

**EYES ACROSS THE ATLANTIC:  
COORDINATION AND MANAGEMENT OF  
GLOBAL PRIVATE ANTITRUST LITIGATION**

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## **I. Introduction**

In years past, the focus of private international antitrust disputes was the United States. Over a century of experience, treble damages, class actions and the American rule for attorneys' fees – plus robust enforcement by the Antitrust Division – have combined to make the United States the natural hub for private cases.

That is probably still true today, but to a lesser extent because emerging private remedies and processes have made European jurisdictions much more viable, and U.S. courts are taking an increasingly close look at the limits of their jurisdiction. The result is litigation increasing across newly empowered jurisdictions: sophisticated and well informed coordination, case management and overarching strategy now are critical.

## **II. Evolving Jurisdictions and New Remedies**

While the focus of this piece is coordination of global private antitrust litigation, it is probably worthwhile briefly to address the developments that brought us to where we are today.<sup>1</sup>

In the U.S., rapidly multiplying decisions are clarifying in the otherwise fuzzy outlines of the Foreign Trade Antitrust Improvement Act (“FTAIA”). The FTAIA governs and limits U.S. courts' jurisdiction over a defendant's sales. In today's evolving world of manufacturing and procurement, these have become critical gateway questions: What overcharges are subject to U.S. jurisdiction and treble damage remedies? What commerce must be pursued elsewhere?

At the risk of grossly oversimplifying a complex subject, one emerging principle seems to be that overcharges on foreign sales of component products to foreign subsidiaries of U.S. companies will not be recoverable in the U.S., and sales outside the U.S. of finished products containing those components also will not be subject to U.S. jurisdiction. *See Motorola Mobility, LLC v. AU Optronics Corp.* 775 F/3d 816 (7<sup>th</sup> Cir. 2015). Claimants must look to other courts for their remedies. Of course, there are nearly infinite variations of these kinds of distribution channels, and results can be hard to predict.

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<sup>1</sup> These are addressed more fully by the same authors in “The Rapidly Changing Landscape of Private Global Antitrust Litigation: Increasingly Serious Implications for U.S. Practitioners”, *Competition*, Vol. 25, No. 2, Fall 2016, pp. 1-19, at 2-14. Several sections of this paper first appeared in that publication.

The consequence, at a minimum, is that jurisdictions outside the U.S. are increasingly important. At the same time, remedies in the U.K. and E.U. are becoming much more attractive and procedurally accessible.<sup>2</sup>

The evolution of private antitrust cases outside the U.S. has been driven by at least the following developments:

- 1) The European Court ruled in 2001 that anyone can claim compensation for injury caused by an infringement of competition law;<sup>3</sup>
- 2) In 2003, European Regulation 1/2003/EC made European Commission decisions binding on national courts of member states;<sup>4</sup>
- 3) In 2013, the Europe Commission adopted a non-binding recommendation for collective redress and in 2014, the Commission mandated revisions to national laws to ensure uniform rules across member states;<sup>5</sup> and
- 4) The U.K. enacted the Consumer Rights Act of 2015 that includes a collective redress process.<sup>6</sup>

The Commission's 2014 Directive mandated several important minimum requirements:

- 1) Disclosure of evidence – while leniency statements and settlement submissions are to remain protected, courts can order proportionate

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<sup>2</sup> Of course, there is a critical third option – arbitration. Many vendor contracts have arbitration clauses of various kinds, and these typically embrace antitrust disputes. The subject of arbitration has its own issues and complexity, but arbitrations typically are relatively quick and foreclose most grounds of review. Arbitrators may also take an expansive view of commerce subject to their scrutiny.

<sup>3</sup> Case C-453/99 *Courage Ltd v Crehan* [2001] ECR I-6297, *see also* C-295/04 *Vincenzo Manfredi* [2006] ECR I-6619.

<sup>4</sup> Official Journal L 001, 04/01/2003 P. 0001 - 0025.

<sup>5</sup> Recommendation of 11 June 2013 on common principles for injunctive and compensator collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, 11.6.2013 CM(2013) 401 final.

<sup>6</sup> CRA 15.

disclosure of relevant evidence. For many member states, this kind of discovery is new;<sup>7</sup>

- 2) Pass-on – the defense claiming that an overcharge was passed on can be asserted, and the burden of proof lies with the defendant;<sup>8</sup>
- 3) Joint and several liability – defendants jointly responsible are jointly and severally liable, but the plaintiff can sue a single infringer leaving the infringer to seek contribution;<sup>9</sup> and
- 4) For indirect customers there is a rebuttable presumption that overcharges were passed on to indirect customers.<sup>10</sup>

The critical subject of quantification of damages remains subject to national laws, but the Directive clearly states – as is the case in the U.S. – that the burden of proof cannot render the recovery of damages impossible or excessively difficult.<sup>11</sup> Unlike the U.S., however, where damages for antitrust violations are explicitly intended to serve a punitive as well as compensatory purpose, damages in the E.U. go no further than addressing harm caused by the infringement.

Importantly, the Commission has also adopted a non-binding Communication on the quantification of damages. As is typically true in the U.S., the basic analysis is to compare a counter-factual scenario – assuming no infringement – with what happened in the infringed market.<sup>12</sup>

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<sup>7</sup> Directive 2014/104/EU Of The European Parliament And Of The Council of 26 November 2014, Recitals 15-33, Chapter II.

<sup>8</sup> Directive 2014/104/EU OF The European Parliament And Of The Council of 26 November 2014, Recitals 39-44, Chapter IV.

<sup>9</sup> *Id.* Recitals 37, 38, Chapter III, Article 11.

<sup>10</sup> *Id.* Recital 44, Article 14.

<sup>11</sup> *Id.* Recitals 45-46, Article 17.

<sup>12</sup> *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 1607/07), p. 19, June 23, 2013.

The bottom line, then, is that the kinds of damages recoverable in the U.S. since enactment of the Sherman Act in 1890 are largely available in the E.U. but for the trebling component, and procedures for collective actions are multiplying.<sup>13</sup>

What does all of this mean, then, for private litigation outside the U.S.? Clearly, some remedies are available now that were not before, and the procedures are somewhat more user-friendly. But will all of these enhancements also change what have traditionally been the favored venues for litigation outside the U.S.? In the short run, probably not. The European courts with the deepest and longest experience are likely to remain the forums of choice. Experience, and the data points of rulings and results are always critical.

For that reason, Germany, the U.K. and The Netherlands are likely to remain the jurisdictions of choice. What follows are examples of recent developments in these jurisdictions that demonstrate the growth of the experience in private damages cases.

### **Germany**

On July 16, 2016, the German authorities issued a draft set of rules intended to comply with the Commission's 2014 Directive. On March 31, 2017, the German legislator adopted<sup>14</sup> the new Act Against Restraints of Competition. Germany has been a pioneer in private antitrust actions so its laws already were broadly similar to what the Directive required. Nonetheless, the new Section 33 of the German Act Against Restraints of Competition now details the right to full compensation for victims of competition infringements. Also, the 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.

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 new statute, 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

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<sup>13</sup> CRA 15.

<sup>14</sup> <https://www.bundestag.de/dokumente/textarchiv/2017/kw10-de-kartell/493842>

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 as so far only legally recognized associations are able to bring collective damages actions. For example, the Cartel Damage Claims Consulting SCRL<sup>15</sup> ("CDC"), an antitrust claims aggregation vehicle established under the laws of Belgium, has lodged several class actions in German courts. The CDC has the purpose of offering victims of illegal cartels an effective method of obtaining compensation, but so far its results have been mixed.

In 2015, a case brought by CDC was dismissed by the Higher Regional Court of Düsseldorf 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.<sup>16</sup> Also, on 24 January 2017, a Regional Court of Mannheim rejected a EUR 138 million claim against cement maker Heidelberg Cement for damages stemming from two regional cement market sharing cartels.<sup>17</sup> The Court ruled that CDC's claim was time-barred and that the limitation period had not been suspended in the course of the proceedings. The claim followed a decision of the Bundeskartellamt (BKartA) in 2003 in which six cement makers were fined a total of EUR 661 million for allocating customers and making quota agreements. The decision was confirmed by the Federal Supreme Court in Karlsruhe in 2013. On March 21, 2017, CDC announced that it is challenging the judgment of the Regional Court of Mannheim before the Higher Regional Court of Karlsruhe.

Also, in March 2017, a German industry body for food transportation companies announced that it will prepare a joint damages claim over a 14 year-long EU truck

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<sup>15</sup> Société coopérative à responsabilité limitée.

<sup>16</sup> Landgericht Duesseldorf, Urteil vom 17. Dezember 2013 37 O 200/09 and Oberlandesgericht Duesseldorf.

<sup>17</sup> Landgericht Mannheim, 2 O 195/15.

cartel. The logistics trade association, the Bundesverband Güterkraftverkehr Logistik und Entsorgung (BGL), invited all interested market players to join the action. The damages claims are based on the European Commission's decision of July 2016, in which four truck makers were fined EUR 2.9 billion. The European Commission has found that companies that purchased trucks larger than 6 tons between 1997 and 2011 colluded on truck pricing and on passing on the costs of compliance with stricter emission rules. The industry body will act as a platform that bundles separate claims together in a lawsuit.

In addition to these collective claims, German courts are addressing non-collective damages claims even outside the area of cartels. On January 24, 2017, the Federal Supreme Court in Karlsruhe ruled that the Higher Regional Court of Frankfurt incorrectly assessed a private damages claim in 2014 that sought EUR 400m from Telekom Deutschland.<sup>18</sup> The Federal Supreme Court returned the case to the lower instance court, which has to re-evaluate the details of Kabel Deutschland's case to establish if there was an antitrust infringement. Kabel Deutschland filed a compensation claim arguing that the network owner Telekom Deutschland abused its dominance by setting excessive fees for access to its cable network.

On 21 December 2016, the Dortmund Regional Court ruled that seven members of a German bid-rigging cartel that affected railway tracks, switches and sleepers are liable to pay compensation to an unnamed public rail firm following a damages claim by the latter.<sup>19</sup> The defendants were among the companies the BKartA fined a total of EUR 97.64m in July 2013 for their participation in the cartel.

## U.K.

As earlier noted, a critically important addition to U.K. remedies was the collective redress mechanism enacted in the Consumer Rights Act 2015.<sup>20</sup> The Competition Appeal Tribunal ("CAT"), a specialized court in London, has exclusive jurisdiction over collective action proceedings.<sup>21</sup> The CAT serves as a gateway by granting a collective proceedings order ("CPO") and certifying the

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<sup>18</sup> BGH, KZR 2/15.

<sup>19</sup> Landgericht Dortmund, 8 O 90/14 [Kart].

<sup>20</sup> CRA 15.

<sup>21</sup> *See* CAT Guide to Proceedings 2015.

claims that may be brought.<sup>22</sup> In order to grant a CPO, there must be an “identifiable class”,<sup>23</sup> claims must raise common issues,<sup>24</sup> and claims must be “suitable” for collective proceedings.<sup>25</sup> One important distinction from U.S. practice is that the Competition Appeal Tribunal decides not only whether the case can proceed on all collective acts but also whether it will proceed on an opt-in or opt-out basis. In other words, the CAT will decide whether a claimant needs to affirmatively choose to be included, or, conversely to be excluded, as is true in the U.S. Two fundamental questions, however, remain to be answered that have been at the heart of U.S. class action litigation for many years: what will the standards or burden of proof be for granting a CPO and how will the standards be analyzed?

Very recently, the CAT supplied some initial answers. In *Dorothy Gibson v. Pride Mobility Products Limited*, the CAT held a three-day hearing on an application for a collective proceedings order (CPO)<sup>26</sup>. The Tribunal reviewed witness statements and detailed expert reports. Importantly, the Tribunal also heard live testimony from the Applicant’s expert, and questioned him extensively.<sup>27</sup>

As for the standards to be applied, the Tribunal had this to say:

1. This was not a mini-trial and the essential question is whether the Applicant has established a sufficiently sound and proper basis to proceed, having regard to the statutory criteria.<sup>28</sup>
2. We accept that the approach of the CAT to certification of claims for a CPO should be rigorous and that we cannot simply take at face value whatever may be said on behalf of the Applicant.<sup>29</sup>

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<sup>22</sup> CAT rule 79.

<sup>23</sup> CAT guide section 6.37.

<sup>24</sup> CAT rule 73(2).

<sup>25</sup> CAT rule 79(2)(a)-(g).

<sup>26</sup> Case No.: 1257/7/7/16 31 March 2017.

<sup>27</sup> *Id.*, ¶ 23, 24

<sup>28</sup> *Id.* ¶ 24

<sup>29</sup> *Id.*, ¶ 102



3. .... We consider the US approach to certification of common issues for the purpose of class actions is of limited assistance (citing the ABA antitrust Class Action Handbook (2010) at p. 33 detailing the length and expense of class action litigation as a ‘multi-year, multi-million dollar proposition.’)<sup>30</sup>

4. The approach under the UK region of collective proceedings is intended to be very different, with either no or very limited disclosure and shorter hearings held within months of the claim form being served.<sup>31</sup>

The CAT explicitly rejected the argument that “the court should weigh the competing expert evidence added by both sides and apply a robust or vigorous standard” and instead adopted the view that the expert methodology, must be:

... sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that if an overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (*i.e.*, that passing on has occurred).<sup>32</sup>

While the CAT obviously was at pains to distinguish U.K. process from U.S. practice, we may well question whether the distinction is without a difference. A three-day evidentiary hearing with extensive live expert testimony would be very unusual in the U.S. And, while explicitly eschewing a “rigorous analysis” standard, the CAT in practical terms did exactly that. The result was that the case was adjourned for the proceedings so that the Applicant’s economist could address the definition of sub-classes and estimate losses on that basis.

More instructive rulings are on the horizon. In September, 2016, for example, 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 also is likely to generate precedents that impact the future of collective actions in the U.K.

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*, ¶ 104

<sup>32</sup> *Id.*, ¶ 105

U.K. private case law also is developing in single plaintiff cases. Currently there are over 14 private cases pending in front of the CAT alone, including injunctive relief cases relating to abuse of dominance allegations.

Last year, the U.K. CAT issued a judgment<sup>33</sup> in a single plaintiff case that was its first stand-alone action since it was empowered to hear them by the new rules on antitrust damages action.<sup>34</sup> The *MasterCard* 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”.<sup>35</sup> 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. On November 22, 2016, MasterCard was refused leave to appeal any aspects of a key liability and damages ruling in Sainsbury’s claim that the company’s UK interchange fees were unlawful. The CAT found MasterCard lacked sufficient grounds of success to appeal its judgment of July 14, 2017.<sup>36</sup>

The *MasterCard* case also was the first decision of a U.K. court explicitly addressing pass-on.<sup>37</sup> The CAT defined pass-on as an aspect of the process of the assessment of damage rather than a defense.<sup>38</sup> 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.

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<sup>33</sup> *Sainsbury's Supermarket Ltd. v. MasterCard Inc.*, Case 1241/5/7/15 (T), July 14,2016, [2016] CAT 11.

<sup>34</sup> *See* Section II.B.2, *supra*.

<sup>35</sup> *Supra*, footnote 10, para 424 (3).

<sup>36</sup> Sainsbury’s Supermarkets Ltd Claimant -and- (1) MasterCard Incorporated (2) MasterCard International Incorporated (3) MasterCard Europe Sa Defendants, [2016] Cat 23, 1241/5/7/15(t) in the Competition Appeal Tribunal of England and Wales.

<sup>37</sup> Pass-on was recognized by European Courts in cases such as *Courage v Crehan* and *Manfredi*, *see* footnote 4 and many subsequent cases. It is a well-known concept in many civil law jurisdictions.

<sup>38</sup> *See supra*, footnote 10, para 484. Similar position taken by the German Federal Court in 2011: BGH, judgment of 28 June 2011 - KZR 75/10).

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 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.<sup>39</sup> The court also perceived this as necessary in order not to render recovery of compensation “impossible or excessively difficult” as stipulated by the Directive.<sup>40</sup> These conditions may amount to the U.K.’s implementation of the Directive’s concept of pass-on. MasterCard has asked for permission to appeal the judgment.

On January 30, 2017, the High Court in London ruled in favor of MasterCard in a damages claim brought by British retailers against its multilateral interchange fees (MIF).<sup>41</sup> The Court held that the level of fees charged to merchants on each transaction paid with a MasterCard branded card was appropriate in light of the benefits derived for retailers. The retailers, including Asda, B&Q and Wm Morrison, were seeking to recoup their losses from MIF fees charged between 2006 and 2014.

### **The Netherlands**

Dutch courts also have been active in attracting antitrust damages litigation, including collective actions. These courts have a reputation for flexibility, possibly a virtue in a new and growing area of law, and the expertise of these courts continues to expand. In February of this year, the Netherlands adopted the Directive. A draft bill has recently been submitted to the Dutch Parliament that, if passed in its current form, would introduce a collective opt-out system for cartel and other damages and substantially strengthen current rules on collective action which do not allow for the award of collective damages.<sup>42</sup>

The Dutch experience has generated notable decisions in several areas. The Netherlands so far is the only EU member state where a collective settlement of

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<sup>39</sup> *Supra*, footnote 18, para 484 (4).

<sup>40</sup> *See supra* footnote 10.

<sup>41</sup> High Court of Justice, *Asda Stores Ors v MasterCard Incorporated Ors.*, 2017 EWHC 93 (Comm).

<sup>42</sup> <https://www.government.nl/latest/news/2016/11/16/legislative-proposal-presented-to-the-dutch-second-chamber-about-collective-compensation-actions>

mass claims can be declared binding on an entire class on an opt-out basis.<sup>43</sup> Recent cases in the Netherlands also have confirmed the availability of the pass-on defense in antitrust damages action<sup>44</sup> and that parent companies are not liable for damages arising from antitrust infringements committed by their subsidiaries. That ruling stands in contrast to other case law in Europe.

Current cases relate to the European Commission's Paraffin Wax cartel decision,<sup>45</sup> the Sodium Chlorate<sup>46</sup> and the Air Cargo<sup>47</sup> cartels.

### **Brexit Impacts**

Because the U.K. is now arguably 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.<sup>48</sup> This uncertainty alone may impact forum choices.

Post Brexit, plaintiffs could 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 allocation of jurisdiction and the enforcement of judgments (*e.g.*, Brussels Regulation<sup>49</sup>) no longer apply. The Brussels Regulation

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<sup>43</sup> Wet Collectieve Afwikkeling Massaschade (WCAM) (Dutch Act on Collective Settlement of Mass Claims) of 2005, *see* Articles 907-910 of Book 7 of the Dutch Civil Code and Article 1013 of the Dutch Code of Civil Procedure or Wetboek van Burgerlijke Rechtsvordering.

<sup>44</sup> July 8, 2016, the Dutch Supreme Court, *TenneT v. ABB*.

<sup>45</sup> Case COMP/39181 – Candle Waxes.

<sup>46</sup> C/13/500953/HA ZA 11-2560.

<sup>47</sup> C/13/553534/HA RK 13-353 (Claim was brought by Claims Funding Europe Limited (CFE) a special purpose vehicle).

<sup>48</sup> 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.

<sup>49</sup> 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.

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) were 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. Coordination and Case Management**

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

#### **A. Coordination**

Obviously, close coordination among counsel is essential. 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.<sup>50</sup>

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.<sup>51</sup> Privilege also does not apply to in-house counsel in France, the Netherlands, Austria and Sweden, among other jurisdictions.

The subject of coordination also necessarily raises the question of whether international litigation is best handled by one law firm, or more. Certainly, there are times when national court and language issues may require more than one law firm. But if there is a choice, are there coordination issues that need to be considered? Assume, for example, that some materials are discoverable in one case and fully protected in another. Would a single law firm find it more difficult to address ethical issues and conflicts than two firms? Would two firms find it easier to navigate among potential discovery and protective order issues?

## 1. **Discovery**

As for the subjects of coordination, discovery is an obvious example. Lawyers faced with widely varying discovery rules in different jurisdictions will focus on these questions immediately: What parts of the U.S. discovery record could 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? How might discovery in a court system become available in an arbitration proceeding?

In U.S. courts, a very early order of business is the circulation of a protective order that controls disclosure of discovery materials. Commonly, protective orders limit use of confidential documents to “this case.” Could 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 non-U.S. cases should be governed by their discovery laws not, as a practical

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<sup>50</sup> 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).

<sup>51</sup> See Case C-550/07, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v. European Commission* (2010).

matter, by what is discoverable in the U.S. The response could be equally obvious: let the other 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 another 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 other jurisdictions would rule in the same way. Protective orders, of course, are supposed only 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 view that U.S. discovery always is broader than anywhere else and the litigation will concern the extent to which extensive U.S. discovery can be used elsewhere. But could there be information discoverable internationally that would not be discoverable in the U.S. but for its production in another jurisdiction? And would that court shield that discovery from use elsewhere? These are new issues, and the reach of U.S. discovery is sufficiently broad that the question might be more academic than practical. Perhaps a court in the E.U., however, would have a different calculation of the burden of producing materials situated in that 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.<sup>52</sup>

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<sup>52</sup> 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

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.<sup>53</sup> An earlier case reached a different result.<sup>54</sup>

The implications for case management and coordination are obvious. Plaintiff's counsel in the U.K. and E.U. member states no doubt are alert to the opportunities for developing their cases and making arguments to their courts that are informed by discovery only available in the U.S. Witness testimony can only be compelled for a U.S. case. And, U.S. courts readily order extensive global electronic document discovery.

No doubt defense counsel are also keen to understand how U.S. discovery could be used elsewhere and perhaps to confine U.S. discovery to U.S. cases.

## 2. Case Schedules and Progression

The interplay of U.S. discovery rules and cases elsewhere might be the most obvious area of immediate concern. How might the discovery issues and other considerations impact case scheduling? Are there ways to sequence events in multi-jurisdictional cases to best advantage? In the U.S., these kinds of case management issues often are addressed in the federal courts through the multi-district litigation process. A proliferation of cases with similar issues can be sent

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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.

<sup>53</sup> *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).

<sup>54</sup> *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).



to the same federal judge specifically for the purpose of arriving at a single, efficient schedule for discovery and pre-trial proceedings. This Multi-District Litigation process is common for cases that generate many similar class actions. *See* 28 U.S.C. § 1407:

- (a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.

Upon motion, a seven judge Judicial Panel on Multi-District Litigation will decide whether cases should be litigated together and, if so, where. Typically, the number and complexity of the cases are central considerations. The goal is to avoid the risk of conflicting rulings and eliminate duplicative effort, especially in discovery. *See, e.g., In re Starmed Health Personnel, Inc. Fair Labor Standards Act Litig.*, 317 F. Supp. 2d 1380 (J.P.M.L. 2004) (ordering consolidation to eliminate duplicative discovery and conserve judicial resources). As for the location of the MDL proceeding, the location of the evidence is a key but not necessarily dispositive factor. *See, e.g., Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices and Product Liability Litig.*, 704 F. Supp. 2d 1379 (J.P.M.L. 2010) (recognizing that the Central District of California would be the most appropriate transferred district as Toyota was headquartered there as were expert witnesses and documents).

While case schedules vary widely, an MDL case schedule might look like what follows. A major variable not shown here is whether or not the Department of Justice seeks, or the parties' advocate, a stay of the proceedings. Sometimes stays are granted, sometimes not. Their length also is highly variable with a range typically falling between six and twelve months. A hypothetical U.S. price-fixing MDL class action schedule beginning January 1, 2018, might look like this:

<u>Event Dates</u>	<u>Actions</u>
<u>YEAR 1:</u>	
January 1, 2018	First class action filed.

<u>Event Dates</u>	<u>Actions</u>
March 1, 2018	All class actions filed.
April 1, 2018	Motions to coordinate cases filed before the Judicial Panel on Multi-District Litigation Panel of 7 federal judges.
June 1, 2018	Hearing before MDL Panel.
July 1, 2018	Ruling by MDL Panel; transfer to selected District Court
August 1, 2018	First status conference held.
September 1, 2018 – December 31, 2018	Consolidated Amended Complaints filed; pleading motions filed; rulings issued.
<u>YEAR 2:</u>	
January 1, 2019 – July 1, 2019	<p>Discovery begins of class representatives and liability witnesses.</p> <p>Direct action cases filed by large customers in various jurisdictions; State Attorneys General cases filed in their home state courts.</p>
July 1, 2019 – November 1, 2019	Class certification motions filed; class expert discovery conducted; oppositions filed.

<u>Event Dates</u>	<u>Actions</u>
November 1, 2019 – December 31, 2019	Class certification hearings held; decisions issued.
<u>YEAR 3:</u>	
January 1, 2020 – July 1, 2020	Liability discovery completed.
July 1, 2020 – November 1, 2020	Expert reports filed; expert discovery; liability motions filed.
November 1, 2020 – December 31, 2020	Motions heard; Direct action cases sent back to home jurisdictions.
<u>YEAR 4:</u>	
January 1, 2021 – May 1, 2021	Final pre-trial proceedings; witness lists, document lists exchanged; final pre-trial hearing.
May 15, 2021 – August 15, 2021	Class action trial.

There are nearly infinite variations of this kind of schedule, but 3½ years from filing of the first class action to the conclusion of a class action trial, if any, is probably a fair average. Then, disposition of direct action cases by large customers, and State Attorneys General can take two more years. Direct action cases are sent back for trial to the jurisdictions where they were originally filed. State Attorneys General always file cases in their home state courts and utilize discovery generated in the MDL process.

There is no mechanism similar to MDL coordination for multi-jurisdictional cases in the E.U., and no process for coordinating U.S. and European cases.

Moreover, the timing considerations for U.K. or E.U. cases are very different from those in the U.S. In the U.S., class actions typically are filed very quickly with a view to establishing priority of a federal jurisdiction and leadership roles for plaintiffs' counsel.

The counsel selection issue is not relevant in the E.U. In some cases, claimants might want the benefit of European Commission decisions and statement before filing. In others, they might wish to follow along closely with the U.S. cases.

The lack of a formal cross-border coordination mechanism leaves these kinds of issues at present to the arguments and ingenuity of counsel in each case. Perhaps momentum will build in Europe for a coordination mechanism if it becomes common for similar cases to be filed in different member states. As cases proliferate on both sides of the Atlantic, it should become more common for judges on each side to be informed of developments and scheduling needs elsewhere. But at the moment, those kinds of presentations are rare. Whether judges in distant jurisdictions would be receptive to the notion of managing their cases with an eye to efficient litigation of an international dispute of course is an entirely different question.

The inclination of arbitrators to fit their proceedings in with ongoing litigation in the court system is another key variable.

### **3. Witness Coordination – Experts**

The subject of coordination necessarily includes witnesses. Simply coordinating depositions in the U.S. is an ongoing and often vexing task in the kinds of cases where over 100 depositions are common. Because jurisdictions outside the U.S. do not rely as heavily on live testimony, juggling most witnesses among jurisdictions may not be required – with one notable exception. Experts, especially economists, are key witnesses everywhere. The topics of their testimony could be similar or even identical in some kinds of international cases. In a price-fixing case, the issues would be: Was there an overcharge and, if so, what sales were impacted? Would it, therefore, be wise to use the same expert for all of the cases?

Using a single expert surely is cheaper than paying for two or more.<sup>55</sup> 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. U.S. expert reports run to hundreds of pages. Often the reports are highly technical and filled with complex econometric studies. Lengthy depositions are the norm. 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 must be keenly aware of potential collateral effects of judgments from different courts. Generally speaking, the doctrine of comity allows U.S. courts to recognize foreign judgments if the party against whom the judgment will be used had the opportunity for a full and fair hearing, the foreign court had jurisdiction, and it does not contravene U.S. public policy.<sup>56</sup> 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.<sup>57</sup> In short, the rules governing the preclusive effect of foreign judgments are complex.<sup>58</sup> Let it suffice to say that practitioners must beware of the potential collateral impact of foreign judgments as the U.K. and EU member states 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

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<sup>55</sup> The U.S. trend currently is to break up economic issues, particularly for class certification, among multiple economists.

<sup>56</sup> *Hilton v. Guyot*, 159 U.S. 113 (1895).

<sup>57</sup> See, e.g., *Alfadda v. Fenn*, 966 F. Supp. 1317 (S.D.N.Y. 1997) (applying U.S. law); *U.S. v. Kashamu*, 656 F.3d 679 (7th Cir. 2011) (suggesting that the foreign court's preclusion rules apply).

<sup>58</sup> See *Restatement (Fourth) of Foreign Relations Law of United States Jurisdiction* (Tentative Draft No. 2 March 22, 2016).

of the civil procedure code.<sup>59</sup> 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.<sup>60</sup> 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 of whether effects will be broader than among the parties. A detailed assessment of this complex topic is beyond the scope of this piece.

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

## **B. Settlement**

Resolution of multi-jurisdictional litigation also calls for a coordinated approach. The complexity of settlement analysis has increased in equal measure to the proliferation of worldwide 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 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 consider a potentially quicker U.S. treble damage process as useful to drive 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, in particular at this point in time where a number of key concepts are still being developed by national judges which shifts the burden of these early cases to the plaintiffs.

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<sup>59</sup> See German Civil Procedure Code (Zivilprozessordnung), par. 328.

<sup>60</sup> *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).

The enforceability of global settlement agreements is another new and critical question.

#### **IV. Coordination and Case Management Goals**

To a degree, discussion of these areas of concern reveals what case management goals the parties might have both for efficiency and maximum procedural advantage. Plaintiffs and defendants' interests may collide at times, but there should be areas where all parties share the same interests – and could convince courts to adopt their views. A shared desire for efficiency and cost savings should produce agreement for at least the following goals:

1. Counsel in all cases should understand schedules, timetables and events in all relevant jurisdictions.
2. Major events should not take place at the same time.
3. Discovery tasks should be undertaken only once. Perhaps there could be a central document storage system for materials that are allowed to be used in all cases, provided this can be brought in line with the stricter EU data protection rules.
4. Similarly, maximum use of technology should be planned with discussion of cost-sharing.
5. Representations to different courts must be consistent. Judges (and arbitrators) should be kept informed of events elsewhere to the extent necessary.

Beyond these non-controversial goals, others are more difficult to pin down. Would it be possible for factual issues to be litigated only once, with the results treated as decided for all cases? Could the parties reach agreement on basic, critical facts such as the amount of commerce, and which court has jurisdiction over what sales? Could expert testimony also be crafted for use in all cases?

No doubt these concepts are the starting point, not the end for sophisticated and efficient management of international antitrust litigation.

## **V. Conclusion**

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 private damages actions that will add many more variables to what are already complex disputes. Collective actions and private damages actions throughout the EU's member states now have joined an already crowded field of U.S. class actions, direct customer actions and states' Attorney General cases. The need for close coordination among these cases and global dispute management has grown in equal measure. With the right focus and cooperation among counsel, there should be no shortage of opportunities for making litigation of even the most complex international matters more efficient and streamlined.