its discretion.[42]

Attorney Fees, Case Funding, and Financial Risks

In the United States, there are several interlocking financial considerations that together heighten the incentives for victims of competition law violations to seek redress for their injuries. The U.K. system does not offer the same mix of features, but those it does have create many (though not all) of the same incentives as the U.S. system.

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[34] Buccirossi et al., *supra* note 4, at 39.

[35] Mélanie Thill-Tayara & Marta Giner Asins, *France*, *in* THE PRIVATE COMPETITION ENFORCEMENT REVIEW 108, 111 (Ilene Knable Gotts ed., 4th ed. 2011). "Under French law, there is no discovery process comparable to that found in the US. . . . This sets a high standard according to which parties are only required to disclose the documents they rely on." *Id.* "[T]he fact that the English rules of disclosure are more extensive than those in other European jurisdictions enhances the appeal of the English courts." Maton & Campbell, *supra* note 30, at 6.

[36] Buccirossi et al., *supra* note 4, at 43.

[37] *Id.* at 44.

[38] *Id.*; CPR Rules 31.12, 31.17.

[39] CPR Rule 31.16; Buccirossi et al., *supra* note 4, at 45. The court will consider four factors in deciding whether to order pre-action disclosure: (1) whether "the applicant appears likely to be a party to subsequent proceedings"; (2) whether "the defendant appears likely to be a party" to subsequent proceedings; (3) whether "the defendant appears likely to have or have had relevant documents in his or her possession, custody, or power"; and (4) whether "advanced disclosure is desirable to dispose of the anticipated proceedings fairly, to prevent the need to commence proceedings, or to save costs." Clough & McDougall, *United Kingdom*, *supra* note 24, at 17; *see also* Civil Court Act, 1984, c. 28, § 52(2) (Eng.); Supreme Court Act, 1981, c. 54, § 33(2) (Eng.).

[40] Competition Appeal Tribunal, Guide to Proceedings 45, § 12.1 (Oct. 2005) ("Strict rules of evidence do not apply before the Tribunal. The Tribunal will 'be guided by overall considerations of fairness, rather than technical rules of evidence.'" (quoting Argos & Littlewoods v. OFT, [2003] CAT 16, at [105])), *available at* http://www.catribunal.org.uk/files/Guide_to_proceedings_October_2005.pdf.

[41] CAT Rule 19(2)(k); Clough & McDougall, *United Kingdom*, *supra* note 24, at 15.

[42] Buccirossi et al., *supra* note 4, at 45.

Especially compared to financing options under other EU Member State systems,[43] the U.K. system remains the most favorable European forum for claimants.

As in the United States, successful plaintiffs in the United Kingdom can recover attorney fees from losing defendants. Unlike in the United States, however, unsuccessful plaintiffs, at least in the High Court, are liable for the attorney fees of successful defendants under the traditional European "loser pays" rule, and legal costs in the United Kingdom can be high.[44] However, the court will examine the circumstances of each case and the Civil Procedure Rules vest the judge with discretion in awarding legal costs. Additionally, even if a prevailing party is awarded legal costs, a "successful party is generally only likely to recover around two thirds of its costs."[45] Cases before the CAT are not subject to the general "loser pays" rule, but the tribunal remains empowered to award legal costs at its discretion.[46]

To protect High Court plaintiffs against the risk of being liable for the defendant's fees and costs in the event of an adverse result, the United Kingdom has a well-developed litigation insurance community offering "after-the-event insurance" (ATE insurance) for almost any demonstrably successful claim. A claimant choosing to pursue ATE insurance funding to cover the costs of a potential adverse decision must first issue proposals to ATE insurance companies detailing the merits of their case and the proposed costs associated with it. ATE insurance companies will respond with quotes for the cost of insurance coverage (if they deem the case insurable). Alternatively, a claimant may submit a proposal to an ATE insurance broker, who will shop the claim around to various insurance companies in order to obtain the best rate.[47]

Though the mechanisms in the United Kingdom are different from the lawyer-funding frequently used in the United States, the effect is similar—plaintiffs need not incur the costs or financial risks of litigation.

After accepting an ATE insurance provider's offer of insurance, the claimant, or his or her lawyer, may be required to begin to pay premiums.[48] Should a claimant choose not to pay premiums during the course of litigation, they may elect to obtain a "deferred and insured" policy. Deferred and insured policies do not require the payment of premiums until after a judgment has been rendered, and in

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[43] The French system is particularly illustrative of a difficult litigation financing environment; fees purely contingent on success are forbidden, although fixed-sum "success" fees that do not exceed standard fees are permitted. *Id.* at 32.

[44] CPR Rule 44.3(2)(a).

[45] Buccirossi et al., *supra* note 4, at 52; *see also* Clough & McDougall, *United Kingdom*, *supra* note 24, at 31 ("[A] successful party is unlikely to recover more than 70% of the legal costs involved.").

[46] CAT Rule 55. On several occasions, the CAT has not awarded costs against an unsuccessful claimant as a policy matter in order not to discourage future claims. Clough & McDougall, *United Kingdom*, *supra* note 24, at 31.

[47] ATE insurance brokers offer relatively cheap rates and are predominately compensated by ATE insurance companies in the form of commissions. For example, Universal Legal Protection Ltd., a U.K.-based ATE insurance broker, offers its services for only £100. Even this £100 claim submission fee is recoverable from the defendant if the case is successful (as one of the claimant's costs of litigation).

[48] Nothing suggests that a lawyer cannot pay for his or her client's ATE insurance premiums. Premiums are often payable in one lump-sum payment.

any event, do not require any payment if the claim is unsuccessful. With any form of ATE insurance, a successful claimant may recover his or her ATE insurance premiums from the defendant(s) as a cost of litigation.[49]

Similarly, third party litigation funding is permitted in the United Kingdom to cover the costs of litigation (e.g., expert fees, expenses related to discovery/disclosure, etc.).[50] Litigation funding is entirely success-dependent—if the claim turns out to be unsuccessful, there is nothing to pay. As of 2011, there are at least fifteen dedicated third party funding companies with over £457 million invested in U.K. cases.[51] At least one U.K.-based litigation funding firm, Calunius Capital LLP, is specifically dedicated to funding cartel follow-on actions.[52] In evaluating a claim for funding, Calunius requires that the claim be worth at least six times the cost of pursuing the case through trial. The Court of Appeal has held that a third party funder's liability for costs pursuant to the "loser pays" rule should be limited to the amount of funding it provides.[53]

Unlike in the United States, however, contingency fees are currently prohibited in the United Kingdom.[54] But the *Courts and Legal Services Act of 1990* introduced Conditional Fee Arrangements (CFAs) as a limited exception to the prohibition. CFAs allow a lawyer to accept a case on the understanding that if the case is lost, he or she will not charge the client for services rendered. However, if the case is successful, the lawyer can charge a success fee in addition to his or her normal fee in order to compensate the lawyer for assuming the risk of not being paid.[55] The success fee is an agreed percentage of the lawyer's normal fee and generally may be collected from the losing defendant(s).[56]

U.K. courts have previously blessed the use of CFAs in the competition context. In *Arkin v. Borchard Lines*,[57] the claimant was financially unable to pursue a price-fixing claim against BCL Shipping Line. He therefore entered into a CFA with his lawyers and obtained third-party financing to cover other litigation costs. While his claim against BCL Shipping Line was ultimately unsuccessful, the claimant was not required to pay his lawyers under the CFA.

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[49] Effective April 2013, under the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*, however, successful claimants may no longer recover ATE insurance premiums from defendants. Legal Aid, Sentencing and Punishment of Offenders Act, 2012, c. 10 (Eng.).

[50] "Third-party litigation funding is 'a group of funding methods that rely on funds from the insurance markets or capital markets instead of, or in addition to, a litigant's own funds.'" Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1275–76 (2011) (quoting BAKER & MCKENZIE LLP, DEMAND FOR THIRD PARTY LITIGATION FUNDING RISES AS SUPPLY BECOMES VOLATILE (2008), *available at* http://www.bakernet.com/NR/rdonlyres/427586D3-6891-4FC2-B926-B0181DB75595/0/third_party_litigation_funding_ca_oct08.pdf).

[51] Christopher Hodges, John Peysner & Angus Nurse, *Litigation Funding: Status and Issues*, Research Report, CTR. FOR SOCIO-LEGAL STUDIES 62 (Jan. 2012).

[52] CALUNIUS CAPITAL LLP, http://calunius.com/ (last visited Aug. 29, 2012).

[53] In certain circumstances, however, a third party may be subject to a costs order for an unsuccessful claim. *See* Arkin v. Borchard Lines Ltd. & Ors, [2005] EWCA (Civ) 655 (Eng.); Buccirossi et al., *supra* note 4, at 52.

[54] Solicitors Act, 1974, c. 47, § 59 (Eng.); Solicitors' Code of Conduct 2007, Rule 2.04. The United Kingdom considers all fee agreements involving the lawyer accepting a percentage of the judgment to be a prohibited contingency fee.

[55] Hodges, Peysner & Nurse, *supra* note 51, at 17.

[56] *Id.* at 17–18. A success fee may never exceed 100% of the lawyer's normal fee and should reflect the level of risk involved. *Id.*

[57] Arkin v. Borchard Lines Ltd. & Ors, [2005] EWCA (Civ) 655 (Eng.).

The *Arkin* court upheld this financing arrangement and thus affirmed the use of CFAs in the competition law context.

The favorable U.K. litigation financing scheme may be improving—or at least changing.

The favorable U.K. litigation financing scheme may be improving—or at least changing. In April 2013,[58] the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (LASPO) is scheduled to come into effect. LASPO will lift the ban on contingency fees in civil litigation,[59] but extinguish the ability of claimants to recover CFA success fees from losing defendants pursuant to the "loser pays" principle (they must instead pay success fees out of their damages award). British experts predict the LASPO reforms will lead to a "range of 'imaginative' and blended DBA solutions" that will lead "more US law firms [to] enter the UK market to take advantage of contingency fees."[60]

Though the mechanisms in the United Kingdom are different from the lawyer-funding frequently used in the United States, the effect is similar—plaintiffs need not incur the costs or financial risks of litigation.[61]

Jursidictional Reach

Damages from competition law violations tend to affect large segments of the population. The geographic size of the United States, as well as the application of the Sherman Act to certain foreign conduct affecting U.S. imports

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[58] This effective date may be delayed beyond April 2013. As it stands, the effective date of the law has already been pushed back from the original October 2012 entry into force. *See* James Arrowsmith, *LASPO—CFA Ban to Be Delayed?*, Law, Less Ordinary: Legal Opinions from Browne Jacobson (May 24, 2012), http://www.law-less-ordinary.co.uk/wordpress/2012/05/24/laspo-bill-cfa-ban-to-be-delayed/ ("In the background to the announcement, rumours are already circulating of a general delay to implementation until October 2013.").

[59] Perhaps due to a cultural aversion to the term "contingency fee" and a desire to avoid adopting a fee structure tantamount to a U.S.-style contingency fee, the fees are referred to as "damages-based agreements" (DBAs) in the United Kingdom. Despite the distinguishing effort, DBAs are contingency fees in all but name. LASPO contains provisions allowing Parliament to adopt regulations on DBAs, but it remains unclear whether, and if so, how Parliament will regulate them. DBAs will be capped at 25% for personal injury actions; it remains unclear whether other types of actions will be similarly regulated. *See* Rachel Rothwell, *DBAs Under Scrutiny*, *in* 77 LITIG. FUNDING 5, 5 (Feb. 2012), *available at* http://www.calunius.com/media/3396/litigation%20funding%20-%20dbas%20under%20scrutiny%20-%20feb%202012.pdf.

[60] *Id.* at 7.

[61] Private plaintiffs in the United States are also incentivized by automatic trebling of damages resulting from federal competition law violations. *See* 15 U.S.C. § 15 (2006). In the United Kingdom, and in nearly every other EU Member State, however, success generally brings only compensatory damages. For example, both France and the Netherlands do not recognize any form of punitive damages and only allow recovery of compensatory damages. Frederieke Leeflang, *Netherlands*, *in* PRIVATE ANTITRUST LITIGATION IN 27 JURISDICTIONS WORLDWIDE 86, 90 (Samantha Mobley ed., 2010); Thill-Tayara & Asins, *supra* note 35, at 113–14. This aspect of the United Kingdom's private competition law damage recovery scheme is unlikely to change. *See* BIS Consultation, *supra* note 5, at 34–35 ("[T]he Government does not wish to bring about a regime in which the correct move for a defendant with a strong and winnable case is nevertheless to settle to avoid the risk of damages or legal costs. . . . [It] is clear that treble or punitive damages and contingency fees have no place in a UK collective action regime."). While automatic treble or double damages may be unavailable before U.K. tribunals, the CAT recently demonstrated a willingness to award punitive (exemplary) damages under limited circumstances. *See* 2 Travel Grp. Plc (in liquidation) v. Cardiff Trans. Servs. Ltd., [2012] CAT 19 (awarding £60,000 in exemplary damages on a £33,311.70 compensatory damages award in a follow-on action).

and commerce,[62] brings significant damage amounts within the ambit of U.S. private recovery actions. EU Member States like the United Kingdom, however, are smaller. Thus, the viability of a private damage recovery regime depends on the ability of U.K. claimants to bring claims before U.K. courts for damages caused by foreign concerns and/or incurred outside the country's borders.

What nexus must a foreign company have to permit a plaintiff to assert jurisdiction before a U.K. tribunal?

A claimant may bring suit in the United Kingdom against defendants from any number of Member States, provided at least one defendant is domiciled within the United Kingdom.[63] A corporation is domiciled in the Member State where its "statutory seat," central management, or principal place of business lies.[64] Under U.K. law, a corporation's statutory seat exists in the country where the business (1) is incorporated, (2) maintains a registered office,[65] or (3) was formed.[66] After establishing that at least one defendant is domiciled within the United Kingdom, similar claims[67] against other defendants (even those domiciled in foreign Member States) may be consolidated before the U.K. tribunal under European Commission Regulation 44/2001.[68]

Other EU Member State jurisdictions do not provide such broad jurisdiction. French law, for instance, takes no consideration of the nationality or domicile of the defendant(s) in establishing jurisdiction over a competition-related matter. Instead, French courts will only hear claims if "the anti-competitive practice was implemented in France or the damage was suffered in France."[69] Compared with the relatively limited French system, the United Kingdom remains "an attractive place in which to litigate antitrust disputes," due in large part to the "broad approach adopted by the English courts in affirming their own jurisdiction in cases with international elements."[70]

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[62] Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (2006).

[63] All persons and entities within the EU are governed by European Commission Regulation 44/2001, which mandates that all "persons domiciled in a member state shall, whatever their nationality, be sued in the courts of that member state." EC Regulation 44/2001, art. 2(1), 2001 J.O. (L 012) 1 (EC).

[64] *Id.* art. 60(1).

[65] A company's registered office is understood to be "a physical location where notices, letters and reminders can be delivered to the company," however it "need not be the place where the company carries on its day-to-day business." *Incorporation & Names*, DEP'T FOR BUSINESS INNOVATION & SKILLS 10 (May 2012), http://www.companieshouse.gov.uk/about/pdf/gp1.pdf.

[66] EC Regulation 44/2001, art. 60(2), 2001 J.O. (L 012) 1 (EC). The "registered office" is defined as the "address notified to the Companies Registry where a company's records will normally be kept. Under the Companies Act 2006 the registered office is to be quoted on company correspondence and is where official correspondence will be sent." *Legal Glossary*, CLICKDOCS, http://www.clickdocs.co.uk/glossary/registered-office.htm (last visited Sept. 17, 2012). Companies House, an Executive Agency of the Department for Business Innovation and Skills, maintains an online database of all registered offices in the United Kingdom. *See* COMPANIES HOUSE, http://wck2.companieshouse.gov.uk/a5623cfed1ee383c1ec8a9e40c6446ef/wcframe?name=accessCompanyInfo (last visited Aug. 27, 2012).

[67] The court will weigh whether the claims are closely related and whether consolidation would promote judicial economy.

[68] EC Regulation 44/2001, art. 6(1), 2001 J.O. (L 012) 1 (EC).

[69] Thill-Tayara & Asins, *supra* note 35, at 110–11.

[70] Maton & Campbell, *supra* note 30, at 6.

Can damages suffered outside of the United Kingdom be claimed before a U.K. tribunal?

Recent U.K. case law supports the exercise of jurisdiction over damages suffered on foreign soil. In particular, three U.K. court decisions—*Ryanair v. ExxonMobil Aviation International*, *Provimi v. Aventis*, and *Cooper Tire v. Shell Chemicals*—evidence the expansive jurisdictional reach of U.K. courts. In *Ryanair v. ExxonMobil Aviation International*, the High Court exercised jurisdiction over claims against the U.K.-based ExxonMobil Aviation International and its Italian subsidiaries based on the subsidiaries' participation in a cartel in Italy.[71] In *Provimi v. Aventis*,[72] the court exercised jurisdiction where claimants sued only the Switzerland-based Roche Group and did not directly charge any U.K. entity.[73] The court found that because an English subsidiary of Roche "implemented" the alleged anti-competitive scheme by selling products at cartel prices,[74] a sufficient nexus existed to allow jurisdiction over all Roche Group entities (even those located outside of the United Kingdom).[75] And in *Cooper Tire v. Shell Chemicals*,[76] the court exercised jurisdiction over a follow-on action based on a European Commission determination against non-U.K. tire manufacturers on similar reasoning as that adopted in *Provimi*.[77]

Standing and Pass-Through

While U.S. federal competition law generally restricts standing to direct purchasers, it also guarantees that direct purchasers generally are not vulnerable to a pass-through defense.[78] The standing and pass-through rules in the United Kingdom are less clear cut. To date, the applicability of the pass-through defense in the competition law context has never been determined by a U.K. court. Thus, its applicability in the United Kingdom remains uncertain.[79] However uncertain the state of the law in the United Kingdom, other EU Member States—like France—offer far greater hurdles for successful competition law claims. French law recognizes the pass-through defense and imposes a high burden of proof on claimants to prove the absence of passing-on as part of proving

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[71] The ruling has been appealed by ExxonMobil Aviation International and is scheduled to be heard in October 2012.

[72] Provimi Ltd. & Ors v. Aventis Animal Nutrition SA & Ors, [2003] EWHC (Comm) 1211 (Eng.).

[73] *See* Morony & Morfey, *supra* note 29, at 40.

[74] The court found the agreement was implemented in the United Kingdom even when the U.K.-based subsidiary had no knowledge of the cartel itself. *Id.*

[75] U.K. courts are often willing to exercise such broad jurisdiction that creative and knowledgeable potential defendants have resorted to employing the so-called "Italian torpedo" strategy. *Id.* at 43. The Italian torpedo strategy takes advantage of European Commission Regulation 44/2001 Articles 27 and 28. Regulation 44/2001 requires a Member State court to dismiss or stay an action where the same or similar action is ongoing in another EU jurisdiction. Under the Italian torpedo strategy, a potential defendant will sue in a jurisdiction like Italy seeking a negative injunction or declaratory relief as to liability before a claimant files suit elsewhere. *Id.* The intended effect is to preempt a U.K. court's exercise of jurisdiction over the matter. *Id.* While creative, the Italian torpedo strategy may be unconstitutional and the English High Court has continued to exercise jurisdiction nonetheless. *Id.*; *see also* Cooper Tire & Rubber Co. v. Shell Chemicals UK Ltd., [2009] EWHC (Ch) 2609 (Eng.) (determining that the court was not bound to grant a stay or dismissal under Article 28 of Regulation 44/2001).

[76] [2009] EWHC (Ch) 2609 (Eng.).

[77] *Provimi*, [2003] EWHC (Comm) 1211, [31], [39]–[41] (Eng.); Morony & Morfey, *supra* note 29, at 40.

[78] A pass-through defense is one in which a defendant seeks to reduce or eliminate a plaintiff's damage claim on the ground that the plaintiff passed through some or all of any alleged illegal overcharge to downstream customers.

[79] Lesley Farrell & Sarah Ince, *United Kingdom: Private Enforcement*, *in* THE EUROPEAN ANTITRUST REVIEW 2008, at 228, 228, *available at www.sjberwin.eu/Contents/Publications/pdf/49/280907100746.pdf.*

damages suffered.[80] Thus, the legal climate in the United Kingdom, while uncertain, remains the most claimant-friendly jurisdiction in the EU.[81]

Likewise, the status of indirect purchaser claims under U.K. law is undetermined. The European Court of Justice (ECJ) decision in *Manfredi v. Lloyd Adriatico* declared that "any individual" is entitled to claim damages under European Commission competition law. Because ECJ decisions are binding on Member State courts, U.K. courts must allow all individuals and businesses, even indirect purchasers, to claim damages under European Commission competition law. Under U.K. law, however, the matter remains unclear and there have been no successful indirect purchaser claims to date.[82]

Collective Redress

A significant deterrent to competition law plaintiffs in the United Kingdom is that, like most of Europe,[83] the United Kingdom adopts a pure "opt-in" approach for identifying claimants, and does not have an equivalent to the U.S. opt-out class action system. While there do exist collective redress options for consumer associations or groups of individuals, depending on whether the case is before the High Court or the CAT, they do not compensate for the absence of an opt-out scheme.

A significant deterrent to competition law plaintiffs in the United Kingdom is that, like most of Europe, the United Kingdom adopts a pure "opt-in" approach for identifying claimants, and does not have an equivalent to the U.S. opt-out class action system.

For claims before the High Court, Civil Procedure Rule 19.11 permits the court to manage claims raising "common or related issues" of law or fact under a group litigation order (GLO). Pursuant to the general U.K. opt-in system, the court will consolidate claims lodged on an individual basis by named clients into a GLO. When determining whether the cases concern "common or related" issues of law or fact, the court has wide discretion and often groups individual claims broadly. The consolidated claims procedure is, by its very nature, a cumbersome method to bring a claim for a large number of claimants.[84]

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[80] Doux Aliments v. Ajinomoto Eurolysine, Cour d'appel [CA] [regional court of appeal] Paris, June 10, 2009 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters], June 15, 2010 (Fr.).

[81] The European Commission White Paper "acknowledged that defendants should be able to rely on a passing-on defence." Morony & Morfey, *supra* note 29, at 49; *see also White Paper*, *supra* note 5.

[82] By contrast, in the United States, indirect purchasers have standing to sue in the majority of states. *See* Daniel L. Rubinfeld, *Antitrust Damages*, RESEARCH HANDBOOK ON THE ECONOMICS OF ANTITRUST LAW 2 (Einer Elhauge ed., 2009) *(indicating that thirty-five states permit indirect purchaser lawsuits)*, *available at* http://ec.europa.eu/competition/antitrust/actionsdamages/rubinfeld.pdf. *However, under federal law, only direct purchasers may sue. Id.*

[83] With the notable exceptions of the Netherlands and Portugal, no EU Member State offers an opt-out approach for identifying claimants. Buccirossi et al., *supra* note 4, at 20.

[84] "In practice, GLOs are rarely used, and have not been used in the context of competition litigation to date." Morony & Morfey, *supra* note 29, at 49.

Representative actions are also permitted at the High Court under Civil Procedure Rule 19.6(1). A claimant may pursue a representative action on behalf of himself and others with the "same interest," provided that all participants opt-in to the action. Use of representative actions under Civil Procedure Rule 19.6(1) has proved difficult in the past. For example, in *Emerald Supplies Ltd. v. British Airways plc*, the High Court refused to allow a representative action where the group of direct and indirect claimants was not narrowly defined.[85]

U.K. courts . . . offer claimants "a considerable arsenal—a combination of efficiency, expertise and extensive disclosure rules."

Claims before the CAT are governed by sections 47A and 47B of the 1998 Competition Act, under which individual claimants and designated consumer protection associations may bring actions.[86] Since the CAT was established in 2003, only one representative action has been brought before the tribunal by a designated consumer protection association under section 47B of the Competition Act.[87]

But the current limitations on collective redress in the United Kingdom may be changing. In April 2012, the U.K. Department for Business Innovation and Skills (BIS) issued a request for public consultation entitled *Private Actions in Competition Law: A Consultation on Options for Reform* proposing several changes to existing U.K. competition laws. BIS outlined four primary proposals to further its goal of promoting private-sector led challenges to anti-competitive behavior: (1) to establish the CAT as a "major venue" for U.K. competition actions; (2) to introduce an opt-out collective redress system for competition law claims; (3) to promote alternative dispute resolution procedures; and (4) to ensure private actions complement the existing public enforcement system. To accomplish its goals, BIS proposed to allow the CAT to hear stand-alone actions and issue injunctive relief, establish a fast-track procedure for simple competition claims, and to grant the OFT power to "encourage" companies found in breach of competition law to provide restitution to harmed parties. The comment period for the BIS consultation closed on July 24, 2012, and BIS is currently preparing a response and revisions to its initial proposals.

Conclusion

Though not as hospitable as their U.S. counterparts, U.K. courts nonetheless offer claimants "a considerable arsenal—a combination of efficiency, expertise and extensive disclosure rules."[88] Recent proposals, such as an opt-out collective redress system, offer further hope that the United Kingdom may become the European forum of choice for competition law litigation.

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[85] *Id.*; Emerald Supplies Ltd. v. British Airways plc, [2009] EWCA (Civ) 741 (Eng.).

[86] Morony & Morfey, *supra* note 29, at 49. The only currently recognized designated consumer protection association is the Consumers' Association. *Id.*

[87] The Consumers' Association filed a follow-on action on behalf of consumers who were overcharged for soccer shirts. Despite the large number of affected consumers, the Consumers' Association was unable to locate a significant number of consumers to opt-in to the complaint and the case was settled. *Id.*; Consumers' Ass'n v. JJB Sports plc, [2009] CAT 3.

[88] Maton & Campbell, *supra* note 30, at 6.

Recent Korean Supreme Court Decisions on Per Se Illegality and Noerr-Pennington in Korea

by Cecil Saehoon Chung and Sung Bom Park[1]

Cecil Saehoon Chung

The Korean Supreme Court recently announced three important opinions. In the first two cases announced on the same day, the Court clarified the proper analytical mode and sequence for concerted conduct. The Court ruled that the rule of reason applies to all concerted conduct cases in Korea, including even those commonly recognized as *per se* illegal horizontal price fixing cases in the United States.[2] In the third case, the Court rejected a defense theory that would have amounted to the *Noerr-Pennington* doctrine in the United States. It remains to be seen how these rulings will affect the courts and Korea Fair Trade Commission ("KFTC") in their interpretation, application and enforcement of the Korean antitrust laws and help further develop Korean antitrust jurisprudence.

Sung Bom Park

No *Per Se* Illegal Concerted Conduct in Korea

On April 26, 2012, the Korean Supreme Court issued two decisions that shed light on the proper analytical framework for concerted conduct cases under Article 19(1) of the Monopoly Regulation and Fair Trade Act ("MRFTA"). In *Kolon Glotech et al. v. KFTC* (Supreme Court judgment No. 2010Du18703 delivered on April 26, 2012) (the "BMW" decision), the Court clarified the correct sequence of Article 19(1) analysis by holding that, first and foremost, a relevant antitrust market must be defined based on a correct set of relevant factors before competitive effects can be ascertained. In *D & T Motors et al. v. KFTC* (Supreme Court judgment No. 2010Du11757 delivered on April 26, 2012) (the "Lexus" decision), the Court reconfirmed that Article 19(1) offenses are not *per se* illegal but rule of reason offenses and that the KFTC has the burden of proof in establishing a properly defined relevant antitrust market and anticompetitive effects within the properly defined market.

In the BMW decision, the Second Department of the Korean Supreme Court decided that the KFTC incorrectly analyzed an alleged agreement among certain BMW automobile dealers in Korea. The Court held that the KFTC should define a relevant antitrust market first and then assess anticompetitive effects, if any, within the properly defined market. In the Court's opinion, the failure to employ the correct analytical steps and methodology tainted

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[2] Page citations are not available for the Korean Supreme Court's decisions.

the rest of the Seoul High Court's decision (Seoul High Court judgment No. 2009Nu9873 delivered on July 22, 2010) that affirmed the KFTC's initial determination. Therefore, the Court reversed and remanded the case to the Seoul High Court for further consideration consistent with the Supreme Court's instructions.

In 2008, the KFTC alleged that certain BMW automobile dealers in Korea agreed among themselves to protect their sales margins in violation of Article 19(1) Item 1 of the MRFTA, which prohibits an agreement to undertake unfair concerted actions or an action directing others to engage in such conduct that fixes, maintains, or changes prices. The KFTC imposed an administrative fine of Korean Won 14,259 million. On the BMW dealers' appeal, in 2010 the Seoul High Court sided with the KFTC. However, in its April 26, 2012 decision, the Supreme Court ruled that the KFTC and the Seoul High Court should have defined a relevant market by undertaking a comprehensive review of all of the factors that are relevant for market definition, and then assessed anticompetitive effects, if any, within the properly defined market. Instead, in the Court's view, the KFTC and the Seoul High Court relied on incorrect and incomplete set of factors that are more relevant to competitive effects analysis but not as relevant to or appropriate for market definition. The Court admonished that such an incorrect analytical framework would unfairly and inappropriately define a self-serving market.

Specifically, the KFTC asserted that market definition can vary depending on the types of potentially anticompetitive conduct, *i.e.*, the commonly used distinction between hardcore and softcore agreements. The KFTC then relied on the following factors to allege an "imported new BMW automobiles in Korea only" market:

(1) The subject of the concerted conduct and the intent of the actors – the BMW dealers in Korea agreed to limit the discount range and other sales conditions;

(2) The scope or area of the concerted conduct – the concerted conduct here is limited to "intrabrand" competition and cannot be said to affect "interbrand" competition against other brands of imported automobiles;

(3) The methods of the concerted conduct – it is not a direct restriction on the consumer purchase price, but rather the BMW dealers in Korea could only employ a very limited method of adjusting the sales margins within the range of margins available to them; and

(4) The effects of the concerted conduct – the concerted conduct directly affects "intrabrand" competition, especially "intrabrand 'price'" competition.

It remains to be seen whether the KFTC will start losing an inordinate number of horizontal price-fixing cases due to its supposedly increased burden of proof on market definition and competitive effects.

The Court overruled the KFTC's "imported new BMW automobiles in Korea only" market definition. The Court held that these factors are not factors for market definition as a threshold matter, but rather they are factors for assessing potential anticompetitive effects after a relevant antitrust market has been properly defined.

In remanding the case, the Court instructed that the factors that are relevant to and should be comprehensively examined for market definition include: (1) similarities or dissimilarities of product functions and uses; (2) consumers' perception of interchangeability or substitutability; and (3) sellers' business decision making processes and types in response to consumers' such perception on the substitutability. In the process, the Court strongly indicated that the evidence of "interbrand competition," *i.e.,* substitutability among different brands, should not be

lightly dismissed in favor of "intrabrand competition" in the market definition phase of a properly constructed antitrust analysis.

In the Lexus decision decided on the same day as the BMW case, the First Department of the Korean Supreme Court reviewed the history of Article 19(1) of the MRFTA and reconfirmed that it proscribes "unfair" concerted conduct under the rule of reason analysis rather than a *per se* illegal treatment. Therefore, the Court observed that the necessary first step is to define a relevant antitrust market and discussed the relevant factors for market definition in greater detail.

While noting that the Seoul High Court was correct in engaging in market definition first, the Court ruled that there was insufficient evidence to support the Seoul High Court's actual market definition. More specifically, the KFTC argued that either the conduct at issue was a *per se* illegal offense and thus no market definition was necessary or, alternatively, the relevant market was "imported Lexus sales in Korea only." On the other hand, the Lexus dealers in Korea asserted that the market should include all imports and luxury Korean automobiles. After considering various relevant factors, the Seoul High Court adopted the Lexus dealers' market definition.

On appeal, however, the Supreme Court noted that the evidence before the Seoul High Court simply consisted of (1) the KFTC's investigation report and Commission Opinion; (2) a study on the effect of Korean car taxes or sales trends of domestic cars; and (3) mere registration records of each brand of imported automobiles. The Court determined that this was insufficient evidence to support the Seoul High Court's market definition. By pointing out the inadequacy of the proffered evidence in the proceedings below, the Court provided further guidance on the types of evidence that may be required to support a properly defined antitrust market. Furthermore, the Court unequivocally stated that the KFTC has the burden of proof to establish and justify its "imported Lexus sales in Korea only" market. As it did in the BMW case, the Court remanded the case to the Seoul High Court for reconsideration consistent with the Court's instructions.

On August 20, 2012, pursuant to its already existing review and update schedule, the KFTC revised the 2007 version of its internal Concerted Conduct Analysis Guidelines ("KFTC Concerted Conduct Guidelines"). In response to the Supreme Court's BMW and Lexus rulings, the KFTC deleted references to the "hardcore v. softcore concerted conduct" distinction found in the 2007 KFTC Concerted Conduct Guidelines.[3] Moreover, in the 2012 version, the KFTC kept the 20% market share safe harbor rule from the 2007 Concerted Conduct Guidelines, but without the clause specifically limiting the safe harbor rule to softcore concerted conduct only.[4] While the KFTC kept the qualifier "in the absence of special circumstances," under the new 2012 Concerted Conduct Guidelines[5] effective August 21, 2012 through August 20, 2015, arguably even what is commonly deemed as a hardcore price-fixing agreement may not be automatically ineligible for a safe harbor treatment.

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[3] Article IV.1.(a) of the 2007 KFTC Concerted Conduct Guidelines defined "hardcore" concerted conduct as those concerted actions that, by their very nature, clearly produce nothing but anticompetitive effects. Furthermore, "hardcore" concerted conduct has no purpose other than restricting competition, and directly increases prices or reduces output in a relevant market. Article IV.1.(a)(1) of the 2007 KFTC Concerted Conduct Guidelines.

[4] Under the 2007 version, in conducting a "softcore" concerted conduct investigation, the KFTC would close the investigation if the combined market share of the concerted conduct participants were 20% or less as there likely would be no or insignificant anticompetitive effects. Article IV.2.(a)(2) of the 2007 KFTC Concerted Conduct Guidelines. The 2012 version does not contain the term "softcore" in an otherwise identical provision.

[5] Article IV.2.(b)(3) of the 2012 KFTC Concerted Conduct Guidelines.

It remains to be seen whether the KFTC will start losing an inordinate number of horizontal price-fixing cases due to its supposedly increased burden of proof on market definition and competitive effects, and if so, whether that would prompt legislative action to codify the concept of hardcore concerted conduct or price-fixing cartels.

No *Noerr-Pennington* in Korea

On May 24, 2012, the Third Department of the Korean Supreme Court in essence ruled that there is no *Noerr-Pennington* doctrine in Korea. In *Samsung Fire & Marine Insurance Co., Ltd. v. KFTC* (Supreme Court judgment No. 2010Du375 delivered on May 24, 2012) (the "Samsung Fire Insurance" decision), the Court held that even if competitors' concerted attempt to influence government policy or law enforcement were their exercise of the constitutionally protected rights to free speech and to petition government, this alone would not mean such concerted conduct is exempt from the reach of antitrust law.

The KFTC characterized the ruling as the Korean judiciary's first explicit opinion that rejected in Korea the judicially created *Noerr-Pennington* doctrine of the United States. Until this Samsung Fire Insurance opinion, it was not clear whether competitors' individual or concerted efforts to petition government and agreements for such joint petitioning were exempt from the reach of antitrust as an exercise of the constitutionally protected right to free speech. Previously, it was suggested that in certain situations the *Noerr-Pennington* doctrine may shield from antitrust liability an otherwise illegal competitor agreement. The Samsung Fire Insurance decision seems to reject such an exception to antitrust law and clarifies that the rights to speech and petition alone will not save companies from a potential violation of the ban on price-fixing agreements among competitors.

In the Samsung Fire Insurance case, through over twenty meetings, fourteen life insurance companies and ten casualty insurance companies agreed to reduce discount rates for preferred corporate clients, reduce or eliminate premium refund rates, jointly determine risk rates in connection with their group casualty insurance business. The KFTC ordered corrective measures and imposed substantial administrative fines. The Seoul High Court affirmed.

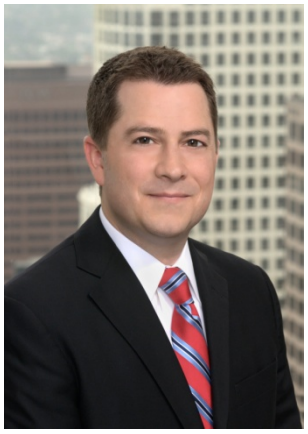
On appeal, the Supreme Court affirmed the lower court's decision. First, the Court agreed with the lower court that the defendants' concerted conduct went beyond simply collecting and expressing opinions to the Financial Supervisory Service for its policy formulation. Second, the Court held that the Financial Supervisory Service did not directly and specifically command the defendant insurance companies to agree to reduce discounts on group insurance premiums and to agree to reduce or eliminate refunds of premiums. The Court also determined that the underlying insurance laws and regulations did not provide an exception to the reach of antitrust. This part of the opinion could be understood as the Court's determination that Korean Congress did not displace competition with regulation for the group casualty insurance market.

On the *Noerr-Pennington* type defense argument, the Seoul High Court ruled that the insurance companies' concerted conduct was a *per se* illegal direct restraint on price and as such could not be viewed as an exercise of the constitutionally protect right of free speech. Without much elaboration, the Supreme Court ruled that a company's exercise of the constitutionally protected rights to free speech and petition government does not in and of itself remove the conduct from the reach of antitrust.

Nonetheless, the Court also observed that in this case the defendant insurance companies did not engage in the prohibited concerted conduct for the (presumably legitimate) purpose of influencing the Financial Supervisory Service's policy formulation. Thus, it remains to be seen whether the Court will recognize a rare but appropriate occasion for according immunity in the future when companies are indeed engaged in concerted conduct for the legitimate purpose of influencing or petitioning government.

Be Quick, But Don't Hurry[1] — An Initial Checklist for Responding to a Grand Jury Subpoena Served by the Antitrust Division

by Eric P. Enson[2]



There are few things more jarring to a company than receiving a grand jury subpoena regarding possible criminal violations of the antitrust laws. The initial hours and days of an investigation by the Antitrust Division of the Department of Justice can be particularly daunting as executives, employees, and attorneys scramble to comprehend what lies before them, piece together what happened, and deal with inquiries from within and outside the organization. Critical decisions, however, must be made quickly. And missteps in this early phase of the investigation — whether from failing to act or failing to think before acting — can have great consequences that may not be reversible.

Criminal penalties for obstruction of justice are severe and could well exceed penalties levied under the antitrust laws.

The manner in which counsel works with clients in responding to a grand jury subpoena, as well as the manner in which such matters are defended, vary from case to case and from lawyer to lawyer. For instance, the decision of whether to cooperate with an investigation or to seek leniency will depend almost entirely on the facts surrounding, and the parties involved in, the investigation. But there are some steps counsel should immediately consider after learning of an investigation, such as preserving relevant documents and data, contacting the government, and conducting an internal investigation. What follows are some practical considerations relating to the initial steps outside counsel should consider taking in the immediate aftermath of a grand jury subpoena.

Start at the Beginning — Read the subpoena. Learning of a criminal antitrust investigation can be one of the most overwhelming events in an organization's existence. Counsel can frequently be overwhelmed by concerned executives and employees, demands from the government, and management of the legal team. So, it is sometimes easy to forget that the first step in virtually all investigations is for counsel to carefully read the grand jury subpoena and its requests for documents.

Reviewing the subpoena is the best way to get an early sense of the government's focus. The subpoena will state where the grand jury is sitting, which may provide some insight into the geographic scope of the investigation. The

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subpoena's document requests will give a glimpse into the type of conduct the government is focusing on (*e.g.*, "all documents regarding YOUR bid to supply X Corp"), some of the relevant players (*e.g.*, "all COMMUNICATIONS with Competitor Y"), and the time frame under scrutiny (*e.g.*, "Unless otherwise specified, this Subpoena shall cover the period from January 1, 2002, to the date of this Subpoena"). Moreover, the subpoena will provide counsel with a starting point for discussions with the company and an understanding of potential problem areas.

Reduced to its essence, the first communication with the government is an opportunity to learn valuable information, assess the strength of the government's case, and create an open and cooperative dialogue with the Antitrust Division lawyers.

Don't Make Matters Worse — Preserve all possibly-relevant documents and electronic data. In the early hours of an investigation, counsel must ensure that the company is preserving all possibly-relevant documents and data. Failing to immediately preserve all potential evidence can signal an unwillingness to cooperate with the government's investigation.[3] What is more, deleting or concealing relevant materials can support a charge of obstructing justice.[4] Criminal penalties for obstruction of justice are severe and could well exceed penalties levied under the antitrust laws.[5] In fact, the Antitrust Division has been known to prosecute individuals for obstruction of justice, regardless of whether they took part in the underlying antitrust violation. For example, in the carbon products antitrust investigation, the DOJ successfully prosecuted four executives (one of whom was extradited to the United States from the United Kingdom) for obstruction of justice.[6] According to the government, these individuals impeded the Antitrust Division's investigation by, among other things, forming a "document destruction task force" to collect and destroy documents called for by the grand jury.[7] What is notable about these prosecutions — besides the fervor with which the DOJ went after these individuals — is that none of these executives were charged with the underlying antitrust violations.[8]

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[3] During most investigations, Antitrust Division attorneys frequently ask — formally or informally — for a description of all document-preservation efforts, including when the efforts were undertaken.

[4] In the Antitrust Division's investigation of price-fixing in the DRAM industry, a sales manager of one of the investigation's targets pleaded guilty to obstruction of justice for altering and concealing documents containing competitor pricing information, which were requested in a grand jury subpoena. *See* Press Release, Antitrust Div., Micron Executive Agrees to Plead Guilty to Obstructing a Price-Fixing Investigation Involving Computer Memory Chips (Dec. 17, 2003), *available at* http://www.justice.gov/atr/public/press_releases/2003/201884.pdf. Likewise, in the carbon fiber investigation, a company was charged with obstruction of justice for sending incriminating documents from the United States to Japan in an effort to hide the documents from the grand jury. *See* Press Release, Antitrust Div., Japanese Company, Its American Subsidiary and Japanese Executive Indicted for Obstruction of Justice (Mar. 19, 2002), *available at* http://www.justice.gov/atr/public/press_releases/2002/10863.pdf.

[5] *See* 18 U.S.C. §§ 1503(b)(3) (calling for a maximum prison sentence of ten years for unlawfully impeding or influencing a grand jury investigation), 1505 (calling for a maximum prison term of five years for obstruction of proceedings before departments, agencies, and committees).

[6] *See* Press Release, Antitrust Div., Former CEO of the Morgan Crucible Co. Found Guilty of Conspiracy to Obstruct Justice (July 27, 2010), *available at* http://www.justice.gov/opa/pr/2010/July/10-at-859.html.

[7] *Id.*

[8] *Id.*

Needless to say, then, there are a lot of good reasons to stay on the right side of the document-preservation line. With assistance from the company's information technology personnel, counsel should work to cease the automatic deletion of electronic documents and data. All information on back-up tapes and servers should be preserved and overwriting procedures should be halted. Moreover, in a broad "document preservation memorandum," all relevant personnel (and perhaps all personnel, depending on the situation) must be instructed not to delete relevant documents. And even if it is too early in the investigation to know precisely what types of documents need to be preserved, counsel and the company can call for the preservation of all documents relating to pricing, bids, competition, and contacts with competitors just to be on the safe side. Preservation demands can be refined later as counsel learns more about the investigation and the alleged conduct. A good rule of thumb is that an early document preservation memorandum cannot be too broad. Finally, the company's document preservation efforts can be questioned down the road, so it is important to document all steps taken on this front and the rationale behind them.

"Be a Good Listener. Your Ears Will Never Get You in Trouble."[9] ***— Assess whether to contact the DOJ.*** In most situations, it is a good idea for counsel to contact the DOJ shortly after learning of the investigation.[10] At the very least, immediate contact will put the government on notice that the company is represented by counsel, which may head off informal attempts by the government to interview employees, and the contact should signal that the company takes compliance with the subpoena seriously.[11] But this is generally not the time for counsel to advance any arguments or attempt to educate the government.

Rather, the first communication with the DOJ is a time to listen. In many circumstances, the Antitrust Division will provide defense counsel with critical information during the first communication, such as whether the company is a target of the investigation or merely a witness and possibly the names of employees who the government believes have individual exposure. In addition, the government may provide details regarding the true focus of the investigation, the manner in which the investigation originated, and possible shortcuts to resolving the investigation. Reduced to its essence, the first communication with the government is an opportunity to learn valuable information, assess the strength of the government's case, and create an open and cooperative dialogue with the Antitrust Division lawyers.

Sometimes, the first communication with the Antitrust Division may also present an opportunity to pledge cooperation with the investigation in the hope of reducing fines and prison terms. To do this in the infancy of the investigation, however, counsel must have a significant understanding of the company's exposure as well as the government's focus. The possibility of quickly seeking leniency is discussed below.

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[9] Frank Tyger, Editorial Cartoonist, Columnist, and Humorist, Trenton Times.

[10] The bottom portion of the grand jury subpoena will indicate the Antitrust Division attorney who served the subpoena. The attorney who served the subpoena is usually one of the attorneys responsible for running the investigation.

[11] In the absence of assurances that relevant documents are being preserved, the Antitrust Division has the ability, with probable cause, to obtain search warrants and seize relevant documents. *See* Fed. R. Crim. P.. 41; Gregory J. Werden, Senior Econ. Counsel, Antitrust Div., et al., Deterrence and Detection of Cartels: Using All the Tools and Sanctions," Speech Before The 26th Annual National Institute of White Collar Crime (Mar. 1, 2012), at 13, *available at* http://www.justice.gov/atr/public/speeches/283738.pdf.

Managing Expectations — Meet with the client. The first meeting between counsel and client after learning of a criminal investigation is perhaps the most critical step in building a relationship that is strong enough to weather what will likely be a long and arduous investigation. An ideal way to foster this relationship is for counsel to ensure that the client has a firm understanding of the scope of the problem. The tone, temperament, and results of this meeting will vary based on a number of factors, such as counsel's relationship with the client, but there are several topics counsel should address during this initial discussion.

The first meeting between counsel and client after learning of a criminal investigation is perhaps the most critical step in building a relationship that is strong enough to weather what will likely be a long and arduous investigation.

First and foremost, it is important to determine who the client is and from whom counsel will be taking direction. This is not always a clear-cut determination when dealing with large corporations, particularly if one or more of the company's executives are implicated in the alleged antitrust violation. In such circumstances, it may be necessary to exclude implicated executives from discussions with corporate counsel, or for the company to form a special committee to communicate with counsel, in order to avoid conflicts of interest and waiver of the attorney-client privilege, as discussed below.[12]

Second, it is critical that counsel communicate the magnitude of what the company is facing. This may include a description of the antitrust laws and relevant statutes,[13] the DOJ's approach to investigating and prosecuting alleged antitrust violations,[14] potential criminal penalties, which are now as high as up to $100 million per violation for corporations and up to $1 million and 10 years in prison per violation for individuals,[15] and examples of charges recently brought by the Antitrust Division.[16] In addition, the company needs to understand that it cannot buy its way out of the problem. To be clear, the Antitrust Division will seek to individually prosecute the most-senior employees involved in unlawful cartel activity, and the government will almost certainly seek prison time.[17] As the

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[12] *Ryan v. Gifford*, No. 2213-CC, 2007 WL 4259557 (Del. Ch. Nov. 30, 2007), *appeal denied*, 2008 WL 43699 (Del. Ch. Jan. 2, 2008) (ruling that when a special litigation committee shared the report of its outside counsel's investigation of criminal conduct with the full board, which included individual board members who were under investigation for alleged wrongdoing, it waived any claim to attorney-client privilege which may have attached to communications with the outside counsel).

[13] While most investigations handled by the Antitrust Division are brought under the Sherman Act, 15 U.S.C. § 1, the Antitrust Division regularly prosecutes alleged acts of mail fraud, 18 U.S.C. § 1341, wire fraud, 18 U.S.C. § 1343, and other statutes, such as the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68.

[14] *See generally*, Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For (Revised Sept. 28, 2005), *available at* http://www.justice.gov/atr/public/guidelines/211578.htm; *see also* R. Hewitt Pate, Ass't Att'y Gen., Antitrust Div., Vigorous and Principled Antitrust Enforcement: Priorities and Goals, Address Before the Antitrust Section of the ABA Annual Meeting (Aug. 12, 2003), *available at* http://www.justice.gov/atr/public/speeches/201241.pdf.

[15] *See* 15 U.S.C. § 1. In addition, the Comprehensive Crime Control Act provides for alternative maximum sanctions of twice the gross gain to the defendant, or twice the gross loss to the victims. 18 U.S.C. § 3571(d).

[16] *See* Antitrust Div. Update (Spring 2012), *available at* http://www.justice.gov/atr/public/division-update/2012/criminal-program.html; *see also* U.S. Dep't Justice, Antitrust Div., Criminal Enforcement, Fine and Jail Charts (2000-2011), *available at* http://www.justice.gov/atr/public/criminal/264101.html.

[17] Scott D. Hammond, Deputy Ass't Att'y Gen., Antitrust Div., Charting New Waters in International Cartel Prosecutions, Speech Before The 20th Annual National Institute on White Collar Crime (Mar. 2, 2006), §§ D, F ("It is indisputable that the

Antitrust Division has publicly stated, "Division practice now is to insist on jail sentences for all defendants domestic and foreign. The Division will not agree to a 'no-jail' sentence for any defendant, and our practice is not to remain silent at sentencing if a defendant argues for a no-jail sentence."[18]

Third, if the client operates in other countries, or is suspected of participating in an international cartel, it should be advised that foreign competition authorities may pursue their own investigations of the alleged conduct. Indeed, the United States has entered into cooperation agreements with a number of foreign authorities, which permit information sharing among the countries in the pursuit of international cartels.[19] Accordingly, counsel and client need to explore whether the company should obtain representation and/or advice in foreign jurisdictions.

"The Division will not agree to a 'no-jail' sentence for any defendant, and [its] practice is not to remain silent at sentencing if a defendant argues for a no-jail sentence."

Fourth, counsel should make clear that once word of the investigation becomes public, scores of private suits by direct and indirect purchasers will be filed and that, in many instances, damages obtained in these private actions exceed fines levied by the government.[20] Various other types of civil lawsuits should also be anticipated, such as securities fraud actions and shareholder derivative suits seeking reimbursement of losses caused to stockholders by the antitrust investigation. And if the federal government is a purchaser in the market affected by the alleged collusion, it may seek reimbursement of resulting overcharges under the False Claims Act,[21] or it may institute debarment proceedings seeking to terminate the company's participation in government-funded programs.[22] Not to be outdone, state attorneys general frequently institute their own civil investigations of the alleged collusion under state antitrust laws.

Fifth, counsel should also explain that public companies receiving a grand jury subpoena may need to disclose the investigation in SEC filings. It is therefore essential for counsel and the company to consider seeking the advice of securities lawyers where necessary.

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most effective deterrent to cartel offenses is to impose jail sentences on the individuals who commit them. Corporations only commit cartel offenses through individuals, so executives as well as their employers need to be deterred from engaging in such conduct."), *available at* http://www.justice.gov/atr/public/speeches/214861.htm.

[18] Scott D. Hammond, Deputy Ass't Att'y Gen., Antitrust Div., The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades, Speech Before The 24th Annual National Institute on White Collar Crime (Feb. 25, 2010), *available at* http://www.justice.gov/atr/public/speeches/255515.htm.

[19] *See* Scott D. Hammond, Deputy Ass't Att'y Gen., Antitrust Div., Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program, Speech Before The 56th Annual Spring Meeting (Mar. 26, 2008), *available at* http://www.justice.gov/atr/public/speeches/232716.htm; *see also* USDOJ: Antitrust Division International Program, http://www.justice.gov/atr/public/international/index.html (providing information regarding the Antitrust Division's International Program).

[20] *See* Deterrence and Detection, *supra* note 11.

[21] 31 U.S.C. §§ 3729-33.

[22] 48 C.F.R §§ 9.400-.409.

Finally, it is also important to alert the company that the Antitrust Division, particularly when faced with international cartels, frequently places subjects of an investigation on the government's "border watch" list.[23] Under this program, if an individual of interest attempts to travel in or out of the country, he or she could be stopped by customs officials, questioned, and even arrested.[24] Likewise, the Antitrust Division has utilized INTERPOL's "Red Notice" system, which is an international "wanted list" monitored by INTERPOL's member countries, to capture and detain fugitives in foreign jurisdictions.[25] Thus, as the DOJ has put it, "even if a fugitive resides in a country that would not extradite the defendant to the United States for an antitrust offense, the fugitive still runs the risk of being extradited if he travels outside of his home country."[26]

The Race Is On — Quickly consider seeking leniency. "On a number of occasions, the second company to apply for leniency has been beaten by a prior applicant by only a number of hours."

With an appreciation for the immensity of the problem, counsel can then engage the client on issues relating to an internal investigation, obtaining independent counsel for certain employees, and possibly seeking leniency with antitrust enforcers at home and abroad, as discussed below. In addition, counsel and the client should explore the logistics of collecting documents and data in response to the subpoena and estimate the costs of the investigation.

Who Knew (or Did) What When? — Conduct an internal investigation. The decisions and strategies that lay ahead for the company depend on a realistic assessment of corporate and individual exposure. Therefore, information about involvement in the alleged collusion is key. The most traditional way to get this information is through an internal investigation, conducted by outside counsel, which, at a minimum, should include a review of relevant documents and employee interviews. It is, of course, crucial that counsel conduct the internal investigation in a way that ensures the information learned is protected by the attorney-client and work product privileges. Under U.S. law, privilege generally will attach to an investigation if it is conducted pursuant to management direction, for the purpose of providing legal advice to the company, and the information obtained during the investigation is shared with key decision-makers only.[27]

As part of the investigation, counsel should attempt to interview, and review the documents of, all current and former employees who might have knowledge of, or involvement in, the alleged antitrust violations. Collecting and reviewing relevant documents on an expedited basis can be difficult. It may, therefore, be best to pull and review documents from the key players in the first instance, such as those with pricing authority, and then utilize targeted search terms, date filters, and other techniques for mining the relevant information. What is critical is that counsel use documents to either confirm or refute the information provided during the employee interviews.

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[23] *See* Charting New Waters, *supra* note 17.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] Privilege considerations are far more complex if counsel are dealing with foreign corporations. *See, e.g.*, Case T-253/03, *Akzo Nobel Chems. Ltd. v. Comm'n*, (Sept. 17, 2007) (Court of First Instance of the European Communities refusing to recognize claim of privilege over communications between in-house counsel and company employees), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003A0125:EN:HTML.

A number of problems can arise with employee interviews. Chief among them is confusion regarding whether it is the employee or the corporation who holds the privilege over communications with counsel during the investigation. To combat this confusion, corporate counsel usually invoke the "*Upjohn* warning," which takes its name from the Supreme Court ruling, in *Upjohn Co. v. United States*, that communications between company counsel and employees are privileged, but the privilege is held by the company and not the individual employee.[28] A proper *Upjohn* warning typically includes a statement that: (1) the attorney represents the corporation, not the employee; (2) the interview is covered by the attorney-client privilege, but the privilege belongs to the company, not the employee; and (3) the company, in its sole discretion, can decide whether to waive the privilege and disclose information from the interview to third parties.[29] In other words, an *Upjohn* warning alerts the employee to the fact that he or she has no control over whether the company decides to waive the privilege with respect to information provided by the employee, as companies frequently do in cooperation with a government investigation. Failure to provide a proper *Upjohn* warning may result in a finding that the privilege is held jointly by the employee and the company, which could block the corporation's ability to use the information and could lead to liability for outside counsel.

Information about involvement in the alleged collusion is key. The most traditional way to get this information is through an internal investigation . . . .

It is a good idea for at least two lawyers to attend all employee interviews so there is always a witness who can attest to what was said — on both sides — during the interview. The results of the employee interviews and document review should be documented as the investigation proceeds. Keeping an ongoing, comprehensive memorandum — protected by the work-product privilege — will allow counsel to quickly access critical information in discussions with the company and perhaps the government.

Finally, the investigation should be broad, rather than limited to the markets or conduct identified in the government's investigation. If there are problems in markets or territories outside those being investigated by the Antitrust Division, it is best to discover them sooner, rather than later.

The Race Is On — Quickly consider seeking leniency. The Antitrust Division has a comprehensive leniency program under which cartel members may obtain amnesty from prosecution or a significant reduction in penalties for being the first to self-report violations or pledge cooperation with an investigation. The catch, however, as the Division has noted, is that, "in applying for leniency, the company is in a race with its co-conspirators and possibly its own employees who may also be preparing to apply for individual leniency."[30] Indeed, the Division has indicated that "[o]n a number of occasions, the second company to apply for leniency has been beaten by a prior applicant by only a number of hours."[31]

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[28] *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

[29] *United States v. Nicholas*, 606 F. Supp. 2d 1109, 1116 (C.D. Cal. 2009).

[30] Scott D. Hammond, Deputy Ass't Att'y Gen., & Belinda A. Barnett, Senior Counsel, Antitrust Div., Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters (Nov. 19, 2008), *available at* http://www.justice.gov/atr/public/criminal/239583.htm.

[31] Scott D. Hammond, Deputy Ass't Att'y Gen., Antitrust Div., Recent Developments Relating to the Antitrust Division's Corporate Leniency Program, Speech Before The 23rd Annual National Institute on White Collar Crime (Mar. 5, 2009), *available at* http://www.justice.gov/atr/public/speeches/244840.htm.

Complete amnesty from prosecution — meaning no fines, no prison time for employees, and a possible reduction in civil damages — is available to the first cartel member to voluntarily report its involvement in the conspiracy to the DOJ, as long as the DOJ is unaware of the conduct at that time and the reporting company is truthful and cooperative.[32] If the company has received a grand jury subpoena, however, it likely will not qualify for amnesty because an investigation is already underway.

But all is not lost. "While the top prize is reserved for the amnesty applicant, a company that moves quickly to secure its place as 'second in the door' and provides valuable cooperation can also reap substantial benefits."[33] A "second-in" company can receive reduced fines and more favorable treatment for its culpable executives if it pledges to plead guilty to the underlying antitrust violation and offers timely and substantial cooperation against remaining cartel members.[34] "To maximize the rewards, however, the company must act quickly and approach the Division as early as possible in the investigation and be prepared to leave no stone unturned in its effort to cooperate with the Division. Evidence, wherever located, must be quickly located, preserved and provided to the Division as soon as possible."[35]

Finally, the Antitrust Division also offers "Amnesty Plus Leniency." Under Amnesty Plus Leniency, a company can reduce its criminal fines for participation in one conspiracy by reporting its involvement in a separate conspiracy that the DOJ has not yet uncovered.[36] Assuming all the prerequisites are met, the Amnesty Plus candidate can receive a significant discount in fines and prison terms for its participation in the first-discovered conspiracy and full amnesty for its participation in the newly-uncovered conspiracy.[37]

Carve Out Potential Carve-Outs — Obtain separate counsel when necessary. The Antitrust Division insists that potentially culpable employees — usually referred to as "carve outs" because they are likely to be carved out of any plea deal with their employer — obtain separate counsel.[38] Generally, the Antitrust Division takes the view that a conflict of interest may exist if counsel represents multiple targets of an investigation who may be able to implicate one another. In addition, multiple representations may discourage one target from cooperating with the investigation in order to avoid implicating other targets. Ultimately, the company must decide whether to pay for carve-out counsel, a decision that may be informed by the company's bylaws and indemnification policies and statutes. Early in most investigations, the Antitrust Division will inform company counsel of the employees on the carve-out list.

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[32] Antitrust Div., Corporate Leniency Policy, *available at* http://www.justice.gov/atr/public/guidelines/0091.htm.

[33] Scott D. Hammond, Deputy Ass't Att'y Gen., Antitrust Div., Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations, Speech Before the ABA Antitrust Section 2006 Spring Meeting (Mar. 29, 2006), at 1, *available at* http://www.justice.gov/atr/public/speeches/215514.pdf.

[34] *Id.* at 14.

[35] *Id.*

[36] Frequently Asked Questions, *supra* note 30.

[37] *Id.*

[38] Scott D. Hammond, Deputy Ass't Att'y Gen., Antitrust Div., The U.S. Model of Negotiated Plea Agreements: A Good Deal with Benefits for All, Address Before OECD Competition Committee Working Party No. 3 (Oct. 17, 2006), § J ("The Division routinely 'carves out' certain individuals from the nonprosecution protections afforded to employees in corporate plea agreements. The carved-out individuals may include culpable employees, employees who refuse to cooperate with the Division's investigation, or employees against whom the Division is still developing evidence."), *available at* http://www.justice.gov/atr/public/speeches/219332.htm.

While hiring counsel for implicated employees may be expensive for the company, obtaining effective representation for potential carve-outs may be critical to a company's defense in that these are the employees who are likely to provide evidence regarding the alleged violation. Thus, it is usually advantageous for a company to pay for carve-out counsel in order to maintain a good working relationship with its implicated employees.

Settle in for a Long Haul — Plan your response to the subpoena. The length of a criminal antitrust investigation varies depending on a number of factors, such as the scope of the investigation, the number of potential targets, and whether the targets are cooperating with the investigation. But most investigations last longer than a year from the time a subpoena is served to entry of a plea, indictment, or closure of the investigation. A large chunk of the investigation is usually consumed by the search for, review and production of documents responsive to the grand jury subpoena.

In order to negotiate the terms of the subpoena, counsel needs to become familiar with the manner in which documents and data are stored and the burdens associated with producing certain materials.

Most grand jury subpoenas are intentionally broad and demand a return date of a few short weeks. Thus, the government fully expects that company counsel will seek to negotiate both the breadth and the return date of the subpoena. In order to negotiate the terms of the subpoena, counsel needs to become familiar with the manner in which documents and data are stored and the burdens associated with producing certain materials. Unless a complete production of materials is critical to the investigation, the government will frequently agree to reasonable limitations on the scope of the subpoena, and will provide the company sufficient time to collect and review documents before making a production. Any limitations on the scope of the subpoena should be documented in a letter to the government. And it is also important that counsel select a "document custodian" from the company who can attest to the steps taken by the company in preserving, searching for, and producing documents. Ideally, the document custodian should not have any involvement in the alleged antitrust violation so that he or she is able to testify before the grand jury or meet with Antitrust Division lawyers if need be.

Guiding a company through the right steps in the early hours and days of an investigation can help to ensure that the investigation proceeds smoothly and may minimize criminal and civil exposure for the company and its employees.

If You Can Keep Your Head When All About You Are Losing Theirs . . .[39] Managing the complex and stressful issues that arise in criminal cartel investigations is a difficult endeavor, particularly in the early stages of an investigation. This is ever more the case as the fines and prison terms obtained by the Antitrust Division continue to grow. While it is certainly important to move quickly in the early stages of an investigation, counsel must appreciate the near-term and long-term consequences of each and every decision. Speed is critical, but the value in taking the time necessary to craft a carefully designed early-response checklist cannot be overstated. Guiding a company through the right steps in the early hours and days of an investigation can help to ensure that the investigation proceeds smoothly and may minimize criminal and civil exposure for the company and its employees. Be quick, but don't hurry.

[39] Rudyard Kipling, If—, *in* Rewards and Fairies (1910), *available at* http://www.poetryfoundation.org/poem/175772.

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Upcoming Programs

Navigating the Globe: Cartel Enforcement Around the World

Chapter 7, China
November 15, 2012

Chapter 8, Russia/Ukraine
December 13, 2012

Chapter 9, Brazil
January 10, 2013

Chapter 10, France
February 14, 2013

Chapter 11, Australia/New Zealand
March 14, 2013

Registration Information for all Committee programs can be found on the Anitrust Section's Events Page, at http://AmBar.org/ATEvents

Cartel & Criminal Practice Quarterly Update

Recent Developments in Criminal Antitrust Law

Learn more about recent Antitrust Division enforcement actions and international developments, with a Q&A period at the end.

Next Program: Jan. 25, 2013

Notes

[i] **This is Not Legal Advice**: Nothing contained in this newsletter is to be considered as the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel. This newsletter is intended for educational and informational purposes only.

Editors' Note: The Cartel and Criminal Practice Newsletter is published twice a year by the Antitrust Section of the American Bar Association's Cartel and Criminal Practice Committee. The views expressed in this Newsletter are the authors' only and not necessarily those of the American Bar Association, the Section of Antitrust Law, or the Cartel and Criminal Practice Committee. If you wish to comment on the contents of this Newsletter, please write to the American Bar Association, Section of Antitrust Law, 321 North Clark Street, Chicago, IL 60654 or email any of the Committee leadership.

Authors Wanted!

If you are interested in writing an article for a future edition of our newsletter, please contact Shimica Gaskins at sgaskins@cov.com or Jennifer Dixton at Jennifer.Dixton@usdoj.gov*

**Ms. Dixton is a member of the Antitrust Section of the American Bar Association's Cartel and Criminal Practice Committee in her personal capacity and this message does not reflect any position of the Government or the U.S. Department of Justice.*