A TURNING OF THE TIDE: VICTIM REDRESS THROUGH PRIVATE ANTITRUST LITIGATION

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I. INTRODUCTION

Access to the courts is necessary to seek redress for anticompetitive activity, but the costs of litigation can deter victims of anticompetitive conduct from filing suits, particularly where individual claims are small and the procedural tool of collective actions is not available. Additionally, access to evidence is necessary to prove an antitrust violation, but pre-trial disclosure is not available everywhere. Indeed, until collective actions and pre-trial discovery are part of the legal landscape, victims of anticompetitive conduct will not be properly compensated.

In the United States, there is a robust class action procedure, just as there is wide-ranging pre-trial discovery. In the European Union, on the other hand, until recently there has been little of either. This paper explores the differences between the U.S. and EU regimes and the fact that the tide is turning in the European Union with the issuance of new legislation.

Both historically and currently, there appears to be an intersection of the availability of group litigation, in one form or another, and the availability of pre-trial discovery or disclosure. In general, the availability to a party of potential evidence in the possession of its opponent helps that party make its case in court. This is all the more true in antitrust litigation where,

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oftentimes, the defendants' wrongdoing is secret. That potential evidence is only relevant if the victim is able to bring a case in the first place – something that, due to the expense of litigation, is only feasible through some sort of group action.

II. COLLECTIVE LITIGATION

A. U.S. Class Action Litigation

Class action litigation has been widely used in the United States since the mid-1800s. Enacted in 1833, Equity Rule 48 provided for "group litigation" in situations in which multiple similar individual suits were filed.[2] Eventually, the statutory law regarding class action litigation was codified in Federal Rules of Civil Procedure ("Federal Rules") Rule 23 in 1938. Probably the most significant change to Rule 23 was the 1966 revision that standardized class actions as being "opt-out" (i.e. an individual or entity that fits within a class definition is automatically considered part of the class unless that individual opts out of the litigation).

The class action mechanism is widely used in the United States in the antitrust context. In antitrust cases, although collective damages might amount to billions of dollars, the small size of individual claims compared to the enormous resources required to litigate an antitrust action against a group of commercial entities (usually large corporations) makes it impractical – perhaps impossible – for individuals to seek compensation for their losses. Banded together, though, victims are able to seek redress.[3]

B. History of EU Collective Litigation

Over the past century, there have been few collective actions in Europe. Recently, that tide has begun to shift. Many countries have enacted legislation regarding collective actions, oftentimes for violations of specific laws. For instance, Germany does not have a general right to collective action, but the German antitrust statutes permit collective actions in limited circumstances. And, in several European countries, there have been moves not only to enact legislation expressly providing for collective redress but also for the use of certain vehicles – such as Stichtings (foundations) in the Netherlands – to which injured parties can assign their claims.

In 2015, the United Kingdom took several significant steps regarding collective actions. A new statute – the Consumer Rights Act (the "CRA") – amended the Competition Act 1998 to enable follow-on and stand-alone collective actions to be brought before the Competition Appeal Tribunal (the "CAT"). Most significantly, the Competition Act was amended to include opt-out collective actions.[4] Although the availability of the opt-out class action mechanism is more in line with U.S. class action litigation, the CRA does maintain certain provisions widely

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[2] Fed. R. Equity 48, 42 U.S. (1 How.) lvi (1843) (repealed 1912).

[3] See, e.g. *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 266 (1972). "Congress has given private citizens rights of action for injunctive relief and damages for antitrust violations without regard to the amount in controversy. 28 U. S. C. § 1337; 15 U. S. C. § 15. Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture."

[4] CRA Schedule 8, ¶¶ 47B(7)(c), 47B(11).

favored in the European Union such as a "loser pays" principle and a bar on exemplary damages.[5] Notably, on June 21, 2016, for the first time, the CAT accepted an application for an opt-out collective proceeding.[6]

In 2013, the EC issued a set of principles and recommendations regarding collective actions for both injunctive relief and damages.[7] The Recommendation's goal, which stemmed from an earlier EC "Resolution" and "Communication" regarding collective redress,[8] is to facilitate access to justice in relation to violations of rights under Union law and to that end to recommend that all Member States should have collective redress systems at national level that follow the same basic principles throughout the Union, taking into account the legal traditions of the Member States and safeguarding against abuse.[9] The Recommendation recognized that there are particular areas of the law – including competition – in which an availability of some sort of collective redress would be of "value."[10]

The modern economy sometimes creates situations in which a large number of persons can be harmed by the same illegal practices relating to the violation of rights granted under Union law by one or more traders or other persons ("mass harm situation"). They may therefore have cause to seek the cessation of such practices or to claim damages.[11] The Recommendation noted that "[t]he possibility of joining claims and pursuing them collectively may constitute a better means of access to justice, in particular when the cost of individual actions would deter the harmed individuals from going to court."[12] Having said that, the EC was clear in the Recommendation that it wanted to avoid "an abusive litigation culture" and, therefore, instructed that, as a general rule, punitive damages, intrusive pre-trial discovery procedures and jury awards should be avoided.[13]

Some other key components of the Recommendation are that it:

- preserves the "loser pays" principle common in the EU;[14]
- adopts the "opt-in" style of collective redress)), exclusively;[15] and

[5] CRA Schedule 8, ¶ 47C(1).
[6] Notice of an Application to Commence Collective Proceedings under Section 47B of the Competition Act 1998, Case No. 1257/7/7/16.
[7] Commission 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 (2013/396/EU) (the "Recommendation").
[8] Recommendation ¶¶ (4)-(5).
[9] Id. ¶ (10).
[10] Id. ¶ (7)
[11] Id. ¶ (2).
[12] Id. ¶ (9).
[13] Id. ¶ (15).
[14] Id. ¶ (III.13).
[15] Id. ¶¶ (V.21-24).

- bars contingency fees that create an incentive "to litigation that is unnecessary from the point of view of the interest of any of the parties."[16]

In 2014, the EC issued a "Directive" regarding private antitrust damages litigation.[17] Although earlier EC papers leading up to the adoption of the, Directive included policy suggestions regarding collective redress, the Directive expressly notes that it does not "require Member States to introduce collective redress mechanisms."[18] Given that the stated goal of the Directive was to enhance private antitrust enforcement, the decision to omit collective actions from the Directive has led to criticism.

The Member States were instructed to implement the principles in the Recommendation by July 26, 2015[19] and to collect statistics regarding collective actions in their countries that are to be reported no later than July 26, 2016.[20] But, per Article 288 Treaty on the Functioning of the European Union ("TFEU"), the Recommendation is not binding. The EC will "assess the implementation of the Recommendation on the basis of practical experience by 26 July 2017 at the latest."[21]

III. ROLE OF DISCOVERY

A. Discovery in the United States

Wide-ranging discovery has been available in the United States since the enactment of the Federal Rules in 1938. The Federal Rules provide for, among other things, depositions as of right, document productions and interrogatories. Ever since the 1946 amendments to Federal Rule 26, the Federal Rules have encompassed the notion that the scope of discovery is not limited to admissible evidence. As the Supreme Court stated,

> [T]he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.[22]

Over the years, the discovery provisions of the Federal Rules have been revised in various ways. Most recently, the Federal Rules were revised effective December 2015 to, among other things, specifically refer to a concept of proportionality:

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[16] Id. ¶¶ (V.29-30).
[17] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on Certain Rules Governing Actions for Damages Under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union (the "Directive").
[18] Directive ¶ (13).
[19] Recommendation ¶ VI.38.
[20] Id. ¶¶ VI.39-40.
[21] Id. ¶ VI.41.
[22] *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

> Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense *and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.*[23]

Although the use of the term "proportionality" is new, this provision boils down to an inquiry regarding burden – a concept that was already in the Federal Rules.

In the United States, no distinction is made among types of civil litigation – whether the case is a class or an individual action, a suit regarding product liability or antitrust – the same broad discovery rules apply.

B. Discovery in the European Union

The vast majority of countries in the European Union have civil law systems in which discovery plays a very small role, if any. In Germany and France, for instance, the applicable codes of civil procedure allow for pre-trial disclosure only where a litigant is able to specifically identify a document and describe why that document is relevant to the lawsuit and, even then, only with a court order. There is no compulsory production in either country, although parties are free to make voluntary disclosures.

The United Kingdom, though, is a common law country. And, while pre-trial discovery there has never been quite as abundant as in the United States, litigants in the United Kingdom have access to far more discovery than do litigants elsewhere in the European Union. Most notably, parties are obligated, as part of "standard disclosure" to produce, among other things, the documents on which they rely in addition to the documents which adversely affect its own case or support another party's case.[24] Having said that, if a party believes "that it would be disproportionate to the issues in the case to permit inspection of documents within a category or class of document disclosed under" the standard disclosure rule, it may deny inspection of that class of documents but must make a statement to that effect in its disclosure statement.[25] In addition, the court can order the production of particular documents or "classes of documents."[26] And the court can also order production from third parties.[27] Parties are also obligated to produce not only documents within their control but also documents that "have been" in their control.[28] And, the obligation to disclose is one that "continues until the

[23] Fed. R. Civ. P. 26(b)(1) (emphasis added to depict new text).
[24] Civil Procedure Rule 31.6 (U.K.).
[25] Id. 31.3(2) (U.K.).
[26] Id. 31.12 (U.K.).
[27] Id. 31.17 (U.K.).
[28] Id. 31.8 (U.K.).

proceedings are concluded" such that if a party becomes aware of documents that should have been disclosed, the party must notify all other parties "immediately."[29]

C. The Directive: A New Dawn on Discovery

Whereas discovery in the United States is uniform across various types of litigation, in the European Union, different regulations and directives have been enacted that provide for – or prohibit – discovery in different contexts.

In the antitrust context, in June 2013, the European Commission proposed a new directive regarding private antitrust enforcement that, among other things, addresses pre-trial disclosure. The directive was signed into law a year and a half later in the Directive.

The EC recognized that there was a dearth of private antitrust enforcement in the European Union, something it attributed, in significant part, to the unavailability of evidence with which a plaintiff could prove its case. The Directive seeks to enable victims of anticompetitive conduct to seek damages effectively,[30] and one of the tools that a litigant needs to seek damages is access to evidence.

Actions for damages for infringements of Union or national competition law typically require a complex factual and economic analysis. The evidence necessary to prove a claim for damages is often held exclusively by the opposing party or by third parties, and is not sufficiently known by, or accessible to, the claimant. In such circumstances, strict legal requirements for claimants to assert in detail all the facts of their case at the beginning of an action and to proffer precisely specified items of supporting evidence can unduly impede the effective exercise of the right to compensation guaranteed by the TFEU.[31] The Directive sought to rectify what it termed "an information asymmetry."[32] The Directive placed the power to order disclosure with the national courts; they will be responsible to assessing the requests and determining issues such as proportionality.[33]

Significantly, the Directive removes requirements that parties seeking disclosure ask for the precise documents they seek and allows them to seek documents by reference to categories of information.[34] Specifically, regarding requests for disclosure of categories of documents, the Directive instructs that the category should be identified by reference to common features of its constitutive elements such as the nature, object or content of the documents the disclosure of which is requested, the time during which they were drawn up, or other criteria, provided that the evidence falling within the category is relevant within the meaning of this Directive. Such categories should be defined as precisely and narrowly as possible on the basis of reasonably available facts.[35]

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[29] Id. 31.11 (U.K.).
[30] Directive ¶ (3.).
[31] Id. ¶ (14).
[32] Id. ¶ (15).
[33] Id, ¶ (16), Art. 5 ¶ 3.
[34] Id. Art. 5 ¶ 2.
[35] Id. ¶ (16).

The Directive also specifically warns against "fishing expeditions."[36] The Directive further provides that claimants should be able to seek documents from third parties in addition to defendants.[37]

Unsurprisingly, in light of the emphasis placed by the European Union and its Member States on privacy, the Directive contains several provisions aimed at protecting confidential information. The Directive specifically mentions "the possibility of redacting sensitive passages in documents, conducting hearings in camera, restricting the persons allowed to see the evidence, and instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form."[38] The Directive, though, goes on to caution that "[m]easures protecting business secrets and other confidential information should, nevertheless, not impede the excise of the right to compensation."[39]

Regarding documents held by a competition authority in connection with an investigation, the Directive provides that, once an investigation is closed, certain documents may be ordered disclosed by a national court.[40] But, the Directive also says that a national court may not order the disclosure of a leniency statement or settlement submission.[41] The Directive reasons, "To ensure undertakings' continued willingness to approach competition authorities voluntarily with leniency statements or settlement submissions, such documents should be exempted from the disclosure of evidence."[42]

The Member States have until December 27, 2016 to introduce national legislation to implement the Directive,[43] and are currently at different points of implementation. The United Kingdom, for instance, in January 2016, published "Competition Policy, Consultation: Implementing the EU Directive on Damages for Breaches of Competition Law" (the "Consultation"). The Consultation sets out how the United Kingdom intends to implement the Directive which, as the Consultation stated, requires "relatively minor changes."[44]

Other countries, however, have not spoken on the Directive at all. The EC will review the Directive and issue a report to the European Parliament no later than December 27, 2020 that includes information on three specified topics regarding private competition litigation (none of which relate to disclosure).[45] The EC may include a legislative proposal with its report.[46]

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[36] Id. ¶ (23).
[37] Id. Art. 5 ¶ 1.
[38] Directive ¶ (18).
[39] Id. ¶ (18).
[40] Id. Art. 6 ¶ 5.
[41] Id. Art. 6 ¶ 6.
[42] Id. ¶ (26).
[43] Id. Art. 21 ¶ 1.
[44] Consultation ¶ 2.1.
[45] Directive Art. 20 ¶¶ 1-2.
[46] Id. Art. 20 ¶ 3.

D. Privacy laws: An Added Wrinkle

Underscoring discovery in the European Union is the fact that there are broad regulations designed to protect EU citizens' privacy. After operating for nearly two decades under Data Protection Directive 95/46/EC, in January 2012 the EC proposed a comprehensive reform of its data protection rules. And, earlier this year, the European Union adopted a new EU Data Protection Regulation and accompanying Directive.[47] According to its terms, "[t]his Regulation protects fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data."[48] Among other things, it prohibits the transfer of personal data – which is broadly defined – processed in the European Union to another country whose privacy laws the European Union believes are inadequate.[49]

Given that most member states in the European Union have their own privacy laws in addition to any applicable EU regulations, analysis of privacy issues in the European Union is complicated – to say nothing about the issues these laws present when EU documents are sought in U.S. discovery.

E. The Effect of the "Brexit" on Competition Litigation

Last month's historic referendum in the United Kingdom in which the majority of voters cast their ballots to leave the European Union will, no doubt, have multiple effects on legal affairs in Europe. Exactly what those effects will be, though, remains to be seen – and it will be a while before there is clarity on the issue.

Until the United Kingdom serves its notice of intent to withdraw from the European Union pursuant to Article 50 of the TFEU, the two years during which the United Kingdom will negotiate the terms of its exit do not begin to run. Once it serves the notice, though, the European Union and the United Kingdom will begin negotiations regarding its future relationship with the European Union. Of course, these negotiations will touch far-ranging aspects of business, trade, the environment, law – just to name a few. With regard to the subjects of this paper, among the details of the UK withdrawal that will need to be ironed out are whether the United Kingdom will still be subject to the Directive. If the United Kingdom elects a Norway-like relationship with the European Union, it would be. On the other hand, the United Kingdom could opt for a cleaner break. Similarly, with regard to group actions, as discussed, the United Kingdom has been gearing up to be more of a central location for collective actions, particularly with its adoption last fall of opt-out class actions. It is unclear, going forward, whether decisions of other member states or EC decisions will be binding on the UK courts, irrelevant to the UK courts, or something in the middle. Similarly, how the rest of the European Union will treat decisions of the UK competition tribunal remains to be seen.

And, in terms of policy influence, as noted above, the United Kingdom, with its common law system, has always had far more pre-trial disclosure than other European countries. And,

[47] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (the "Regulation"); Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016.
[48] Regulation Art. 1 ¶ 2.
[49] Regulation Art. 45.

as its recent adoption of opt-out collective action indicates, it will be a friendly environment for group actions. Whether its future absence from EU discussions about issues relating to litigation practices will stymie the growth of the EU's disclosure and collective action procedures remains to be seen. But, it is hard to imagine that the absence of the British voice in those discussions will not have some of effect.

IV. CONCLUSION

With the issuance of the Directive, and its provisions regarding disclosure, and the Recommendation, regarding collective actions, it is clear that the EC has recognized that changes must be made to the EU litigation landscape to provide victims with a viable opportunity to seek redress for injuries stemming from anticompetitive conduct. As notable as those facts are, equally significant is the express recognition by the EC of the need for those changes. Importantly, the EC's Recommendation acknowledged that collective actions "may constitute a better means of access to justice" and that disclosure is necessary to afford a party "effective exercise of the right to compensation guaranteed by the TFEU."

While the European Union properly wants to avoid litigation "abuse" and "fishing expeditions," its recent pronouncements through the Directive and Recommendation are significant. They do not afford victims of anticompetitive conduct all of the rights and necessary tools to fully protect their interests, but they are a step in the right direction.