

Damages in EC antitrust actions: who pays the piper?

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 Competition law; EC law; Legal advice and funding; Private enforcement

The prospects for private antitrust enforcement to supplement public enforcement by competition authorities in the EC depends on the mix of incentives and disincentives for private parties to bring action. The perceived advantages that underpin US antitrust litigation; namely, treble damages and wide discovery, can be replicated in the EC by awards of interest and damages above pure compensatory level in specific cases and the leniency procedure can be mined for useful documentation. However, the advantage of access to the courts through contingency fees has limited appeal in Europe and a Contingency Legal Aid Fund, incorporating private and public elements, is proposed.

Introduction

The decentralisation of the EC competition rules¹; the publication of the Ashurst Report² and the recent European Commission Green Paper on damages³ in competition cases has stimulated an extensive debate on private antitrust enforcement.⁴ Scholars, practitioners and regulators have debated the relative importance of class actions, the standard of proof, jurisdictional issues within and outwith the Community, as well as the value of the US trinity of triple damages, contingency fees and discovery.⁵ One crucial issue, it is submitted, has been largely overlooked in this debate: the funding of competition actions. Aside from the immediate expression of doubt as to the wisdom and legitimacy

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¹The Community introduced a decentralisation of the EC competition rules under Regulation 1/2003. Regulation 1/2003 envisages both a decentralisation of public enforcement to the National Competition Authorities (NCAs) and greater encouragement and use of the national courts rather than bringing complaints before the Commission.

²Ashurst, *Study on the Conditions of Claim for Damages in Case of Infringement of EC Competition Rules*, Comparative Report, August 2004. Prepared by Waelbroeck, Slater and Even-Shoshan for the European Commission.

³Green Paper (European Commission), *Damages Actions for Breaches of the EC Antitrust Rules*, COM (2005) 672 Final, December 19, 2005.

⁴Woods, "Private Enforcement of Antitrust Rules-Modernisation of the EU Rules and the Road Ahead" (2004) *Loyola Consumer Law Review* 431 at 460.

⁵For two major collections discussing the issues surrounding private antitrust enforcement in Europe see EUI 2001 Annual EU Competition Law and Policy Workshops, *Effective Private Enforcement of EC Antitrust Law* and *Loyola Consumer Law Review* 2004, *Symposium Papers on the Future of Private Rights of Action in Antitrust*.

of contingency fees, the importance of funding barriers to undermining private actions has not had any significant profile in the debate. However, the Ashurst Report revealed that in all Member States costs had to be paid upfront and in all but two Member States the so-called English rule applied: that the loser pays all or a substantial amount of the legal costs which may include the fees of experts.⁶ The prospect of having to pay costs upfront and to pay at least a part of the other sides costs is likely to act as a major disincentive for many potential claimants to bring civil actions. That disincentive is compounded by the heavy costs that are likely to be incurred in most competition cases as a result of the complexity of competition cases; the demands for economic evidence and the heavy reliance on substantial quantities of documentary evidence.

This paper seeks to address this overlooked issue in the continuing private enforcement debate. In part two it examines the extent to which the Europeans are able to absorb the US pillars of antitrust litigation, multiple damages, discovery and contingency fees. In part three the paper provides a brief overview of the Green Paper and considers some of the questions that have already arisen as to the justification for and support for Community legislation in this field. Part four examines in some detail the alternative contingency legal aid fund, drawing particularly on Canadian experience in the provinces of Quebec and Ontario. Part five recommends that the Community and the Member States give serious consideration to the creation of a CLAF at least for cases before national courts involving the most egregious competition infringements, price fixing, market-sharing and bid rigging cartels.

Can the Europeans absorb the antitrust litigation trinity in Europe?

Running a competition case, particularly a damages case,⁷ in a national court is not for the fainthearted. The time that such cases take can be lengthy, the demands for documentary and economic evidence considerable and the costs substantial—in addition to the procedural and funding barriers discussed below. It is not surprising therefore that there have only been 60 adjudicated damages cases since the creation of the Community, and in only 23 cases were damages awarded.⁸ Although there are likely to have been a significant number of settlements in the shadows, the number of cases entering the courts suggests that even the number of settlements is not very high. The very few successful competition cases are likely to deter many potential plaintiffs from bringing cases.

The disincentive is compounded by what the Ashurst Report refers to as “total under development” of the law. In many jurisdictions basic issues have not been answered,⁹ such as the competent court and conditions for liability¹⁰ never mind whether the passing

⁶ Cited above, n.2, p.1.

⁷ There have been significantly more competition cases where no damages have been awarded, for instance, where interim measures cases have been sought. Classically such use of interim measures have been used as a shield when faced with powerful commercial partners or dominant companies. While any use of competition rules in the national courts is welcome, there is a strong case for saying that “shield use” is an immature use of competition law in the domestic courts.

⁸ Cited above, n.2, p.1.

⁹ Cited above, n.2, p.1.

¹⁰ Cited above, n.2, p.10.



750 Damages in EC antitrust actions: who pays the piper?

on and indirect purchaser rule rules apply¹¹ or lack of models for assessing damage.¹² In addition, there is the lack of the American “trinity” of treble damages, discovery and contingency fees, which we are told makes bringing antitrust litigation problematic.¹³

This total under development and consequent legal uncertainty is likely to put off all but the most wealthy and resilient from bringing competition cases. The fear for potential plaintiffs is that even if they have a good case they will end up in a Sisyphean labour,¹⁴ whereby they have to fight every procedural issue through the judicial hierarchy to win their case. This is no phantom fear. That has been the experience of Mr Crehan who has been all the way to Luxembourg,¹⁵ and after successive judgments in the High Court and the Court of Appeal, has now found that after 13 years of litigation his claim has failed.¹⁶ Mr Crehan’s case would be difficult to fund today. Thirteen years ago legal aid was available. Funding for such commercial damages actions has since been withdrawn.

The cost and delays induced by total under development are compounded by the heavy cost generated by the very nature of competition cases.¹⁷ Competition cases tend to be complex, requiring expert economic evidence and often involve the lawyers on both sides mastering voluminous numbers of documents. As a consequence the costs of these cases tend to be very substantial.¹⁸

“(. . .) in all countries it appears that on the basis of a €1 million claim where the level of damages is relatively easy to establish, costs would run into tens of thousand of euro. In the UK and Ireland this figure is even higher, going well above €100,000.”¹⁹

In this context the majority of Member State legal systems which apply the so-called English rule where costs follow the loser, and in which the overwhelming majority of states require upfront payment of costs are likely to deter many plaintiffs from bringing civil actions before the national courts.

¹¹ The passing on defence is where a defendant cartel member denies liability on the basis that the plaintiff has passed on the illegal overcharge to his own customers. An indirect purchaser claim is where a person forced to pay the passed on overcharge seeks to recover from as an “indirect purchaser” against the defendant cartel member. Under US Federal antitrust law the passing on defence is prohibited as is the indirect purchaser’s right to sue. However, indirect purchasers can sue in many US states under local antitrust statutes.

¹² Cited above, n.2, p.6.

¹³ This trinity forms the bedrock of US antitrust litigation.

¹⁴ Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA* (OUP, 1999), at pp.247–248.

¹⁵ C-453/99, *Courage Ltd v Bernard Crehan* [2001] E.C.R. I-6297.

¹⁶ *Inntrepreneur Pub Company (CPC) v Crehan* [2006] UKHL 38.

¹⁷ In the UK there may be some good news on costs in the specialist competition court, the Competition Appeal Tribunal which has reported the outcome of two private damage cases: Case No.1029/5/7/04, *Deans Foods Ltd v (1) Roche Products Ltd (2) F. Hoffman La Roche AG (3) Aventis SA and Case No. 1028/5/7/04 (1) BCL Old Co. Ltd (2) DFL Old Co. Ltd (3) PFF Old Co Ltd v (1) Aventis SA (2) Rhodia Ltd (3) F. Hoffman La Roche AG (4) Roche Products Ltd (5) 2 Sisters Premier Division Ltd, (6) Broomco (2488) Ltd; (7) Broomco (2523) Ltd; (8) Broomco (2524) Ltd; (9) P D Hook (Hatcheries) Ltd; and (10) Deans Foods Ltd*. For comments on these cases see Randolph and Robertson, “The First Claims for Damages in the CAT” [2005] E.C.L.R. and Peysner, “Costs and Financing in Private Third Party Damages Actions” *Competition Law Review* (forthcoming).

¹⁸ Even in cartel cases where the European Commission or a National Competition Authority (“NCA”) has adopted a decision imposing cease and desist orders and fines on cartel members and that decision has been upheld in the final courts of appeal or left unopposed, the burden of proving the extent of the damage caused to the plaintiffs is likely to be considerable.

¹⁹ Cited above, n.2, p.96.



Clearly it is to be hoped that a significant part of the under development of the law that generates uncertainty and thereby delay and significant legal costs can be overcome. The debate initiated by the Commission with the publication of the Ashurst Report and the Green Paper may lead to positive reform at national level and potentially Community legislation.

Furthermore, there are good grounds for thinking that two of the American trinity litigation issues can be substantially addressed.

Treble damages, interest and multiple damages

First, while it is difficult to see the Member States easily accepting the concept of treble damages, the Member States may well be far more amenable to the concept that plaintiffs should be fully compensated for the harm they have suffered. "Full compensation" in this context would include interest from date of damage. There is also a strong argument that to effectively protect Community law rights interest from date of damage should be available.²⁰

There is also a second strong argument for taking the view that while the usual rule that the objective of damages should be compensatory and limited to single damages, that in two cases that damages should be available at a higher rate. The first, as suggested by the Green Paper is that where undertakings take part in the most damaging forms of anti-competitive activity, such as price fixing cartels, significantly heavier damages awards should be available. In cartel cases particularly, the damage caused, unlike in most other forms of anti-competitive infringements, has no possible justification; such infringements often have a significantly damaging impact on their victims²¹; cartels can suppress innovation²² and in almost all cases the cartel arrangements are secret. These factors support the proposal of the Green Paper for a double damages award in cartel cases.²³ The second case is in relation to a specific form of price fixing, bid rigging against the state and public authorities. There is evidence drawn from the Netherlands²⁴ and the United Kingdom,²⁵ that bid rigging against the state is a pervasive form of serious anti-competitive activity. Here it is argued there is a case for triple if not quadruple damages to protect state resources from being plundered by covert bid rigging schemes initiated by powerful commercial operators.

Discovery procedures

The second part of the litigation trinity, discovery procedures, again looks at first sight like an area likely to induce considerable Member State hostility if the Commission were

²⁰ Case C-271/91, *Marshall v Southampton and South-West Hampshire AHA (No.2)* [1993] E.C.R. I-4367. See also the commentary on this point by Jones, cited above, n.14, p.231.

²¹ Connor and Boltova, "Cartel Overcharges: Survey and Meta-Analysis" (2005) Purdue University Paper 22.

²² See in particular the facts of the *Pre-Insulated Pipe* case OJ 1999 L24/1, Commission Decision 1999/60.

²³ Cited above, n.3, para.2.3.

²⁴ Doree, *Collusion in the Dutch Construction Industry* (2005) Routledge.

²⁵ Third OFT Press Release on Roof Contractor Bid Rigging (2006). See: www.of.gov.uk/News/Press+releases/2006/34-06.htm

to come forward with such a discovery proposal. The fundamental difficulty being that most Member States, follow a civil law tradition, which expects that in private litigation it is for the plaintiff, on his own responsibility to bring all the evidence before the court at the beginning of the case. This fact pleading approach stands in stark contrast to the common law tradition in which notice pleading prevails: where the essential legal issues are raised in the originating process but where the plaintiff expects to be able to augment both his body of evidence and potentially his claim by obtaining further evidence through discovery procedures.²⁶ Although the scope of the “discovery” can differ between broad US rights to discovery and the much more restricted English procedure of disclosure introduced in the recently reformed Civil Procedural Rules, “discovery” procedures as a class are deemed extremely burdensome and tantamount to fishing expeditions in the civilian tradition and are unlikely to be adopted.

However, it can be argued that discovery is almost upon us via another avenue: the Leniency Notice. The Commission’s 2002 Leniency Notice has become the most successful instrument in busting cartels in the history of competition law. Between February 2002 and December 2005, the Commission received 167 leniency applications and made 51 conditional offers of immunity.²⁷ This very large number of leniency applications will in due course result in large numbers of cartel prohibition decisions. Plaintiffs can rely on both the finding of infringement and the evidence contained in those decisions, once upheld in the Community courts or if not challenged before the Court of First Instance (“CFI”).²⁸ Those decisions will help plaintiffs in the national courts directly and indirectly encourage national courts to deploy whatever limited local documentary information procedures that are available to assist the plaintiff.

Flowing from the success of the Leniency Notice and the adoption of more cartel prohibition decisions two other “discovery” options open up. The first is for plaintiffs in antitrust litigation to be permitted to obtain documents that defendants have already handed over to the Commission, for example, answers to Art.18 letters and copies of documents surrendered to the Commission under its power of inspection contained in Art.20. Secondly, again flowing from the fact of the egregious nature of price fixing a broader discovery power could be permitted in respect of such cases.

Contingency fees

While full compensation in the form of interest on damages may be required as a matter of Community law; double damages acceptable in cartel cases and some form of discovery may be achievable, it is doubtful at first sight that much progress is likely to be made in respect of the third leg of the trinity: contingency fees. Despite the existing cost barriers to litigation, a mixture of fear of the “compensation culture” prevalent in the USA; the profits of US plaintiff lawyers and the abuses identified by European actors in the US system will make any argument for contingency fees politically toxic. Even in England, with its common legal heritage with the USA there has been a wave of moral panic over

²⁶ Giudici, “Private Antitrust Law Enforcement in Italy” [2004] *Comp.L.Rev.* 61 at 81 *et seq.*

²⁷ Response to Parliamentary Question by Commissioner Kroes requested by Sharon Bowles M.E.P., July 5, 2006, E-2234/06EN.

²⁸ Kerse and Khan, *EC Antitrust Procedure* (5th edn., Sweet & Maxwell, 2005), paras 5-055–5-056.

the “compensation culture”.²⁹ In fact this fear has been inflamed by the arrival in Europe of US plaintiff litigators arguing for the US model of litigation in antitrust cases.³⁰

However, given the importance of the funding issue and notwithstanding the discussion below regarding different models of the contingency legal aid funds it is worth discussing whether the contingency fee system is wholly to be avoided or whether a reformed contingency fee system could be attractive to European legislators. There are two fundamental advantages of any contingency fee system. First, it provides significant access to justice for potential plaintiffs without the means to bring cases themselves and without calling on state resources. Secondly, by obtaining a slice of the damages lawyers are both incentivised to bring cases and can afford to take on costly time consuming and complex cases. Clearly lack of means and the complex nature of competition cases affects plaintiffs willingness to seek remedies and lawyers willingness to run such cases. A reformed contingency fee system could provide part of the solution to funding competition cases in Europe. It also has to be recognised that the principal criticisms of the contingency fee system in the USA, such as the overpayment of lawyers and the abusive use of non-cash payment systems³¹ are not central features of contingency fee systems per se. For example, it would be possible to limit contingency fee systems in the European Union to no more than 10 per cent of the value of the award (substantially less than up to 30 per cent in the USA); it would also be possible to restrict contingency fee awards to direct purchaser actions, which would have the effect of barring abusive non-cash awards.³² Again recognising the egregious nature of price fixing, contingency fees could again be limited to damages actions brought by victims of cartels where the cartel members have been subject to a Commission or NCA prohibition decision that has been subsequently judicially upheld.

While their political toxicity is acknowledged, contingency fees are definitively worth greater consideration even though they have not been included in the Green Paper, when the Commission is considering legislative options and recommendations to the Member States.³³ Without a discussion of the major funding options there is a real question as to how far any other litigation reforms can work effectively. Even if all the most optimal reforms are adopted plaintiffs will still be facing paying out for heavy initial costs, and very severe fiscal sanctions if they lose. This will undoubtedly remain a

²⁹This moral panic was precipitated by the intervention of non-lawyer entrepreneurs into the legal market for personal injury claims following the Access to Justice Act 1999 and is now illustrated by the Compensation Act 2006 which while regulating these entrepreneurs (in effect claims farmers) introduces a one clause restatement of recent Appeal Court decisions offering comfort to schools and other public institutions who were becoming risk averse in organising outside activities. It is hard to see this restatement of what was understood to be the law as other than a political sop to the tabloid press and not jurisprudentially necessary.

³⁰“Michael Hausfeld brings class actions to the UK”, *The Lawyer*, November 7, 2005 “on a crusade to export America’s legal system around the world”.

³¹Classically where the plaintiffs obtain very small value vouchers for the product subject to the price fix, while the lawyers walk away with 30% of the value of the overall claim, which in a class action involving indirect purchasers could amount to millions of dollars.

³²Almost all “voucher” cases are indirect purchaser actions.

³³Contingency fees are given limited support by the Civil Justice Council (of England and Wales) in its Report *Improved Access to Justice—Funding Options and Proportionate Costs: Report and Recommendations* (Napier, Hurst, Musgrove and Peysner, Civil Justice Council, 2005), p.36 <http://www.civiljusticecouncil.gov.uk/> (cost debate page).

major disincentive whatever other reforms are implemented. An alternative approach to contingency fees, which may not generate the same hostility, which works with the grain of European conceptions of solidarity and which is already operating in several jurisdictions worldwide, is the contingency legal aid fund, ("CLAF") which is discussed further below.

A parliamentary discussion of the Green Paper.

The Commission's Green Paper raises two principal justifications as to why consideration should be given to Community legislation in this field.³⁴ The first is justice: as pointed out above far too few victims of illegal antitrust behaviour have been able to recover damages in the national courts. This is despite the fact that the Commission has adopted hundreds of decisions in which it has found very serious infringement of the European antitrust rules. The second justification is deterrence: the prospect of not only being faced with increasingly heavy Commission fines but also significant damages claims in the national courts may act as a major disincentive to potential antitrust infringers to forego illegal behaviour. There is a second stem to the deterrence argument in that by encouraging private claims DG Competition effectively privatises enforcement balance bringing into European antitrust enforcement a group of private plaintiff enforcers who then share the burden of antitrust enforcement with the national and European antitrust regulators.

The Green Paper does not provide a worked out programme for legislation where the Commission seeks consultation only on a number of minor points. The Green Paper is in fact a true consultative document. DG Competition takes the time to describe the extent of the difficulties faced by private litigants and looks at a wide range of connected issues. In the Green Paper these issues are grouped under a number of headings including access to evidence; the existence of a fault requirement; the calculation of damage; the passing on defence and the indirect purchaser rule; the defence of consumer interest; the costs of actions; co-ordination of public and private enforcement and jurisdiction and applicable law. In each section a number of key questions are raised on the subject-matter for potential respondents to consider. In the accompanying staff discussion paper there is an extensive discussion of the difficulties to effective antitrust litigation in Europe and consideration of a broad range of policy options.³⁵ These include examining the prospects for mitigating the "English" rule that the loser pays both his own and the plaintiff's costs, through discovery and access to documents from both defendants and regulators to considerations as to the efficacy of shifting the burden of proof at different stages of a damages action to the creation of a double damages rule in cartel cases.

In this process of consultation DG Competition first invited comments on its Green Paper options. This invitation resulted in 140 papers being filed with DG Competition from both Europe and the USA raising a host of arguments for and against legislation and wide range of proposals for legislation.³⁶ The second stage of the consultation process

³⁴ Cited above, n.3.

³⁵ Commission Staff Working Paper, *Annex to the Green Paper: Damages Actions for Breaches of the EC Antitrust Rules*, SEC (2005) 1732, Brussels, December 19, 2005.

³⁶ The consultation documents can be accessed at www.ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/gp_contributions.html

was the hearing on the Green Paper organised by the European Parliament on June 6. The hearing provided an interesting rehearsal for some of the arguments that are likely to take place both within the Commission, and if legislation is proposed, in the Council and European Parliament.

The debate and the discussion in the Parliamentary hearing accepted the strength of the arguments of justice and deterrence raised by the Commission. However, concern was expressed as to how specific legislation amending national procedural rules could be justified solely for antitrust law. As was pointed out in the hearing while DG Competition can legitimately say that victims of price fixing cartels have little redress in the national courts so to can the victims of corporate fraud in cases such as *Parmalat*. If there is a major problem with victims of infringements of economic law across Europe perhaps Community legislation is required. However, it is difficult at first sight to see how specific antitrust legislation is justified. This point was underlined by the presence at the hearing of Diana Wallis M.E.P. a member of the Legal Affairs Committee.³⁷ She pointed out that the Legal Affairs Committee has a number of draft legislative instruments on civil procedure currently being discussed before that committee. Any legislative proposals from DG Competition threatened to cut across the work already being undertaken in this field by that committee and the Commission Directorate General for Freedom, Justice and Security.³⁸

A second issue raised in the hearing by one of the authors was the question of the natural political sensitivity of the enactment of Community legislation in the sphere of national procedural law. The author raised the question of whether any such legislation should in fact take a minimalist approach leaving as much national procedural autonomy as possible intact. He suggested that the approach of the Commission to any proposed Community legislation in the field should be to remove specific antitrust related barriers to civil litigation while otherwise leaving damages actions to national development. He also pointed out that in multi-state cases this approach would encourage healthy competition between national courts.³⁹ Two examples of the sort of legislation provisions that could be adopted under such minimalist competitive approach were given: first, limitation on damages payable by a leniency applicant. There is a concern that the success of the leniency programme could be undermined if civil litigation against cartels became a regular feature of every cartel case following on from a Commission prohibition decision. Leniency applicants could be deterred from providing information to the Commission if they believed that they would subsequently face antitrust litigation for damages in

³⁷The Economic and Monetary Affairs Committee of the Parliament has legislative oversight of DG Competition.

³⁸Note of hearing held by the authors.

³⁹There is substantial scope for competition between national courts in multi-state cases. Under the "Brussels" Regulation 44/2001, plaintiffs in such multi-state cases have a number of options. The plaintiffs in a multi-state cartel case can sue the defendants can either be sued in the courts of the states where they are domiciled or in the courts of the state where the harmful event occurred or under Art.6(1) a person domiciled in a Member State may also be sued where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments arising from separate proceedings. Particularly in cases with a significant economic footprint several Member States will potentially have jurisdiction. Given the size of the British and Germany economies in most such "wide footprint" cases courts in both jurisdictions are likely to have a defendant or co-defendant in the jurisdiction. This economic reality together with the jurisdictional provisions of the Brussels Regulation opens up the possibility of competition between at least some of the national courts, here for instance the Competition Appeal Tribunal and the English High Court in London and the German courts.

the national courts. In addition to the fall in leniency applications there would also be a further knock-on effect on the number of Commission cartel prohibition decisions which would otherwise have provided the basis for follow-on civil actions in the national courts. Community legislation could be enacted to restrict the level of damages that a leniency applicant would be liable to pay: damages would be limited to single damages without interest against a leniency applicant and any joint and several liability rules would be rendered inapplicable against the applicant by other members of the cartel.⁴⁰ The second example focuses on the specific antitrust issues in relation to access to evidence. Community legislation would provide that evidence provided by an undertaking to the Commission and all National Competition Authorities in the course of an unannounced inspection or by administrative or court order could also be obtained by the plaintiff via a court order from the defendant undertaking.⁴¹

The debate on the Green Paper in the Parliamentary hearing provides only a first skirmish in an argument that is likely to dominate European antitrust law over the next couple of years. DG Competition is likely to find some of the battles very difficult. Not just the question of why special procedural rules for competition law. But the broader sovereignty question for the Member States who see national procedural law substantially off limits to Community law activity save where there is a compelling cross-border argument. However, as argued above, if there is to be any Community legislation or soft law there is one issue that must be at the forefront of the Commission's mind: funding.

The Contingency Legal Aid Fund ("CLAF")

Litigation is about the distribution of risk to client, lawyer, funder, insurer or on a decreasing basis to the state through legal aid. Even in jurisdictions where the English rule does not apply the cost of paying for legal representation is beyond the reach of ordinary citizens. Almost certainly, the most efficient solution to this problem is legal expense insurance⁴² where the risk is spread and adverse selection is reduced as far as possible.⁴³ However, competition cases which are risky, complex and expensive may not be attractive to legal expense insurers who may limit their cover to exclude such matters. If After the Event insurance is not the answer then what is?

One solution to be explored is the contingency legal aid fund. Such schemes operate in different ways but, essentially, they operate as public, non-commercial, funds to support litigation. In Hong Kong the scheme operates a supplement to normal legal aid for those

⁴⁰The USA has sought to limit the exposure of leniency applicants to damages actions in the US courts. In June 2004 President Bush signed into law the Antitrust Criminal Penalty Enhancement and Reform Act. Amongst a number of reform amendments to US antitrust law the Act detribles damages to single damages for a leniency applicant who has been accepted into the Justice Department's Corporate Leniency Programme.

⁴¹It could be argued that this issue could be left to national courts. However, it is open to question whether without express Community legislation the copies of documents taken in unannounced inspections and responses to answers posed by NCAs and the Commission would in fact be so easily obtained from the undertakings who had to initially provide such information to the regulatory authorities.

⁴²Called Before the Event insurance in England.

⁴³It is implicit that After the Event insurance will be bought by clients who have a dispute: before the event insurance by those who are concerned that they may have a dispute in the normal course of business but some purchasers will be aware of the imminent likelihood of a contentious matter.

whose income exceeds the eligibility limits.⁴⁴ Schemes operate in different ways but as a minimum if a scheme accepts a case then in return for a cut of damages the client receives an indemnity against the opponent's costs as well as payment of disbursements. This leaves the question of how the client's lawyer is paid.⁴⁵ This may be by the fund or on a contingency fee basis taking a separate tranche of damages, particularly suitable in class actions where the court can allocate separate compensation to the fund, the lawyers and the class. Essentially, such schemes are third party funders and as such to thrive they need start up and working capital. Start up because even if successful in picking the right cases they will suffer negative cash flow until cases are completed. This problem was resolved in Hong Kong by a loan from the Jockey Club Lottery; elsewhere by loans from the public or community sector.⁴⁶ Absent such support, one possible way forward may be by securitisation of the scheme with a third party financier taking on all the present and contingent liabilities until the fund becomes self-sufficient.⁴⁷ CLAFs are operating in a number of jurisdictions including Australia but for the purposes of this discussion the most useful examples are in Canada.

Canada being a nation of provinces and territories with both common law and civil law systems offers a unique comparison to the European Union; although, of course, full-blown federalism is not on the immediate horizon in Europe. While there are a number of areas with CLAFs the chosen comparators are Quebec and Ontario representing similar approaches to the problem of financing collective action from two different legal and political traditions.⁴⁸

Quebec

By An Act Respecting the Class Action 1978 Quebec established its class action procedure and a class action agency: "*Fonds d'aide aux recours collectives*" whose objective is to ensure the financing of class actions in the context of a civil law jurisdiction. When deciding whether or not to grant assistance the *Fonds*:

"shall assess whether or not the class action may be brought or continued without such assistance; in addition, if the status of the representative has not yet been ascribed to the applicant, the Fonds shall consider the probable existence of the right he intends to assert and the probability that the class action will be brought."⁴⁹

⁴⁴ Such a supplemental scheme is currently being considered in Northern Ireland for the Northern Ireland Legal Services Commission in a project led by Professor Peysner.

⁴⁵ Some schemes may pay the lawyer in any event, win or lose, with a higher rate for success. Some may only pay on success.

⁴⁶ The scheme was established in 1984 with a loan of \$HK1 million. The whole of this amount was never drawn on and operated as an overdraft facility. Money flowed in relatively quickly. (\$HK 1 million in 1984 was a substantial capitalisation). By 1989/1990, all of the overdraft facility was paid off and the scheme was self-funding.

⁴⁷ Asset securitisation involves the sale of income generating financial assets (such as loans, trade receivables and leases) by a company to a special purpose vehicle ("SPV"). The SPV, which might be a trust or a company, finances the purchase of those assets by the issue of bonds, which are secured by those assets. In this instance the client transfers the benefit of the *chose in action* to the CLAF.

⁴⁸ See generally "Financing Class Actions" J.H. McMaster and W.K. Branch of Branch McMaster Attorneys wbranch@branchmac.com

⁴⁹ s.23.

The *Fonds* pays the assisted person or persons attorney fees and expert's fees and other incidental expenses; offering vital cash flow as the case proceeds and replacing the firm's bank or the partners' capital in a US plaintiff litigation firm. Up to 1999 the *Fonds* had made 995 decisions with 79 per cent of cases being approved for funding. Funding was provided to 66 per cent of class actions. The *Fond's* capital is guaranteed by the provincial government and working capital is provided by a subrogation from damages ranging from 2 to 10 per cent in individual awards to up to 90 per cent of the aggregate award as well as subsidy.⁵⁰ Crucially, this subvention applies to *all* class actions. In effect the class of classes subsidises the system. A further enormous advantage is that although a representative plaintiff remains liable for costs following the event this is ameliorated by the costs being low.⁵¹

The latest report on the activity of the *Fonds*⁵² demonstrates the continued vigour of this approach. Sixty-five claims were presented and 51 accepted. The level of aid was Can\$1,509,123 up by Can\$40,000 on the previous year. While 85 per cent of claims were made by individuals 8 per cent were by non-profit making bodies and 5 per cent by co-operatives.⁵³ Eighty-nine per cent of defendants were for profit organisations, local or central government. Clearly, "equality of arms" is well served in this arrangement.

The *Fonds* whilst part of a US inspired class procedure is:

"essentially part of the statist Quebec tradition in which, the state assumes the responsibility for promoting equality and social justice (...) it aims to put (the applicant) at the level of his adversary in strength and organisation."⁵⁴

Certainly, the *Fond* are promoted by the Government of Quebec as an essential part of a right to justice and the values of "a modern and united society".⁵⁵

Ontario

The equivalent arrangement in the common law jurisdiction of Ontario, the Ontario Class Proceedings Fund, was set up with a \$500,000 grant from the Ontario Law Foundation. If the case succeeds at trial or on settlement then the Fund recovers its outlay plus 10 per cent.⁵⁶ The Fund operates in a procedural environment in Ontario which is open to class proceedings and increasingly open to contingency fee funding; first of all by an element of Nelsonian blind eye but increasingly with legislative support.⁵⁷

A successful applicant will receive funding for disbursements (but not legal fees) and indemnity from adverse costs awards made in favour of the defendants to the class

⁵⁰ \$600,000 in 2000.

⁵¹ Limited to \$1,000 to \$3,000. Disbursements remain to be paid. Perhaps, a combination of representative plaintiffs with nothing to lose being chosen and disbursements being covered by the plaintiff lawyers resolves this difficulty.

⁵² *Fonds D'Aide Aux Recours Collectifs Rapport Annuel 2003–2004*.

⁵³ *ibid.*

⁵⁴ Translation from C.Younes, "*Le Recours Collectif Quebecois; les Realities Collectives a Travers Le Prism Du Droit*" (2000) 15 Can.J.L. & Soc'y 111 at p.114.

⁵⁵ The Quebec Portal can be found at www.gouv.qc.ca/wps/portal/pgs/commun.

⁵⁶ Whereas Quebec it is 2–10% of claims not in addition to outlay.

⁵⁷ Justice Statute Law Amendment Act 2002.

proceeding. The Fund carries the risk. A general view is that the Fund has not been wholly successful.⁵⁸ To date, the Fund has failed to achieve its primary objective, namely, access to justice, for a number of possible reasons. First, the 10 per cent levy on any judgment or settlement may be a disincentive. Secondly, there are high transaction costs associated with preparing the application and by time high adverse costs may have been built up without protection. Thirdly, the Fund offers protection but not active litigation support: a lawyer willing to act on a contingency fee must be found.

Comparison between the two CLAFS

While, the Quebec *Fonds* seem well integrated into the legal system and healthy, the 2002 and 2003 Annual Reports of the Ontario Fund show that fewer than a dozen applications were made in the period 2001 to 2003, and that fewer than a handful of applications were granted.

“It is likely that, in the early years of the Fund, the Committee administering it was extremely conservative in its funding decisions. Because the original endowment was only \$500,000, there was a risk that it could be completely depleted in a short period of time by disbursements and adverse cost awards. However, latterly, the balance in the Fund has been high: in 2001, \$613,803; in 2002, \$3,492,427; and in 2003, \$3,388,310.76 It remains to be seen whether this will result in a greater number of successful applications in future.”

The two funds betray their political and social pedigrees with the Quebec *Fonds* having an element of central state policy while the Ontario Fund although directed towards cases with a public interest appearing to be constrained by a more risk averse approach; perhaps, contributed to by more limited funding.⁵⁹ While, Quebec procedure does allow for the English rule it is limited in scope and, in any event, the quantum of costs is low. In Ontario the English rule applies in all its rigour unless the case is a test case, raises a novel point of law or a matter of public interest.⁶⁰ Thus, although contingency fee funding assists plaintiffs in respect of their own side costs it leaves them vulnerable if the case is lost. While, in practice the representative plaintiffs have avoided an adverse cost award,⁶¹ the contingent danger makes this a risky occupation and highly inappropriate in any case that has survived the class certification test. If a class action is supported by the Ontario Fund then this contingent danger is removed: the Fund indemnifies the representative plaintiff. However, from the point of view of the attorney it is unsurprising that in Ontario, whose attorneys are much more influenced by those to the south of the border, the fund with its levy is less attractive than the prospect of taking a contingency fee risk and sharing the spoils. The result is the *Fonds* has been much more active.

Canadian CLAFS and competition cases

The Canadian Competition Act provides a diet of private remedies not dissimilar to those envisaged in Europe following modernisation of the competition regime. The analysis

⁵⁸ See *Lerners LLP*, www.lerners.ca/commercial_lit and *f.n.* 59.

⁵⁹ See G. Watson, “Class Actions: The Canadian Experience” 11 *Duke J.Comp. & Int’l L.* 269 at p.3.

⁶⁰ *Class Proceedings Act* S.O. Ch.6, para.31(1)(1992) (Can).

⁶¹ See *Garland v The Consumers’ Gas Company* (1998) CanL11 766 (S.C.C.).

above suggests that attorneys in Ontario will prefer to take a punt on antitrust damages cases, without troubling the Fund, if the risk seems reasonable and the reward is high enough. Certainly, this was the approach in the price fixing case of *Chada v Bayer Inc*⁶² although, ultimately, the class was not certified. Again, in the recent case of *Ford v Hoffman-La Roche Ltd*⁶³ the Superior Court of Ontario dealt with the settlement of class action vitamins price fixing case. Damages were assessed at about \$140 million in favour of a wide range of plaintiffs.⁶⁴ In the associated case of *Ford v F. Hoffman-La Roche Ltd*⁶⁵ class counsel fees were approved in Ontario equivalent to 15 per cent of the settlement figure plus costs recovered under the “English rule”. In a parallel vitamin case in Quebec *Brochu c. Ajinomoto USA Inc*⁶⁶ in the Superior Court of Quebec it is notable that the *Fonds* were involved in funding the case.

Conclusion: developing a European CLAF for cartel cases

The funding issue cannot be ducked. Whatever proposals and recommendations flow from the Green Paper process they will be rendered at best marginal unless a mechanism by which legitimate claimants can fund their cases exists. A reformed contingency fee system as discussed above may be part of the solution. However, it is submitted that a CLAF developed on the Quebec model may be a funding mechanism that goes with the grain of European traditions.

A CLAF on the Quebec model is more likely to fit into a Europe where class actions are limited, contingency fees are rare and a collectivist approach which includes representative bodies acting for a class rather than class representatives and lawyers is preferred. In addition, such a CLAF has potentially a significant advantage over other funding systems such as contingency fee in that it leaves national procedural arrangements largely untouched. If, for example, a European CLAF were established it would be distinct, leaving the national procedural rules intact.⁶⁷ An alternative less intrusive approach would be for the Commission to recommend this funding system to the Member States. Those states who wished to encourage damages actions and would be happy to see multi-state actions in their courts could adopt such legislation in their own jurisdictions. A CLAF funding solution would also, unlike the US contingency fee system, represent a European style “solidarity” system between applicants in order to promote access to justice. There are, however, a number of questions that would have to be answered. For instance, who would run the European CLAF? Presumably, the Commission itself would not wish to be involved in deciding which plaintiff received funding. More likely a separate agency would have to be established or the responsibility

⁶² 223 D.L.R (4th) 158.

⁶³ 2005 CanL11 8751 (ON S.C.).

⁶⁴ A direct purchaser fund including a range of Canada wide organisations with charitable or non-profit making purpose, e.g. The Victoria Order of Nurses, the Canadian Association of Food Banks, etc. and a Consumer Fund benefiting a wide range of consumers and intermediate purchasers by trickling down the money to universities and colleges.

⁶⁵ 2005 CanLII 8689 (ON S.C.).

⁶⁶ 2004 Carswell Que 6356.

⁶⁷ However, it would be necessary to have the European CLAF established by Community legislation to deal with national rules that specifically limit the types of funding that may be used to finance litigation before the national courts.

for making funding decisions would be transferred to a NGO such as the CCBE.⁶⁸ There is also the problem of how to pump prime a CLAF. One possibility would be to fund the CLAF initially from Commission funds. There are, however, alternative funding approaches including securing a loan against future revenue from competition cases. These questions may suggest that the approach to enacting if not promoting CLAF funding regimes may well be national rather than European. A further question is whether the CLAF should be limited to cartel cases. Once again, the argument can be made for focussing assistance on cases involving the most egregious competition infringements. This argument is reinforced by the likely existence of a prohibition decision following on from a leniency application making success of any damages claim probable if funding is secured.

More broadly there is a question hanging over antitrust litigation reform in Europe. At first sight it is difficult to come up with a strong reason why competition law should be specifically reformed over other types of civil litigation. There are two potential answers to this question. First, it can be persuasively argued the Commission's central role in the field of competition law, and the almost entirely European genus of the case law and legislation makes competition law a good place to start reform of civil litigation. Secondly, it can be argued that there are a narrow class of specific antitrust related litigation issues, such as the link between leniency and civil damages and access to information of antitrust agencies that justify special measures. This is not to deny the reality that jurisdictional, discovery and funding problems face all types of civil actions across Europe, from shareholders actions through to actions brought by consumers. Any significant development by the Commission or the Member States in the competition field may well find itself being replicated in other fields in future years. The most likely scenario for such a development is a multi-state corporate scandal in which national civil litigation rules struggle to cope. It is a sad truth not limited to reform of European civil litigation that wide-ranging effective reform will only take place after a major scandal has generated media exposure and caused significant damage. Until then, the major focus of litigation reform is likely to remain competition law.

⁶⁸ The Council of Bars and Law Societies of Europe.