
THE COMPETITION LAW REVIEW

Volume 8 Issue 1 pp 1-6

December 2011

Editorial - Private Enforcement and Collective Redress: the Benefits of
Empirical Research and Comparative Approaches*Barry J Rodger**

It is clear from a cursory examination of the academic literature in the field that private enforcement is an established, well-developed and vibrant mode of enforcement of US antitrust law constituting the preponderance of antitrust enforcement activity; complemented by public enforcement by the DOJ and FTC.¹ Historically, a range of factors have combined to ensure that private enforcement is effectively the default setting for antitrust enforcement in general, namely: the wider litigative culture; the significant period of development of antitrust law and economics; and, specific characteristics of US civil procedure - the rules on discovery, the funding of actions, the availability of class actions, and the existence of treble damages actions - together with clarification (and modification) of the legal position in relation to issues such as the passing-on defence and standing for indirect purchasers. Private antitrust enforcement is a well developed and mature system of litigation in the US, in contrast with the position in the EU.

Nonetheless, the basic EU doctrine of direct effect ensures that certain EU Treaty rules create rights and obligations which can be enforced in the domestic courts - and in an early Art 267 TFEU ruling, the ECJ confirmed that the doctrine applied to the Treaty competition rules.² Moreover, it is clear that during the last 20 years, the European Commission has sought to encourage and facilitate private enforcement of EU competition law, and a similar process has taken place in certain Member States; for instance in the United Kingdom since 1998, including the introduction of the Enterprise Act 2002 which made provision inter alia for follow-on actions before a specialist Competition Appeal Tribunal (CAT). These 'decentralisation/modernisation' processes were promulgated, at least partly, to develop a greater complementary role for private litigation and thereby enhance the deterrence and effectiveness of EU competition law and alleviate the authorities' resource limitations. Accordingly, there have been a number of important developments to encourage private enforcement of competition law, such as the Commission Notice on Co-operation with the National Courts in 1993,³ the ECJ's *Crehan* and *Manfredi* rulings,⁴ and the introduction of

* Professor of Law, School of Law, University of Strathclyde, Glasgow.

¹ See also, for example, C Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA* (Oxford: OUP, 1999); RH Lande and JP Davis, 'Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases' (2008) 42 U.S.F.L.R. 879; and the US Antitrust Modernization Commission, Report and Recommendations, 2007, available at http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm.

² See *Belgische Radio en Televisie v SV SABAM* (Case 127/73) [1974] E.C.R. 51.

³ Commission Notice on Co-operation with the National Courts [1993] OJ C39/6.

Regulation 1/2003. In this context, there has been considerable literature on the application of the EU competition law rules in the national courts,⁵ and this burgeoning literature has been enhanced by two fairly recent significant publications in the field. *The 'Right to Damages' Under EU Competition Law*, by Veljko Milutinovic,⁶ was published by Kluwer as part of the European Monographs series and was derived from a Ph.D. by the author at the EUI, where I had the pleasure to be on the examining panel. This book provides a much-needed contemporary analysis of European developments, focusing on the Commission and Court, and seeking to answer the question 'why we are where we are?' by assessing the legal context in which private enforcement has developed. This is an excellent addition to the literature, although it does not (seek to) consider two of the developing themes in the debate, namely consumer redress and funding difficulties, two issues which are developed in detail in contributions to this issue of the Review, considered further below.

The International Handbook on Private Enforcement of Competition Law, edited by Albert E Foer and Jonathon W Cuneo,⁷ effectively does 'what it says on the tin' by assessing global developments in this area, with separate Parts of the book devoted to the US, Europe, Americas, Asia, Africa and Australia, together with a final part entitled 'The Future of Private Enforcement'. It is an excellent and important piece of comparative work in this field. Part I, Introduction, brings together the seminal work of Lande, providing an overview of his earlier empirical study on the benefits of private enforcement, together with a piece by Connor in which he gathers together his various writings on the impact of international cartels. This is an impressive start to the book, and albeit some readers may already be familiar with much of the content, it is worth revisiting. Jonathon W Cuneo's introductory chapter on 'differing traditions', provides fascinating historical insights, noting for instance that Adam Smith's *Wealth of Nations* was published in the same year, 1776, as the Declaration of Independence which is the root of US antitrust laws. Part II of the book on 'Experiencing Private Enforcement in the US' provides a comprehensive stage by stage discussion of the process of US antitrust litigation, with Chapters 12 and 14, on Funding Litigation, and Class Notice and Claims Administration, respectively, of particular interest in the ongoing EU debate, as discussed in this issue by Leskinen and Ioannidou. Part III of the book deals with Europe, and a good overview, setting the scene, is provided by Vrcek, although

⁴ *Courage Ltd v Crehan* (Case C-453/99) [2001] E.C.R. I-6297; *Manfredi v Lloyd Adriatico Assicurazioni SpA* (Case C 295/04) [2006] E.C.R. I-6619.

⁵ R Whish, 'The Enforcement of EC Competition Law in the Domestic Courts of Member States' [1994] E.C.L.R. 60; Kon and Maxwell, 'Enforcement in National Courts of the EC and New UK Competition Rules: Obstacles to Effective Enforcement' [1998] E.C.L.R. 443; A MacCulloch and BJ Rodger, 'Wielding the Blunt Sword: Interim Relief for Breaches of EC Competition Law before the UK Courts' [1996] E.C.L.R. 393. In relation to *Crehan* (Case ???) [2001] E.C.R. I-6297: A Komninos 'New Prospects for Private Enforcement of EC Competition Law: *Courage v Crehan* and the Community right to damages' [2002] C.M.L. Rev. 447; G Monti, 'Anti-competitive agreements: the innocent party's right to damages' (2002) 27 E.L. Rev. 282; A Andreangelini, '*Courage Ltd v Crehan* and the Enforcement of Article 81 EC before National Courts' [2004] E.C.L.R. 758; N Reich, 'The 'Courage' doctrine: encouraging or discouraging compensation for antitrust injuries?' [2005] C.M.L. Rev. 35.

⁶ Kluwer Law International, 2010, ISBN 978-90-411-3235-2.

⁷ In association with the American Antitrust Institute, Edward Elgar, 2010, ISBN 978-1-84844-877-3.

discussion of the subsequently withdrawn Commission Directive was, perhaps, precipitate, and the Commission agenda has developed since this was written. Chapters 16- 22 provide discussions of the legal context for private enforcement in England and Wales, France, Germany, Italy, the Netherlands, Spain, Sweden and Turkey, with the authors following a consistent approach to allow for easy cross-comparison in dealing with the issues that arise. In his 'Overview of the Americas', Cuneo discusses the interesting systemic divergences between those countries with a common law and a civil law tradition. Nonetheless, Part IV on the Americas, lacks as consistent an approach as Part III. Part V, on Asia, Africa and Australia, inevitably, in comparing Australia, Israel, Japan and Korea with other countries from those Continents, displays a 'wide range of variation' (p477) in relation to private enforcement which in itself is fascinating, but unfortunately this is also reflected in the varying strength and depth in the chapters in this Part. Part VI on the Future of Private Enforcement starts with a chapter on International Settlements, by Sorkin. This is an interesting piece, but it is not clear how well it fits within the Part VI theme and it should also have been noted that the issue is also partly dependent on international private law rules of jurisdiction. The final chapter by Foer and Cuneo, Towards an Effective System of Private Enforcement, is enlightening and a worthy finale to this book. They understand the variations in different national legal systems and do not set out to be prescriptive, asking the key question: 'why there is no ideal model for private enforcement' (592)? They stress that it is important to recognise 5 key variables in this context: variations in cultural and moral values, political values, legal and economic contexts and institutional capabilities. Nonetheless, in assessing the functions required for a private enforcement system to be effective, they leave it to individual jurisdictions to find their own solutions to these questions, based on the experiences outlined in the previous chapters, and they clearly refrain from advocating or prescribing a one size fits all model. This is an important departure point when we look to the European private enforcement debate post-White Paper, considered in detail in the 3 final articles in this issue of the Review. In his preface to the book, Albert Foer discusses the fact that there has been very little empirical literature in the field. Lande's work has been crucial in that context and there has been increasing consideration of private litigation in practice within the EU.⁸ The book further demonstrates the value of comparative work in the field.

These twin facets of comparative learning and empirical data make Vande Walle's contribution to this issue, 'Private Enforcement of Antitrust law in Japan: An Empirical Analysis', charting the development of private enforcement in Japan, fascinating and important. Empirical research of this type is a welcome addition to the competition law academic literature and provides new and different insights. Vande Walle examines all competition law cases in the post-war period, noting an increase in the last twenty years, and there is potential scope here for comparing developments under the UK

⁸ See for example, B Rodger, *Article 234 and Competition Law: An Analysis*, editor, Kluwer Law International, 2008, ISBN 978-90-411-2605-4; B Rodger, 'Competition Law Litigation in the UK Courts: a study of all cases 2005-2008' - Parts I and II [2009] 2 Global Competition Litigation Review 93-114 and 136-147; and in relation to Germany, S Peyer 'Myths and Untold Stories- Private Antitrust Enforcement in Germany' July 2010, CCP Working Paper No. 10-12.

follow-on actions provisions of the Enterprise Act 2002. The availability of residents' lawsuits is a fascinating phenomenon, and it is interesting to note that injunctive relief only became available latterly, effectively reversing the position for instance in the UK. The focus on bid-rigging cases is interesting, and we may see a rise in cases in that context in the UK following the OFT Construction cartel decision, although Vande Walle notes that damages have been predominately recovered in Japan by public entities, and it is ironic that in fact there has been very little or no redress effectively for consumers. Overall, his conclusion, based on the empirical data, is one of scepticism, and that disappointingly to date private enforcement has been of limited significance, except in relation to bid-rigging cases involving recovery by public entity plaintiffs.

Clifford Jones, in his editorial to Issue 3(1) of the Review, on the same topic of private enforcement, considered the EU to be at the start of the third devolution of EU competition law enforcement, in which private enforcement would take on a more significant role following the Commission Green Paper. There is some evidence of the existence of, and increased resort to, litigation to secure some form of redress in relation to alleged anti-competitive behaviour in the UK and Germany at least,⁹ and the arrival, in the UK, of the American antitrust plaintiff bar. Further, it is arguable, following the Commission White Paper on damages actions for breach of the EU antitrust rules,¹⁰ and the more recent Commission Consultation on 'Towards a Coherent European Approach to Collective Redress'¹¹ that we are entering a fourth phase, focusing on effective consumer redress. The remainder of the articles in this issue concentrate on this broad theme, and in the case of Delatre and Leskinen in particular, provide interesting comparative approaches to the issues of the appropriate models of collective/group actions and funding for this type of litigation respectively.

Delatre, in 'Beyond the White Paper: Rethinking the Commission's Proposal on Private Antitrust Litigation' provides a comparative study of group actions in existence in a number of Member States, with a particular emphasis on the Danish, Portuguese, English, French and Dutch experience, comparing the different approaches taken by Member States, contrasting them with the propositions contained in the European Commission's White Paper. As Delatre stresses, despite the Commission's reticence to consider an opt-out model: 'The opt-out mechanism is present – albeit in various forms – in four major European countries. It is as much part of this European experience as any other model'. The article includes a fascinating diversion on the work of Thaler and Sunstein,¹² and envisages class action mechanism as a choice architecture, a 'nudge' in which the model of passive consent overcomes the traditional mode of rational apathy, exemplified by the incredibly low rates of participation in opt-in actions. Mulheron has

⁹ Ibid.

¹⁰ At <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html#link1>. Editorial Comments, 'A little more action please! The White Paper on damages actions for breach of the EC antitrust rules' [2008] CML Rev 609; F Bulst, 'Of Arms and Armour - The European Commission's White Paper on Damages Actions for Breach of EC Antitrust Law' (2008) 2 Bucerius Law Journal 81.

¹¹ At http://ec.europa.eu/competition/consultations/2011_collective_redress/index_en.html.

¹² RH Thaler and CR Sunstein, *Nudge: Improving Decisions about Health, Wealth and Happiness* (Caravan, Yale University Press, Yale 2008).

for instance noted that opt out rates in Portugal are close to zero, so the mechanism there acts as a ‘nudge’ for consumers. Delatre provides a sustained critique of the alleged excesses of opt out actions - re costs and unmeritorious actions- as being without foundation. There is an absence of any empirical basis for the criticisms and the alleged excesses are arguably not a by-product of the opt-out mechanisms *per se* but a result of various aspects of the US system of litigation. Indeed Delatre urges the opening of an EU debate on opt-out mechanisms which has, to date, never effectively taken place. This article draws on European experience which appears to have been overlooked or neglected, and suggests that an opt-out model may be superior to the models considered in the White Paper, and argues for a Directive to allow flexibility and a multi-speed approach to the adoption of collective redress models across the EU.

Ioannidou’s article, ‘Enhancing the Consumers’ Role in EU Private Competition Law Enforcement: a normative and practical approach’, focuses similarly on the issue of how best to approach the vexed question of enhancing collective redress in a competition law context in the EU, focusing on central themes of access to justice and consumer empowerment. She considers the key dichotomy in the debate on private enforcement between deterrence and compensation, and sets out an approach whereby Group A and Group B types of claims should be distinguished. Although the borderline between these two classes of claim will be difficult to draw precisely in monetary terms (and across jurisdictions), the core argument is that for particularly low value claims involved in Group B type claims, access to justice means something different - akin to moral justice. In this context she develops notions of the collective consumer interest - and how to achieve ‘effective’ redress for such Group B claims, which does not necessarily entail recoupment of damages for all individuals concerned. Ioannidou emphasises the compromise between an individual’s right to damages and its functional deterrent role in the context of competition law enforcement, with the latter playing a more decisive role in Group B type claims, in relation to which, for instance, *cy-pres* awards may be made. Ioannidou’s article is a fascinating approach, advocating a distinct and distinctive approach to competition law consumer collective actions. One of the issues in this context remains the funding of such consumer bodies, and this is a key plank of Leskinen’s article: ‘Collective Actions: rethinking Funding and National cost Rules’. Leskinen sets out to demonstrate that some form of contingency fees or adjusted cost rules would be necessary in order to enhance access to justice for victims of competition law infringements by incentivising lawyers. Leskinen provides a convincing argument, and again draws on experience in some Member States where some form of contingency fees have been adopted, suggesting that this may allow for sufficient political support among Member States to adjust cost rules on an EU-wide basis. The article also looks at alternatives to public funding of collective actions, and in line with Delatre/Ioannidou, concludes that collective actions would be necessary in order to increase access to justice for victims of antitrust violations, but to be effective, funding and incentives to raise actions would also need to be introduced.

The books reviewed in this editorial and the articles contained in this issue reflect the debate in relation to private enforcement of competition law in the EU and the tensions inherent in achieving a suitably coherent scheme, particularly across the EU’s different legal systems, and in relation to consumer redress primarily. Moreover, they

demonstrate, in the context of this ongoing debate, the importance and value of both empirical and comparative work, which can facilitate a more mature and enlightened discussion of the relevant issues. It is hoped that the outcomes from my forthcoming AHRC funded project on Comparative Private Enforcement and Consumer Redress in the EU will add to the quality of the debate on this significant phase in the development of EU competition law enforcement.