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THE RAPIDLY CHANGING LANDSCAPE OF PRIVATE GLOBAL ANTITRUST LITIGATION: INCREASINGLY SERIOUS IMPLICATIONS FOR U.S. PRACTITIONERS

By James L. McGinnis, Oliver Heinisch, and Nadezhda Nikonova¹

I. INTRODUCTION

The center of gravity when it comes to private litigation of international antitrust disputes is still in the United States, but two trends affecting the legal landscape in the U.S., U.K., and EU are shifting it across the Atlantic. In this article, we address these trends and further discuss their implications for lawyers handling major antitrust disputes that have global footprints. Much of the discussion will focus on cartel litigation because those cases often involve global issues and present the most obvious examples for our discussion.

The first trend is the evolving jurisprudence of the Foreign Trade Antitrust Improvements Act (“FTAIA”). The FTAIA governs the scope of U.S. antitrust law over sales that implicate foreign comity concerns. While the FTAIA remains among the more baffling statutes to apply, circuit court decisions are multiplying and foreign jurisdictions are adding their own views in support of their own remedies. Complete clarity is likely to remain elusive, but there are categories of commerce involving foreign entities that are increasingly likely to be ruled out of bounds for U.S. courts with the result that foreign courts may be the only venues with jurisdiction over large amounts of sales.

The second key development is that, after many years of discussion, foreign remedies and procedures in the U.K. and other EU member states are finally being defined in ways that can be attractive for plaintiffs.² In 2013, the European Commission (“Commission”) adopted non-binding recommendations on collective redress.³ On November 26, 2014, the Commission also mandated additions to national laws ensuring uniform rules across the EU’s 28 member states for private damage actions. These revisions must be implemented by December 27, 2016. National law modifications consequently are underway. There will be changes even in those jurisdictions that already have advanced systems and attract most private antitrust actions, such as the U.K., the Netherlands, and Germany.

Last year, the U.K. adopted rules in the Consumer Rights Act of 2015 that include for the first time an opt-out collective redress mechanism that is similar to a U.S.-style class action system. This law goes far beyond both the Commission’s recommendations

1 Mr. McGinnis is a partner and Ms. Nikonova is an associate in the San Francisco office of Sheppard Mullin Richter & Hampton LLP. Mr. Heinisch is a partner in the London office of Sheppard Mullin. All practice in the firm’s Antitrust and Competition Group.

2 The changes in Europe resulted from a protracted process of consultation. In 2005 the Commission adopted a Green Paper on antitrust damages actions and a White Paper in 2008 which dealt among other things with collective redress. A subsequent public consultation on the proposed European framework for collective redress highlighted the divergence of views among the stakeholders across Europe and the difficulty to reach consensus on a Directive.

3 Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, 11.6.2013 COM(2013) 401 final.

and what was required under the Directive. No other European Union Member State has followed suit so far.

In short, until recently, private cases were focused on U.S. remedies with few companion cases across the Atlantic. This dynamic has dramatically changed over recent years as cartels investigated in both the U.S. and the EU now routinely trigger private damages actions on both sides of the Atlantic. Many practitioners now assume that international cartel matters will prompt significant private cases filed by large customers either in the U.K., Germany, or the Netherlands. In the future, more European national courts are likely to be involved, especially if Brexit further shifts the balance toward continental Europe. International cartels already have attracted private actions across Europe including: auto glass, DRAM, CRT, LCD, batteries, and air cargo. Representative cases have started to emerge—despite predictions to the contrary. If there are any early successes, those cases are likely to proliferate soon.

We will begin with a brief overview of how we got to where we are now, move to an analysis of the current situation in the U.K. and the EU, and conclude with a discussion of what all of this may mean for practitioners. Specifically, we focus on the exponentially increasing complexity of decisions concerning arbitration, discovery, settlement, and case coordination.

II. EVOLVING LIMITS ON THE SCOPE OF U.S. LAW AND EMERGING FOREIGN REMEDIES

A. Limits on the Scope of U.S. Law

Traditionally, global cases were litigated almost exclusively in the U.S. Plaintiffs were inclined to pursue all of their damage claims in U.S. courts based on the availability of treble damages and attorney’s fees. And the American rule on attorney’s fees made this a no risk proposition. Moreover, the FTAIA case law was much less developed.

Now, maturing FTAIA jurisprudence has begun to clarify what sales may or may not be addressed in U.S. courts. While parties will continue to disagree about the scope of the U.S. Sherman Act, most would acknowledge that there is a serious risk that a U.S. court will not adjudicate disputes involving foreign sales of components to foreign subsidiaries of U.S. companies. If finished products then are made by those overseas subsidiaries and sold abroad, almost certainly U.S. law will not reach those sales.

The FTAIA was signed into law in 1982, but has not been applied and litigated in earnest until the last fifteen years. The entirety of the surprisingly short statute reads as follows:

Sections 1 to 7 of [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

1. such conduct has a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations;
or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

2. such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.⁴

The FTAIA has two fundamental purposes. First, the statute codifies principles of international comity by limiting the reach of U.S. antitrust laws in order to avoid “interference with other nations’ prerogative to safeguard their own citizens from anti-competitive activity within their own borders.”⁵ Second, the FTAIA promotes “certainty in assessing the applicability of American antitrust law to international business transactions and proposed transactions” by articulating a “single, objective test” for “determining whether American antitrust law is to be applied to a particular transaction.”⁶

The FTAIA establishes a general rule that the Sherman Act does not apply to conduct involving foreign commerce.⁷ The FTAIA then articulates two exceptions. First, under the “import commerce” exclusion, the statute provides that the Sherman Act does apply to conduct involving U.S. import commerce, which courts have defined to mean “transactions that are directly between [U.S.] plaintiff purchasers and [foreign] defendant cartel members.”⁸ Second, the “domestic effects” exception applies only where (1) the foreign conduct at issue had a “direct, substantial, and reasonably foreseeable effect” on U.S. commerce, and (2) that domestic effect “gives rise to” the claim.⁹

Courts have had a remarkably difficult time applying the FTAIA to business situations that have become common in an increasingly global economy. Although there is still little consensus regarding the exact boundaries of the FTAIA, recent circuit court decisions have given practitioners some clarity over which sales may be out of bounds for U.S. courts.

For example, the FTAIA excludes anticompetitive conduct by foreign companies that only causes a foreign injury. In its first major ruling on the issue, the Supreme Court recognized that the purpose of the FTAIA is to “exclude from the Sherman Act’s reach much anticompetitive conduct that causes only foreign injury.”¹⁰ In *Empagran I*, a foreign purchaser brought claims in U.S. court for vitamins that were sold into foreign commerce. It was not disputed that the global Vitamins cartel had affected domestic

4 15 U.S.C. § 6a.

5 *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267, 1271 (D.C. Cir. 2005) (“*Empagran II*”).

6 H.R. Rep. No. 97-686 at 2, 5, 8 (reprinted in 1982 U.S.C.C.A.N. 2487, 2488, 2490, 2493).

7 *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 542 U.S. 155, 158 (2004) (“*Empagran I*”); *United States v. Hsiung*, 778 F.3d 738, 757 (9th Cir. 2015).

8 *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 855 (7th Cir. 2012).

9 15 U.S.C. § 6a(1)-(2).

10 *Empagran I*, 542 U.S. at 158.

commerce, but defendants argued that the foreign plaintiff's purchases did not give rise to a Sherman Act claim in the same way that a domestic plaintiff satisfied the "domestic injury" exception. The Supreme Court held that U.S. antitrust laws do not apply where "price-fixing conduct significantly and adversely affects both customers outside the United States and customers within the United States, but the foreign effect is independent of any adverse domestic effect."¹¹ This case made clear that U.S. antitrust laws do not extend to *independent* foreign injuries, even if they were caused by an alleged global cartel that also caused domestic injuries.

The FTAIA also implicates foreign purchases made pursuant to a global purchasing agreement. In *Motorola Mobility, LLC v. AU Optronics Corp.*, three sets of purchases of TFT-LCD panels (the major component of LCD screens) were at issue.¹² The first set of purchases consisted of LCD panels that were sold directly to Motorola's U.S. parent. These purchases were "import commerce" subject to the Sherman Act, but they comprised only 1% of Motorola's claimed damages. The rest of the LCDs were purchased outside of the U.S. by Motorola's foreign subsidiaries and incorporated into cellphones that were either resold in the U.S. by the parent company ("Category 2" purchases) or sold abroad to foreign purchasers ("Category 3" purchases). The court ruled that Category 3 purchases—which were the majority of Motorola's claimed damages—"can't possibly support a Sherman Act claim" because "neither those cellphones nor their panel components entered the United States." The court also barred Motorola's Category 2 purchases because the added layer of a foreign subsidiary selling the cellphones back to Motorola for resale to U.S. consumers was too tenuous to "give rise" to Motorola's claim under the FTAIA. That the foreign purchases were subject to a master price agreement negotiated between Motorola and LCD manufacturers in the U.S. was not enough, on its own, to bring these purchases under the Sherman Act. Motorola's foreign subsidiaries were thus treated as the foreign purchaser in *Empagran*, rather than a single enterprise.

The law is still developing as to indirect sales of foreign sourced goods that are sold in the U.S. Take *United States v. Hsiung et al.*,¹³ which arose from the same LCD cartel as *Motorola*, as an example. In *Hsiung*, AU Optronics sold LCDs to foreign OEMs which then sold "substantial volume of goods" to U.S. consumers. In this criminal case, the Ninth Circuit determined that AUO's conduct, which "targeted" the LCDs "for sale or delivery in the United States," constituted "import commerce" that fell under the purview of the Sherman Act. The Ninth Circuit held that although the guilty verdict could be sustained under the domestic effects exception, there was no need to apply that exception because the DOJ had proved U.S. import commerce. The Supreme Court refused to hear the *Hsiung* and *Motorola* appeals, even though some argued that the decisions were in conflict.

As the FTAIA jurisprudence was evolving, many foreign nations were simultaneously developing more robust antitrust regimes that did not exist when the statute was first enacted in 1982. The FTAIA, of course, was explicitly enacted to embrace principles of international comity by limiting the reach of U.S. antitrust laws. U.S. courts have

11 *Id.* at 164.

12 775 F.3d 816 (7th Cir. 2015).

13 778 F.3d 738 (9th Cir. 2015).

interpreted “interference” to apply to leniency programs, state enforcement actions, and private remedies.

Though not explicitly stated in the decisions, U.S. courts may be giving more deference to comity principles as they begin to understand the remedies that are available abroad. The Governments of Germany, the U.K. and Northern Ireland, Japan, Switzerland and the Netherlands submitted a joint brief as *amicus curiae* in the *Empagran* case arguing that “fundamental principles of international law and prescriptive comity limit U.S. court jurisdiction over foreign injuries” and that unrestricted U.S. jurisdiction “would shift private claims to U.S. courts and interfere with the policy choices made by other jurisdictions.”¹⁴ They explained that the differences in private damages remedies—or lack thereof—should be treated as deliberate policy choices that should be respected by the United States’ commitment to international comity.¹⁵ The Supreme Court recognized that “the comity concerns remain real as other nations have not in all areas adopted antitrust laws similar to this country’s and, in any event, disagree dramatically about appropriate remedies.”¹⁶

In the *Motorola* case, the Belgian Competition Authority and the Ministry of Economy, Trade and Industry of Japan (“METI”) submitted *amicus curiae* briefs making even stronger comity arguments. The Belgian Competition Authority¹⁷ specifically highlighted changes in Belgium’s competition regime since *Empagran* was decided, including adopting a leniency program, new rules on collective redress, the establishment of a new procedure for early settlement of investigations, and its directive to “build consensus . . . across the global antitrust community” through participation in the International Competition Network (“ICN”). The Belgian Competition Authority urged the U.S. not to interfere with its competition regime.

METI¹⁸ argued that allowing *Motorola* to pursue its Category 2 and 3 claims in the U.S. would have “international public policy implications which would adversely affect the ability of the government of Japan to regulate its own economy and govern its own society.” One of METI’s concerns was that “the applicability of treble damages, which are not common outside US, will be expanded through excessive extraterritorial application of US competition law, and that, as a result, Japan’s ability to regulate its own commercial affairs will be interfered.” METI added: in civil lawsuits based on injuries alleged to have been incurred as a result of foreign anticompetitive activities, plaintiffs often tend to insist on the remarkably enlarged scope of extraterritorial application.” The Seventh Circuit seemed to agree:

14 Brief of the Federal Republic of Germany, United Kingdom of Great Britain and Northern Ireland, Japan, the Swiss Confederation, and the Kingdom of the Netherlands as *Amici Curiae* in Support of Defendants-Appellees, *Empagran, S.A. et al., v. F. Hoffman-La Roche Ltd.*, 2005 WL 3873712 (D.C. Cir. March 9, 2005).

15 *Id.*

16 *Empagran I*, 542 U.S. at 155.

17 Brief of the Belgian Competition Authority as *Amicus Curiae* in Support of Appellees, *Motorola Mobility v. AU Optronics*, 775 F.3d 816, Case No. 14-8003 Dkt. 113 (Oct. 16, 2014).

18 Brief of the Ministry of Economy, Trade and Industry of Japan as *Amicus Curiae* in Support of Appellees, *Motorola Mobility v. AU Optronics*, 775 F.3d 816, Case No. 14-8003 Dkt. 119 (Oct. 17, 2014).

Of course Motorola wants damages for its subsidiaries, rather than just a cessation of the cartel activities that are hurting them. And foreign antitrust laws rarely authorize private damages actions. But . . . Motorola is asserting a right to forum shop; that if some foreign country in which one of its subsidiaries operates happened to provide a more generous private damages remedy than American antitrust law provides, Motorola would direct that subsidiary to seek that remedy in that country.¹⁹

No doubt the emerging case law will continue to refine the analysis of the FTAIA.

B. EU and U.K. Developments

At the same time that the scope of U.S. Sherman Act was being defined, U.K. and EU statutes began to make those jurisdictions more attractive for private cases both in terms of procedure and available damages.

1. Basic European Level Provisions

In 2001, the European Court made clear that any person can claim compensation for harm suffered where there is a causal relationship between that harm and an infringement of competition law.²⁰ While this landmark judgment definitely added momentum to private enforcement in the U.K. in particular, U.K. courts had established for many years that damages were available for harm caused by infringements of competition law. To some extent, that history explains the prominent position of the U.K. courts in private damages actions within Europe.

While it is now well established that anyone who suffered harm can claim compensation for actual loss, lost profit and interest, additional compensation in the form of punitive, multiple or penalty damages is not currently allowed. While the right to compensation stems from the *aquis communautaire*²¹ the exercise of this right in the form of damages actions has remained subject to individual national laws of 28 EU members states. The diversity of those regimes was a contributing factor to the slow overall growth of private remedies in Europe.

European Regulation 1/2003/EC²² was the first important legislative step toward facilitating private damages action across Europe. This regulation made European Commission decisions binding on national courts, consequently promoting cooperation with national courts and the Commission. Since then, national cases have shed more light on questions including standing, standard of proof, interim relief, pass-on and damages—still with a significant degree of diversity across the EU 28.

The European Commission's 2014 Directive was intended to promote private remedies by harmonizing the member states' substantive rights and procedures. While

19 *Motorola*, 775 F.3d at 826.

20 Case C-453/99 *Courage Ltd v Crehan* [2001] ECR I-6297, see also C-295/04 *Vincenzo Manfredi* [2006] ECR I-6619.

21 The accumulated body of European Union law.

22 Official Journal L 001, 04/01/2003 P. 0001—0025.

the Directive explicitly did not address collective actions, it mandated that member states ensure the right to claim and obtain full compensation for competition infringements. The Directive sets minimum requirements in several key areas that must be reflected in 28 national laws by the end of 2016:

***Disclosure of Evidence*²³**

Following a reasoned request based on evidence supporting the plausibility of a claim, national courts will be empowered to order proportionate disclosure of relevant evidence. Evidence will be available to the claimant, defendants, third parties or competition authorities. The resulting rules must ensure that disclosure is limited and proportionate, and can be challenged by the responding party. Both leniency statements and settlement submissions will be protected from disclosure. But it remains to be seen how this new procedure will be implemented and applied in practice. Most European jurisdictions do not have experience with disclosure, nor any precedents and inconsistent practices across the EU may be the result. The U.K.’s longstanding tradition of disclosure likely will offer more legal certainty in this area. The availability of discovery, while likely far less expansive than under U.S. procedures, will be a major change in European jurisdictions.

***Joint and Several Liability*²⁴**

New rules will require that companies jointly responsible for a breach of competition law will be jointly and severally liable. Plaintiffs will have the option to sue one or several infringers for the entire damage, regardless of each company’s contribution. Joint infringers may recover any overpayment of liability through contribution claims against other infringers. However, an immunity applicant’s liability will be limited to the damages caused to its direct or indirect customers or providers unless recovery from other infringers is unavailable. Small and Medium-sized Enterprises²⁵ can also be protected from overpayment if (1) their market share is less than 5%, (2) joint and several liability would jeopardize their economic viability and (3) they were not ringleader of the cartel or (4) recidivists.

***Defenses*²⁶**

The pass-on defense claiming that overcharge was in whole or part passed on can be invoked by defendants as a defense to a damages claim. Defendants must bear the

23 Directive 2014/104/EU Of The European Parliament And Of The Council of 26 November 2014, Recitals 15-33, Chapter II.

24 *Id.* Recitals 37, 38, Chapter III, Article 11.

25 As defined in Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises: The main factors determining whether an enterprise is an SME are: staff headcount and either turnover or balance sheet total.

Company category	Staff headcount	Turnover	or	Balance sheet total
Medium-sized	< 250	≤ € 50 m		≤ € 43 m
Small	< 50	≤ € 10 m		≤ € 10 m
Micro	< 10	≤ € 2 m		≤ € 2 m

These ceilings apply to the figures for individual firms only. A firm that is part of larger group may need to include staff headcount/turnover/balance sheet data from that group too.

26 Directive 2014/104/EU Of The European Parliament And Of The Council of 26 November 2014, Recitals 39-44, Chapter IV.

burden of proof and may require disclosure from the claimant and third parties. Indirect purchasers can claim antitrust damages if they can show that that direct purchasers of the cartelists passed on the overcharge to them. This theory may be facilitated by the introduction of a rebuttable presumption if (1) there is an infringement, (2) an overcharge to the direct purchaser, and (3) the plaintiff purchased the cartelized products or their derivatives. Courts will assess the pass on rate.

Standing for Indirect Customers²⁷

Indirect customers can also claim antitrust damages on the basis of a rebuttable presumption that their suppliers have passed on the cartel overcharge to them if it can be shown that (1) the defendant committed an infringement, (2) the infringement resulted in an overcharge for the direct purchaser, and (3) the indirect purchaser purchased the good or services that were the object of the infringement.

Quantification of Harm²⁸

The quantification of damages remains subject to national rules and the Directive only establishes that the burden of proof shall not render the exercise of the right to damages practically impossible or excessively difficult. The courts will be empowered to estimate the amount of damage, and there will be a rebuttable presumption that the infringement of antitrust law caused the harm.

While the objective of fines imposed by the European Commission is deterrence, the purpose of damages claims in Europe is to repair the harm suffered as a result of an infringement. The Court of Justice of the European Union has described the concept of compensation as placing the injured party in the position it would have been in had there been no infringement. Therefore, compensation includes reparation not only for actual loss suffered (*damnum emergens*), but also for loss of profit (*lucrum cessans*) and the payment of pre-judgment interest (which is not available in the U.S.). Actual loss means a reduction in a person's assets. Loss of profit means that growth of those assets, which would have occurred without the infringement, was stifled.²⁹

The Commission also adopted a non-binding Communication³⁰ on the quantification of damages, including a practical guide,³¹ in order to address the perceived difficulty courts, tribunals and parties have in quantifying the loss suffered. The guide sets out various techniques available to identify the amount of the damage and addresses how they can be applied. The Commission does not favor one method over another and

27 *Id.* Recital 44, Article 14.

28 *Id.* Recitals 45-46, Article 17.

29 Commission Staff Working Document Practical Guide Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, June 11, 2013, SWD (2013) 2015, {C(2013) 3440}, available at http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf.

30 *Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union*, OFFICIAL JOURNAL OF THE EUROPEAN UNION (2013/C 167/07), p. 19, June 23, 2013.

31 *Id.*

leaves this decision to a case-by-case analysis of the court. The first step in the analysis is to establish the counterfactual, *i.e.*, the situation the injured parties would have been in but for the infringement. The favored counterfactual technique is the comparator-based method where actual market outcomes are defined in order to compare them with what would have likely happened in the market but for the infringement. In doing so, a comparison can be drawn with the time before the infringement in the same market and what happened in same product but different geographic or similar product markets. Other methods mentioned are simulation models, cost-based and finance-based methods.

Importantly, the Directive also mandates that “Member States shall lay down procedural rules appropriate to ensure that compensation for actual loss at any level of the supply chain does not exceed the overcharge harm suffered at that level.”³²

Implementation of the Directive

Although the Directive will not lead to complete harmonization, there should be real progress toward common ground across the EU 28. The result will likely make it easier and safer for plaintiffs to launch proceedings.

Indeed, the process of complying with the Directive has begun. On July 16, 2016, the German authorities issued a draft set of rules intended to comply with the Directive. Germany has been a pioneer in private antitrust actions so its laws already are broadly similar to what the Directive requires. Nonetheless, the new draft Section 33 of the German Act Against Restraints of Competition details the right to full compensation for victims of competition infringements. Also, the draft law includes an express, though rebuttable, presumption of harm from cartel activity. As required by the Directive, the German statute provides for indirect purchaser standing and a presumption that direct purchasers passed on the overcharge. Courts will be permitted to evaluate the pass on rate. As is the case in the U.S., pass on cannot be used defensively against the direct purchaser.

As could be the case when other member states comply with the Directive, parts of the German law exceed what the Directive requires. The Directive leaves to national courts the decision whether or not to permit discovery. The draft, by contrast, grants the parties a substantive right to discover documents and obtain information, with the exception of leniency documents and settlement agreements. In this instance, Germany’s implementation of the Directive effectively will result in important changes in German discovery practice. Discovery has never been allowed before in cartel damages cases in Germany.

Germany’s implementation of the Directive is likely to build on the current momentum for private antitrust litigation in German courts. While discovery is likely to remain more limited than in the U.S., other aspects of German procedure will be increasingly familiar to U.S. practitioners. The new rules will no doubt further increase the attractiveness of German courts for businesses to claim damages. However, the lack of detailed rules on collective redress will continue to be a significant hurdle for consumers.

2. The Developing U.K. and EU Private Remedies

While not all EU national parliaments have implemented required changes to facilitate antitrust damages actions, there has been a surge of cases across Europe. Perhaps the most notable development has been the promulgation of a true U.S.-style collective action mechanism in the U.K. While other EU nations have flirted with the collection action concept, none of the resulting procedures resemble U.S. class actions.

U.K.

The U.K. collective action mechanism was enacted in the Consumer Rights Act 2015.³³ The Competition Appeal Tribunal (“CAT”), a specialized court in London, has exclusive jurisdiction over collective action proceedings.³⁴ The CAT will serve as a gateway by granting a collective proceedings order (“CPO”) and certifying the claims that may be brought.³⁵ In order to grant a CPO, there must be an “identifiable class”,³⁶ claims must raise common issues,³⁷ and claims must be “suitable” for collective proceedings.³⁸ Although the CAT has wide discretion, there is still not clear guidance on two fundamental questions that have been at the heart of U.S. class action litigation and certification: what will the standards be for granting a CPO and how will they be analyzed?

The CAT, not the claimants, also will determine whether a collective action will proceed as “opt-in” (each class member must affirmatively opt into the class) or “opt-out” (class members are automatically in the class unless they choose to opt out). In deciding whether the collective action will proceed as opt-in or opt-out, the CAT will determine the strength of the claim, the degree of commonality, and whether opt-in would be practical given the amount of damages an individual class member is estimated to recover.³⁹ Indeed, the class representative is required to provide an estimate of the damages and a proposal for how they would be distributed among class members.⁴⁰ But it is ultimately up to the CAT to determine how each class member’s damages will be calculated.⁴¹

The CAT can calculate damages in the aggregate, via sub-classes, or individually.⁴² When dealing with a “large class with largely identical individual claims”, the CAT “may calculate the damages on a class-wide basis” by either calculating “a lump sum award against the defendant” or by “using a formula to determine each represented person’s claim.”⁴³ One area where the U.K. rules are more flexible than the U.S. is the

33 CRA15.

34 See CAT Guide to Proceedings 2015.

35 CAT rule 79.

36 CAT guide section 6.37.

37 CAT rule 73(2).

38 CAT rule 79(2)(a)-(g).

39 See rule 79(2)(a)-(g).

40 CAT guide, section 6.30 and CAT rule 75(3)(i).

41 CAT guide, section 6.82.

42 See CAT rules 73(2), 88(2).

43 CAT guide, section 6.78.

CAT's ability to grant a CPO for the liability portion of the case and then "direct that the quantification of damages proceed as individual issues."⁴⁴ If the CAT cannot specify a formula, it may appoint an "independent third party to determine the claims or any disputes regarding quantification."⁴⁵

A major difference between the U.K. and U.S. systems is the extent of class action incentives. The new U.K. rules do not allow for punitive or treble damages.⁴⁶ The U.K. rules also limit compensation for class representatives and the use of unclaimed damages,⁴⁷ and the CAT has greater control over certifying the class representative based on policy grounds.⁴⁸ Finally, the U.K. allows fee-shifting, which puts plaintiffs at greater exposure for bringing unsuccessful claims.⁴⁹ Although the incentives to bring collective actions may not be as strong in the U.K. as they are in the U.S., the introduction of opt-out actions clearly has the potential to increase the overall exposure for defendants.

Indeed, on September 8, 2016, U.K. consumers filed an \$18.7 billion collective action against MasterCard. The claim is that 46 million U.K. customers overpaid interchange fees from 1992 to 2008. This case will be closely watched and is likely to generate precedents that impact the future of collective actions in the U.K. Procedural successes in this case, or any of the others, will add to the current momentum for these collective actions in the U.K.

The U.K. CAT recently issued a judgment⁵⁰ in a single plaintiff MasterCard case that was its first stand-alone action since it was empowered to hear them by the new rules on antitrust damages action.⁵¹ This case is important in several ways. It was not only the first case of many multilateral interchange fee cases but also the first in which the CAT awarded damages in a case under Article 101 of the Treaty of the Functioning of the European Union TFEU and Chapter I of the Competition Act of 1998, both of which prohibit anticompetitive agreements. In determining damages, the CAT admittedly used a "broad axe."⁵² The CAT first calculated the overcharge by comparing the actual interchange fee paid by plaintiff Sainsbury with the highest lawful interchange fee it could have been charged in the but-for world. It then turned to pass on and mitigation defenses both of which failed. The result was an award of £68.8 million plus interest.

The MasterCard case was the first decision of a U.K. court explicitly dealing with pass-on.⁵³ The CAT defined pass-on as an aspect of the process of the assessment of

44 CAT guide, section 6.4, 6.79 and CAT rule 88(2)(c).

45 CAT guide, section 6.82 and CAT rule 92(1).

46 CRA15 Schedule 8.

47 CAT Rule 97.

48 CAT Rule 78(2)-(3).

49 CAT Rules 94, 98.

50 *Sainsbury's Supermarket Ltd v. MasterCard Inc.*, Case 1241/5/7/15 (T), 14 July 2016, [2016] CAT 11.

51 See Section II.B.2, *supra*.

52 *Supra*, note 10, ¶ 424 (3).

53 Pass-on was recognized by European Courts in cases such as *Courage v Crehan* and *Manfredi*, see footnote 3 and many subsequent cases. It is a well-known concept in many civil law jurisdictions.

damage rather than a defense.⁵⁴ It also established strict conditions that must be satisfied for pass-on to be established and reduce a damages award. First, there must be identifiable increases in prices by a firm to its customers. Second, the increase in price must be causally connected with the overcharge. Third, on the balance of probability, another class of claimant, downstream of the claimant must exist to whom the overcharge was passed on. The last condition was included in order to address the risk that any potential claim might become either so fragmented or impossible to prove that the end result would be that the defendant retained the overcharge instead of a successful claimant.⁵⁵ The court also perceived this as necessary in order not to render recovery of compensation “impossible or excessively difficult” as stipulated by the Directive⁵⁶. These conditions may constitute the U.K.’s implementation of the Directive which explicitly deals with the concept of pass-on. MasterCard has asked for permission to appeal the judgment.

A significant number of other antitrust cases are pending before judges in England and Wales.⁵⁷ Most of them concern cartel damages actions but there are also an increasing number of damages cases relating to abuse of dominance. As noted earlier, class actions have been filed. In December 2016, the CAT will hold its first hearing in a case brought by the National Pensioners Convention against the maker of scooters for elderly people.⁵⁸ The first issue to be decided is whether the Convention can represent the class and whether the CAT can issue a collective proceedings order.

Outside the U.K., there are many different kinds of cases in EU national courts. The diversity of approaches taken by national judges in those cases has been a major factor driving the perceived need for harmonization. In particular, there are a growing number of cases in German and Dutch courts. There have also been attempts to launch collective actions but so far only with mixed success.

Germany

In 2015, a case brought by a Cartel Damage Claims Consulting SCRL⁵⁹ (“CDC”), an antitrust claims aggregation vehicle established under the laws of Belgium, was dismissed on the basis that (1) the Belgian litigation vehicle did not have sufficient funds to cover the legal costs of its opponents, (2) the transfer was against public morals, and (3) certain claims were transferred to CDC before it was registered to give legal advice.⁶⁰ The CDC had obtained claims of 36 cement customers against six cement manufacturers which the German competition authority had fined for cartel activity. The value of the

54 See *supra* note 10, ¶ 484. Similar position taken by the German Federal Court in 2011: BGH, judgment of 28 June 2011—KZR 75/10).

55 *Supra* note 18, ¶ 484 (4).

56 See *supra* note 10.

57 Private litigation is pending in front of U.K. courts in relation to cartels, including in CRT, bearings, polyurethane foam, car glass, power cable, smart chips, batteries, LCD, and air cargo.

58 In the Competition Appeal Tribunal: *Dorothy Gibson v. Pride Mobility Products Ltd.*, Case No. 1257/7/7/16.

59 Société coopérative à responsabilité limitée.

60 Landgericht Duesseldorf, Urteil vom 17. Dezember 2013 37 O 200/09 and Oberlandesgericht Duesseldorf.

claims was in excess of 130 million Euros. The CDC has since relaunched proceedings in a different regional court in Mannheim.⁶¹

The Netherlands

Dutch courts have also been active in attracting antitrust damages litigation, including collective actions. The Netherlands so far is the only EU member state where a collective settlement of mass claims can be declared binding on an entire class on an opt-out basis.

Recent cases in the Netherlands also have confirmed the availability of the pass-on defense in antitrust damages action⁶² and that parent companies are not liable for damages arising from antitrust infringement committed by their subsidiaries which stands in contrast to other case law in Europe.

In a case following on from the European Commission's Paraffin Wax cartel decision,⁶³ the CDC asserted claims that were assigned to it from customers of companies fined by the Commission in a court in the Hague. The CDC so far has shown that it is able to cover potential litigation costs, a hurdle it faced in the German cement litigation.⁶⁴ Although different CDC entities are acting, this result shows the possible divergent views on collective actions between EU member states.

Two similar proceedings are pending following European Commission decisions relating to the Sodium Chlorate⁶⁵ and the Air Cargo⁶⁶ cartels.

3. Brexit Impacts

Because the U.K. is now the most sophisticated jurisdiction for antitrust damages actions, an obvious question arises: What impact will Brexit have? Assuming a hard Brexit (withdrawal from the EU with no application of EU law), the impact could be significant though it will not likely be felt until the parameters of Brexit are known. Rules for antitrust damages, however, will not be on the agenda anytime soon.⁶⁷ This uncertainty alone is likely to impact forum choices.

Post Brexit, plaintiffs may be more inclined to choose the EU over the U.K. for litigation unless the rules are similar to what they are now. For example, if European Commission decisions are no longer binding on U.K. judges, there would be an incentive to litigate where they are. The same would be true if European law and rules on the

61 Landgericht Mannheim, 2 O 195/15.

62 July 8, 2016, the Dutch Supreme Court, *TenneT v. ABB*.

63 Case COMP/39181—Candle Waxes.

64 C-09-414499-HA ZA 12-293.

65 C-13-500953-HA ZA 11-2560.

66 C-13-553534-HA RK 13-353 (Claim was brought by Claims Funding Europe Limited (CFE) a special purpose vehicle).

67 The Article 50 negotiations will only deal with the parameters of the exit. Competition law is likely not even on this agenda and will be discussed once Brexit has occurred.

allocation of jurisdiction and the enforcement of judgments (*e.g.*, Brussels Regulation⁶⁸) no longer apply. The Brussels Regulation successfully regulates and facilitates the cross-border enforcement of judgments in relation to civil and commercial matters. The Regulation also deals with jurisdiction of courts including over claims relating to defendants not domiciled in their jurisdiction.

Brexit might also affect U.K. courts' willingness to assert jurisdiction over all of the worldwide parties in a cartel case. Recent cartel damages claims have proceeded in the U.K. without a strong connection of the cartel to the U.K. Companies not domiciled in the U.K. (or the EU) have been brought into the jurisdiction on the basis of a so-called "anchor defendant"—the primary defendant domiciled in the U.K. chosen for the ostensible purpose of bringing the claim before a U.K. court. Even if U.K. common law rules would allow jurisdiction in the absence of the Brussels Regulation, the question will be whether the U.K. courts continue to provide the one-stop-shop a plaintiff might desire. It is unclear whether these differences would discourage so called stand-alone actions which do not rely on prior infringement findings.

While foreign jurisdictions are still catching up, the bottom line is that the U.S. is no longer the only important forum. There are still no treble damages, no contingent fee arrangements, and the English rule for attorney's fees still prevails. However, the ability to recover for worldwide sales and more user-friendly procedural rules are healthy incentives for sophisticated plaintiffs.

III. ISSUES FOR PRACTITIONERS

So if it is clear that cases are likely to be filed both in the U.S. and elsewhere, what does that mean for decisions and strategies in litigation?

A. Arbitration

To arbitrate, or not, is an early and critical question in any case for which that course is at least arguably available. Not infrequently, supplier contracts have arbitration clauses in them. Does the availability of foreign remedies change the calculus as to whether arbitration is desirable? Of course, the facts of the case matter as do the arbitration forum and its procedural rules. At a minimum, though, a close examination of the possible legal jurisdictions is necessary, followed by an equally close comparison of the available arbitral forums, processes and remedies.

At the very least, the following new questions must be answered:

- (1) Where is there jurisdiction? How would a foreign court's analysis of jurisdiction impact the timing of its decision and relate to key events in litigation elsewhere?

68 Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 1/03/2002 and Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) which applies to legal proceedings and judgments of the time after 10 January 2015.

- (2) What damages are available in each forum? Overcharges on worldwide sales? Or something less? What are the U.S. sales subject to trebling compared to sales at issue in an arbitration?
- (3) What defenses are available in a foreign court compared to what an arbitrator would consider?
- (4) Is there joint and several liability, or are there limitations to a party's own sales? How would contribution rights be enforced?
- (5) How quickly does one forum proceed compared to the other?

Certainly there are many other important considerations. The firm conclusion now, though, is that the arbitration analysis is much more complicated and cannot be made on the same basis as before foreign remedies became more readily available.

B. Discovery

Lawyers on both sides of the plaintiff-defense fence and both sides of the Atlantic are likely to focus very quickly on these questions: What part of the U.S. discovery record will have to be produced in foreign cases? Are there parts of the foreign case discovery that would not normally be reached by even the broad U.S. discovery procedure—but might be imported into a U.S. case because they are discoverable abroad?

Probably the first battleground in the U.S. court would be the drafting of a protective order. Commonly, protective orders limit use of confidential documents to “this case.” Should that language be changed to “this case or any other case with fundamentally similar allegations,” *i.e.*, cases filed elsewhere? Arguments for and against opening up the typical language are not difficult to frame. A defendant might begin with the idea that foreign cases should be governed by their discovery laws not, as a practical matter, by what is discoverable in the U.S. The response could be: let the foreign court decide what it wishes to consider, rather than foreclosing the issue by walling off discovery in the U.S. case.

This discussion also assumes a foreign court would honor a U.S. protective order or enter one of its own for the documents at issue. Is there any basis for that assumption? At present, there is very little law on this subject nor is there reason to believe that all judges in all foreign jurisdictions would rule in the same way. Protective orders, of course, are supposed to shield confidential documents with proprietary information in them. Both plaintiffs and defendants would be wise to pay close attention to confidentiality designations.

Also implicit in this discussion has been the idea that U.S. discovery is always broader than foreign discovery and the litigation will concern the extent to which extensive U.S. discovery can be used elsewhere. But could there be information discoverable abroad that would not be discoverable in the U.S. but for its production in a foreign court? And would a foreign court shield that discovery from use elsewhere? Again, this is virtually unexplored territory and the reach of U.S. foreign discovery is sufficiently broad that it may not matter very much. Perhaps a foreign court, however, would have a different calculation of the burden of producing materials situated in that foreign jurisdiction, and those materials might then be brought before a U.S. court.

As noted earlier, corporate immunity and witness statements provided to the European Commission and other national authorities are not discoverable there. Whether they can be discovered in the U.S. has been hotly contested with the European authorities frequently providing amicus statements opposing discovery.⁶⁹

The law requires a multi-factor comity analysis, and some U.S. Courts have recently denied discovery of confidential leniency communications and non-public EC decisions.⁷⁰ An earlier case reached a different result.⁷¹

This is yet another area where there could be an awkward interplay between U.S. and foreign cases. What if U.S. counsel obtains that kind of discovery at the same time she is representing the same claimant abroad in cases where those statements cannot be produced?

At present, there are few reported cases that can provide sound guidance for discovery. As cases proliferate, that may change. Probably the best that can be done now is for there to be close coordination between U.S. and foreign counsel.

C. Settlement

The complexity of settlement analysis has increased in equal measure to the proliferation of foreign remedies. In years past, that calculation was much simpler: What are the sales in the case? What is the overcharge? What is the strength of the liability case? Now, both the U.S. FTAIA jurisdictional analysis and settlement value of foreign cases

69 See, e.g., Letter of Georg De Bronett, EU Comm'n, *In re Vitamins Antitrust Litig.*, 2002 U.S. Dist. LEXIS 26490 (D.D.C. Jan. 23, 2002) (“[T]he effectiveness of the EU antitrust procedures could indeed be seriously undermined” if leniency communications were discoverable); *In re Rubber Chemicals Antitrust Litig.*, 486 F. Supp. 2d 1078 (N.D. Cal. 2007) (citing to the EC’s brief opposing discovery of confidential EC materials); Decl. of P. Lowe, *In re Flat Glass Antitrust Litig.*, No. 08-180 Dkt. 200-3 (Oct. 7, 2009) (disclosure “could seriously undermine the effectiveness of the Commission’s and other authorities’ antitrust enforcement actions” and “authorizing discovery in American litigation of documents that are strictly confidential under European competition law would be highly detrimental to the sovereign interests and public policies of the European Union”); Mem. of Law of *Amicus Curiae* the European Comm’n i/s/o Defendants’ Objections, *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 1:05-md-01720 Dkt. 1372 (E.D.N.Y. March 19, 2010) (objecting to production of confidential investigation materials: “These documents are confidential under the laws of the EU and were provided to Visa and MasterCard by the Commission on the explicit condition that they maintain the confidentiality of those documents. Their production would hinder the European Commission’s ongoing ability to detect and investigate unlawful, anticompetitive activities.”); Letter of European Comm’n, *In re Cathode Ray Tube (CRT) Litig.*, Case 3:07-cv-05944-SC Dkt. 2449 (N.D. Cal. March 26, 2014) (objecting to disclosure of non-final unredacted findings because it would, *inter alia*, undermine the EC’s leniency program which requires confidentiality to be effective). The EC has submitted similar amicus briefs to National Courts arguing that corporate leniency statements should not be discoverable. See, e.g., Observations of the European Comm’n Pursuant to Art. 15(3) of Reg. 1/2003, *National Grid Electricity Transmissions PLC v. ABB Ltd. et al.*, In the High Court of Justice Chancery Div., March. 11, 2011.

70 See, e.g., *In re Rubber Chem. Antitrust Litig.*, 486 F.Supp.2d 1078 (N.D. Cal. 2007) (denying discovery of a leniency applicant’s confidential communications with the EC); Order Denying Motion to Compel, *In re Cathode Ray Tube (CRT) Litig.*, Case 3:07-cv-05944-SC Dkt. 2463 (N.D. Cal. March 26, 2014); Order Denying Direct Action Plaintiffs’ Renewed Motion to Compel Production of the European Commission Decision; *id.* Dkt. 3133 (N.D. Cal. Nov. 20, 2014).

71 *In re Vitamin Antitrust Litig.*, 2002 U.S. Dist. LEXIS 26490 (D.D.C. January 23, 2002) (allowing discovery of submissions to foreign competition authorities).

must be added to the mix, as well as timing considerations stemming from the speed of proceedings in foreign jurisdictions (or arbitrations).

Normally, global settlements are desirable—is that still true? A plaintiff might try to use a potentially quicker U.S. treble damage process to achieve a global settlement that includes both treble damage value and worldwide sales value (albeit without treble damages). Perhaps a defendant would prefer the opposite course: settle the treble damage case and let the foreign cases develop on their own. At least from a conceptual viewpoint, global arbitration probably would be the most straightforward vehicle to drive settlements.

D. Coordination

The proliferation of foreign companion cases underlines the importance of coordination among counsel. But coordination in itself presents legal issues. A routine practice in the U.S. is for lawyers on the same side to enter into joint defense or common interest arrangements often memorialized in writing. That practice is much less common elsewhere. The validity of a joint defense agreement among U.S., U.K. and EU counsel has not been litigated and is an open question. The common interest privilege, however, has been recognized.⁷²

Of course, the information disclosed in such an arrangement must be protectable as privileged. The exchange of non-privileged material among parties with a common interest cannot confer a privilege where one does not otherwise exist. Note also that the EU does not recognize a privilege for in house lawyer communications.⁷³ Privilege also does not apply to in-house counsel in France, the Netherlands, Austria and Sweden, among other jurisdictions.

As for the subjects of coordination, discovery is an obvious example. But there are other areas that can be equally important:

1. Jurisdiction

Jurisdiction may be available in several forums outside the U.S. Each will have its own rules—albeit rules likely to be increasingly harmonized in Europe under the Directive—and speed to judgment. Each of the possibilities must be compared to what is likely to happen in the U.S.

2. Briefs and Discovery

In most cases, briefing on substantive legal issues will be significantly different. The relevant competition statutes are not the same. Factual representations, however, cannot diverge without potentially serious credibility impacts, nor can representations be different about the availability of discovery and the burdens of producing it.

72 See *Winterthur Swiss Insurance Company and another v. AG (Manchester) Ltd.* EWHD 839 (2006); *Buttes Gas and Oil Co. v. Hammel* (No. 3) QB223, CA (1981).

73 See Case C-550/07, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v. European Commission* (2010).

3. Experts

Using a single economist surely is cheaper than paying for two or more.⁷⁴ But how many economists have true transatlantic reputations and are equally comfortable in U.S. and foreign litigation? Economists based in the U.K. or Europe rarely have experience with the intensive scrutiny of expert opinions that is typical of U.S. antitrust litigation. Nor could they be expected to have the same amount of experience with the kinds of expert issues that U.S. economists have been studying for decades. At the same time, coordinating opinions of multiple economists on the same or similar subjects is challenging. It is difficult to see how the opinions of an expert in a U.K. case, for example, would not become known in the U.S. and turned into yet another source of expert discovery, and vice versa.

4. Collateral Impact of Factual Findings

Counsel should be keenly aware of potential collateral effects of foreign judgments. Generally speaking, the doctrine of comity allows U.S. courts to recognize foreign judgments if the party against whom the judgment will asserted had the opportunity for a full and fair hearing, the foreign court had jurisdiction, and it does not contravene U.S. public policy.⁷⁵ Once a U.S. court recognizes a foreign judgment, it may have collateral estoppel effects exactly like a domestic judgment. The next question is whether the scope of the preclusive effect is governed by U.S. law or the law of the foreign nation.⁷⁶ In short, the rules governing the preclusive effect of foreign judgments are complex.⁷⁷ Let it suffice to say that practitioners must beware of the potential collateral impact of foreign judgments as the U.K. and EU become increasingly common jurisdictions for private antitrust actions.

Foreign courts may similarly recognize U.S. judgments and, under certain conditions, give those judgments preclusive effects. German courts, for example, would give effect to foreign judgments if they are recognized under the conditions of the civil procedure code.⁷⁸ However, judgments can only have effect in Germany if those effects are recognized under German law. Treble damage judgments are a well-known exception for that reason. In Germany as well as in Japan, foreign judgments containing treble damages and punitive damages are not enforceable.⁷⁹ Whether other elements of judgments containing findings on treble damages retain effect is an unresolved question under German law. Generally, German courts would recognize procedural as well as substantive effects of a foreign judgment. The law is complex in particular on the question

74 The U.S. trend currently is to break up economic issues, particularly for class certification, among multiple economists.

75 *Hilton v. Guyot*, 159 U.S. 113 (1895).

76 See, e.g., *Alfadda v. Femm*, 966 F. Supp. 1317 (S.D.N.Y. 1997) (applying U.S. law); *United States v. Kashamu*, 656 F.3d 679 (7th Cir. 2011) (suggesting that the foreign court's preclusion rules apply).

77 See *Restatement (Fourth) of Foreign Relations Law of United States Jurisdiction* (Tentative Draft No. 2 March 22, 2016).

78 See German Civil Procedure Code (Zivilprozessordnung), par. 328.

79 *Bundesgerichtshof [BGH] [Federal Court of Justice]* June 4, 1992, 118 BGHZ 312 (Ger.); *Ore. State Union No-sokon v. Mansei Ko-gyo Co.*, 51 Minsu 2573 (Sup. Ct., July 11, 1997).

of whether effects will be broader than among the parties, and a detailed assessment of this complex topic is beyond the scope of this article.

With the increasing frequency of parallel cartel damages proceedings around the world, more useful precedents likely will emerge. In the meantime, awareness of this issue is critical.

IV. CONCLUSION

The practice of antitrust law is now truly international. For many years, practitioners have understood that competition enforcement authorities coordinate their efforts, and a plan to deal with many or all of them is necessary. Now the same is true for damages actions that will add many more variables to what are already complex disputes in the U.S. civil arena. Collective actions and private damages actions throughout the EU's 28 member states now have joined an already crowded field of U.S. class actions, direct actions and states' Attorney General cases. Unpleasant surprises await practitioners who do not pay close attention to developments abroad and shape their positions and strategies for a global litigation landscape.

*Recent Developments in
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Editor-in-Chief

HEATHER S. TEWKSBURY

Partner

Wilmer Cutler Pickering Hale and Dorr LLP
Palo Alto, CA

Deputy Vice Chair

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Wilmer Cutler Pickering Hale and Dorr LLP
Washington, DC

competition

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