# DEVELOPMENTS IN PRIVATE ENFORCEMENT OF COMPETITION LAWS -- INTRODUCTION

CHARLES E. KOOB, DAVID E. VANN, JR. AND ARMAN Y. ORUC[1]
SIMPSON THACHER & BARTLETT LLP

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Private enforcement of the antitrust laws continues its steady rise across the globe. Although the volume of private enforcement actions in the United States remains to overshadow any other jurisdiction, extensive procedural and substantive changes in the European Union, the United Kingdom, Canada and Japan – to name a few – have paved the way for an accelerated growth in private enforcements actions. Indeed, true to the "free market" underpinnings of substantive antitrust theory, the authorities, agencies and the courts in various jurisdictions appear to have discovered that the effective, and arguably efficient, enforcement of antitrust laws require a healthy dose of decentralized, and "privatized" enforcement actions.

In this introduction, we survey the trend for private actions to play an increasing role in a number of jurisdictions and conclude with a brief summary of some of the developments in the United States. The remainder of this publication contains detailed jurisdiction-specific descriptions of the substantive and procedural factor regarding the availability of private actions.

**The European Commission Opens the Floodgate**

In December 2002, in what may prove to be the most significant event in European competition laws since the Treaty of Rome, the Council of Ministers of the European Commission adopted Regulation (EC) no 1/2003 to govern the implementation of the competition rules laid down in Articles 81 and 82 of the Treaty ("Reg. (EC) no 1/2003").[2] The regulation will become effective on May 1, 2004, and replaces the provisions of Regulation (EEC) no. 17/62.

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[1] Mr. Koob is Co-Head of the litigation department at Simpson Thacher & Bartlett LLP. Mr. Vann is a partner in the London office and Mr. Oruc is an associate in the New York office. They devote a substantial portion of their practice to antitrust matters involving litigation and regulatory approval.

[2] Article 81, similar to Section 1 of the Sherman Act in the United States, prohibits agreements and practices which prevent, restrict or distort competition. Article 81(3) provides for exemptions from the general prohibition of Article 81(1) where the agreement improves production or distribution of goods or services and/or promotes technical or economic progress. By contrast, Article 82 prohibits unilateral conduct that amounts to an abuse of dominance.

The new regulation reflects an acknowledgement that each member state of the European Union has had a sophisticated national court system and regulatory infrastructure that could, and perhaps should, assume the heavy load of enforcement of competition laws.

Whereas under the current regulations, Articles 81(1) and 82 of the Treaty of Rome are directly applicable in national courts, the Commission has exclusive jurisdiction to grant exemptions under Article 81(3). As a practical matter, the Commission's exclusive jurisdiction to grant exemptions has made the direct applicability of Article 81 in private actions in national courts virtually impossible. A defendant can delay a private action simply by lodging a notification with the Commission for an exemption under Article 81(3). Indeed, as early as 1999, in a white paper regarding the need to modify the existing regime, the Commission expressed the need to decentralize the exemption process in order to ensure the rigorous enforcement of competition laws throughout the European Union:

> companies have used this centralised authorisation system not only to get legal security but also to block private action before national courts and national competition authorities. This has undermined efforts to promote decentralised application of EC competition rules. As a result, the rigorous enforcement of competition law has suffered and efforts to decentralise the implementation of Community law have been thwarted. In an ever more integrated Community market, this lack of rigorous enforcement and the failure to apply one common set of rules harms the interests of European industry.[3]

Reg. (EC) no. 1/2003 ends the bottleneck created by this notification system. As of 1 May 2004, prior Commission intervention will no longer be required in order to determine whether the conduct or agreement is subject to an exemption pursuant to Article 81(3) and the national court itself will have the power to decide the issue.

Relationship with national competition law

Reg. (EC) no 1/2003 expressly states that not only the Commission, but also the national competition authorities and the national courts will have jurisdiction to enforce Articles 81 and 82. Such decentralization, of course, brings with it the possibility of inconsistent application and also the potential of conflict with the national laws. Indeed, as discussed [in the United States section] below, courts and enforcement agencies long have struggled with these issues in the United States.

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[3] WHITE PAPER ON THE MODERNISATION OF THE RULES IMPLEMENTING ARTICLES 85 AND 86 OF THE EC TREATY, COMMISSION PROGRAMME No 99/027', EC DG COMP, Brussels, 28 April 1999. (online) http://europa.eu.int/comm/competition/antitrust/wp_modern_en.pdf .

Reg. (EC) no 1/2003 attempts to clear up any inconsistency between Articles 81 and 82, and national competition laws by expressly stating how the national authorities can or cannot interpret the inconsistencies. Where an agreement or practice which affect trade between Member States does not infringe Art. 81(1) EC, or otherwise fulfills the conditions of Art. 81(3) EC, the national authorities are not allowed to prohibit such conduct on the basis of national competition law. Hence, compatibility of such agreements, decisions or practices with European Union competition law automatically preempts a negative evaluation under national competition law. By contrast, Reg. (EC) no 1/2003 does not preclude Member States from applying national laws that are stricter than Article 82 in order to prohibit or sanction unilateral conduct.

**National Remedies and Procedures: Is the United Kingdom Becoming the Forum of Choice in Europe?**

The direct applicability of the substantive law, alone, is not sufficient for encouraging private enforcement of the competition laws. After all, the European Commission regulations do not set out a right to sue for damages or provide for the procedural structure for a private action. Therefore, the legal systems of the Member States themselves must provide the appropriate procedural structure.

Indeed, some of the procedural and jurisdictional developments in the United Kingdom seem to suggest that, as far as the European Union goes, the United Kingdom may soon become the forum of choice for private actions under the competition laws. For example, not only can plaintiffs seek damages for violations of the national or European competition laws, but also the English courts have asserted broad jurisdiction, allowing non-UK claimants to bring actions that might be strategically difficult to bring in other jurisdictions. The recent High Court judgment in *Provimi v Aventis* [2003], which involves a damages action arising out of the *Vitamins* cartel, held that an English or foreign claimant seeking damages for loss suffered as a result of a breach of European competition law, can sue for its entire loss in the English courts, irrespective of where the loss was suffered, provided that there is an English subsidiary which implemented the anti-competitive conduct.[4]

The relatively modest jurisdictional nexus required by *Provimi* is particularly significant in light of some of the other procedural tools that make private actions more feasible in the United Kingdom. Although civil courts in the United Kingdom already had procedures for private damages, as well mechanisms to form a class of plaintiffs, the Enterprise Act of 2002 is poised to catapult private actions under the competition laws. The act establishes a specialist competition court, the Competition Appeal Tribunal ("CAT"), with a broad jurisdiction. The act enables the Lord Chancellor to make regulations enabling the High Court or any county court to transfer to the CAT for its determination any proceedings before it as they relate to whether or not the national or community competition laws have been infringed. Further, the

[4] In the *Provimi* case, a German company, Trouw, sued various companies which were part of the Roche and Aventis corporate groups in the English High Court, despite the fact that Trouw had only purchased vitamins from the foreign subsidiaries, and none from the English subsidiaries.

act confers jurisdiction on the tribunal to hear claims for damages or other pecuniary relief for loss or damage suffered as a result of an infringement of national or community competition laws. Finally, the act also provides for a streamlined "class action" procedure for consumer actions.

Although having streamlined procedures for seeking monetary damages and class actions undoubtedly will spur private actions, it remains to be seen how the courts or CAT will assess damages in private antitrust actions. To date no English court has awarded damages in an action under the competition laws.

**One Big Judgment May be As Important As New Procedures: Lessons From Japan**

If history of private enforcement in Japan is an accurate indication, the impact of a precedent where significant money damages were rewarded could not be overestimated. Until 1998, there were almost no cases in Japan in which plaintiffs had prevailed in seeking redress of injury caused by the a violation of competition laws. As discussed in detail in [NB: fill in cross reference], after a successful challenge by plaintiffs against a cartel resulted in a damages award equivalent to more than $400,000, more plaintiffs have started to successfully bring such actions. As a result, the number of private antitrust actions is increasing in Japan, and this trend can be expected to continue. Of course, as the risk of a judgment for damages increase, so does the incentive to settle. Not surprisingly, we expect to see more settlements involving large payments to plaintiffs similar to the settlement in Tokyo earlier in 2003 involving water-meter companies, where the Tokyo Metropolitan Government settled its case for a payment equivalent to $20 million.

**Availability of Class Actions May be Critical: Canada Expects More Class Actions**

An obvious limiting factor to the growth of private enforcement Japan is the unavailability of procedural mechanisms for bringing class action lawsuits. Without the procedural ease of aggregating damages of a large group of consumers, it may indeed be impractical to initiate private enforcement actions against cartels or monopolists. Consumer overcharge cases involving price fixing or monopoly pricing are hard to structure where the individual consumer has a negligible damages claim.

Indeed, the increasing availability of class actions is one of the driving forces behind the expected continued growth in private enforcement actions in Canada. Section 36 of the Competition Act provides for a private right of action for damages flowing from a violation of the competition laws. Nevertheless, relatively few private actions have ever gone to trial. However, numerous provinces, including British Columbia, Ontario and Quebec, already have adopted civil rules of procedure that allow for class actions. In addition, the Supreme Court of Canada held that, even in provinces that have no express procedural rules for class actions,

class actions may be certified under existing rules of civil procedure.[5] Further, Federal Court has adopted rules providing for class actions.[6]

Recent litigation over class certification has resulted in significant legal developments. The Ontario Court of Appeal denied the certification of a class of new home purchaser who alleged a price fixing case and damages as a result of indirect purchases of iron oxide, a substance used in home construction.[7] In doing so, the court reversed a lower courts certification of this class of indirect purchasers, where the lower court, contrasting the federal law in the United States, expressly held that indirect purchasers had standing to sue for damages.[8] The Court of Appeal did not contradict the lower court with respect to the ability of indirect purchasers to sue, but instead focused on the notion that these indirect purchasers could not establish a common, class-wide overcharge that would justify the certification of a class. In short, indirect purchasers still have an open avenue to form a class seeking damages under the competition laws.

**More Fine-tuning in the United States**

In the United States, where the availability of class actions, treble damages, contingency fees and a well-developed body of law make private actions very appealing, there have been significant developments affecting the growth of private actions. To be sure, private antitrust litigation showed no signs of slowing down. Cases involving claims of monopolization[9] and horizontal[10] and vertical restraints[11] have addressed key policy issues affecting these theories. In fact, similar to some of the developments in the United Kingdom, the recent jurisdictional developments, expanding the extraterritorial reach of the United States antitrust laws, likely

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5 *Western Canadian Shopping Centers Inc v. Dutton*, 2001 SCC 46.

6 Note that the Federal Court likely will not have jurisdiction over common law claims, such as the tort of conspiracy, which commonly are brought along with an antitrust claim under Section 36 of the Competition Act.

7 (2003) 63 OR (3d) 22 (CA)

8 (1999) 45 OR (3d) 29 (SCJ)

9 *See, e.g., Law Office of Curtis V. Trinko LLP v. Bell Atlantic Corp.*, 305 F.3d 89 (2d Cir. 2002); *Covad Communications Co. v. Bell-South Corp.*, 299 F.3d 1272 (11th Cir. 2002); *LePage's, Inc. v. 3M,* 324 F.3d 141 (3d Cir. 2002).

10 *See, e.g., High Fructose Corn Syrup Litigation,* 295 F.3d 651 (7th Cir. 2002); *United States v. Taubman*, 297 F.3d 161 (2d Cir. 2002).

11 *See, e.g., Apani Southwest, Inc. v. Coca-Cola Enterprises, Inc.,* 300 F.3d 620 (5th Cir. 2002); *StunFence, Inc. v. Gallagher Security (USA), Inc.,* 2002 WL 1838128, 2002-2 CCH Trade Cases ¶73,789 (N.D. Ill.); *Lubbock Beverage Co., Inc. v. Miller Brewing Co.,* 2002 WL 31011266, 2002 CCH Trade Cases ¶73,767 (N.D. Tex.).

will make the United States a convenient forum for plaintiffs from outside of the United States. At the sane time, however, two doctrines that limit antitrust liability, the implied immunity doctrine and the *Illinois Brick* direct-indirect purchaser doctrine, have sparked important decisions fine-tuning the scope of antitrust laws.

Extraterritorial Reach of the United States Antitrust Laws Expand

Recent decisions have opened door for plaintiffs from outside of the United States to bring antitrust claims in federal courts for their non-United States injury. In 1982, the United States Congress adopted the Foreign Trade Antitrust Improvement Act of 1982 ("FTAIA") to govern whether a federal court has subject matter jurisdiction over conduct that occurs outside the United States. FTAIA provides that US courts have subject matter jurisdiction over conduct involving trade or commerce where:

1) Such conduct has a direct, substantial, and reasonably foreseeable effect on (a) US domestic or import commerce; or (b) export trade or commerce of a person engaged in such trade or commerce …in the United States; and
2) Such effect gives rise to a claim under the Sherman Act.

The principal issues are whether the "effect" on US commerce is "direct, substantial, and reasonably foreseeable" and whether there is a sufficient nexus between that effect and the alleged violation of the US antitrust law.

It is well settled that where foreign conduct affects the price of products imported into the US, such conduct has a direct effect on United States commerce and may be actionable under the United States antitrust laws.[12] Of course, the same conduct could have anticompetitive effects in other countries and jurisdictions, but it generally had been understood that the second requirement permits jurisdiction only when the plaintiff's alleged Sherman Act injury arises from the direct, substantial, and reasonably foreseeable effect in the United States, as established in the first prong. Thus, where the plaintiff's injury was sustained in transactions in a foreign market even from a single global conspiracy that caused harm in the United States, courts have found a lack of connection between the injury and the effect on the US market. In this interpretation, plaintiff's injury must stem from the conspiracy's harm in the United States. Thus, the Court of Appeals for the Fifth Circuit, in *Den Norske Stats Oljeselskap AS v. HeereMac vof*, 241 F.3d 420 (5th Cir. 2001), in addition to a unanimous string of federal district court opinions, had held that customers could not bring treble-damage claims under U.S. law for injuries stemming from effects occurring wholly in foreign markets.

In recent cases, however the Second Circuit and the D.C. Circuit have eased this requirement and have allowed plaintiffs to bring suits, even where the injuries arose from conduct directed at foreign markets, as long as the conduct harmed competition in the United

[12] The effect, of course, also has to be "substantial" rather than a "spillover" of effects that occur outside the United States. *See United Phosphorus, Ltd. V. Angus Chem. Co.*, 131 F. Supp. 2d 1003, 1011-12 (N.D. Ill. 2001).

States. In *Kruman v. Christie's International PLC*, 284 F.3d 384 (2d Cir 2002), the Second Circuit held that jurisdiction lay for a potential plaintiff class of purchasers and sellers of goods in foreign auctions conducted by Christie's and Sotheby's, two auction houses accused of fixing prices. The claimed injury was excessive auction service charges paid at foreign auctions. The district court dismissed the claims on grounds of lack of jurisdiction because the plaintiff class had not shown that its injury had arisen from the direct, substantial, and reasonably foreseeable effect in the United States, *i.e.*, its injury was not domestic. The Second Circuit reversed the holding and held that so long as there was an effect on domestic commerce that violated the substantive provisions of the Sherman Act, United States federal courts had jurisdiction to hear the claim even if the plaintiff's claim and injury arose from conduct occurring outside the United States.

In *Empagran S.A. v. F. Hoffman-LaRoche, LTD*, 315 F.3d 338 (DC Cir 2003), plaintiff sued on behalf of all foreign purchasers of certain vitamins and vitamin mixes, for damages arising from a worldwide price-fixing conspiracy in vitamins. The injuries alleged were the inflated prices paid for the vitamins in foreign markets, and thus were injuries solely from the conduct's effect on foreign commerce. The DC Circuit upheld jurisdiction under FTAIA, holding that jurisdiction for injuries suffered outside the US was proper if some private person in the United States, even if not the particular plaintiff in the instant case, also had suffered injury as a result of defendant's illegal conduct. Thus, because in this case American vitamin purchasers were injured by the same conspiracy, foreign purchasers could also sue under American law for their injuries. The court reasoned that only giving American purchasers relief would insufficiently deter global cartels, because cartels would not have to worry about damages to foreign purchasers, and ultimately this underdeterrence would harm the American market. Due to this trend, more conduct risks being challenged in private actions in the United States, even by plaintiffs whose injuries are suffered wholly outside the United States.

The "Implied Immunity" Doctrine Expands

Whereas the private enforcement got a shot in the arm with the extraterritorial expansion of the United States competition laws, recent developments have curbed the application of these laws in contexts where they may contradict with other regulatory authority. Two recent decisions[13] have examined the potential clash between the antitrust and securities laws. The Supreme Court in earlier cases established a rule that immunity from the antitrust laws should be implied when the application of the antitrust laws to the challenged conduct would be *plainly repugnant* with the securities laws at the time of the alleged conduct. *Friedman* and *Options* broaden the scope of the immunity doctrine by applying it to situations where there is a *potential* for a conflict. Thus, *Friedman* and *Options* underscore the importance of the regulatory authority of the Securities and Exchange Commission ("SEC") at a time in the United States where alleged violations of securities laws are perhaps at an all time high.

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[13] *In re Stock Exchanges Options Trading Antitrust Litigation,* Nos. 01-7371, 01-7580, 2003 WL 77100 (2d Cir. Jan. 9, 2003) ("*Options*"), and *Friedman v. Salomon/Smith Barney, Inc.,* 313 F.3d 796 (2d Cir. 2002) ("*Friedman*").

The Second Circuit in *Friedman* upheld the district court's dismissal of a complaint that challenged the practice by investment banks of permitting institutions to flip their stocks in the aftermarket for IPOs, but restricting individuals from selling their stock for between 30 and 90 days after purchase. The complaint alleged that this practice inflated prices in the aftermarket by restricting the supply of shares and was illegal *per se* price fixing under the antitrust laws. The Second Circuit held that because the SEC could conceivably permit price stabilization in the aftermarket under its regulatory powers, there was a *potential* for conflict and applied the implied immunity doctrine.

In *Options,* the Second Circuit upheld the district court's dismissal of a class action lawsuit that alleged that five stock exchanges engaged in illegal price fixing by agreeing not to list any options classes that already were listed on another exchange. The SEC had regulated this issue for many years and at the time of the lawsuit prohibited multiple list options. The plaintiffs argued, *inter alia,* that because both the securities and antitrust laws prohibited the alleged conduct there was no conflict. The Second Circuit rejected this analysis and concluded that implied immunity was necessary to preserve the authority of the SEC to regulate the conduct, i.e., the SEC had power to allow the conduct in the future and that authority should not be "rendered nugatory" by application of the antitrust laws. Thus, *Friedman* and *Options* broaden the implied immunity doctrine to apply to *potential* conflicts between the securities and antitrust laws.

Indirect Purchaser Actions: The *Illinois Brick* Doctrine Continues to Erode

The right of indirect purchaser to sue for overcharges continues to complicate the private enforcement of antitrust in the United States. The "*Illinois Brick*" rule, established twenty-five years ago by the U.S. Supreme Court, holds that indirect purchasers generally are barred from recovering damages in federal antitrust actions. *Illinois Brick v. Illinois,* 431 U.S. 720 (1977). However, more than twenty states have passed so-called "*Illinois Brick* repealers" that provide indirect purchasers (or state attorneys general on behalf of consumers) with a right under state laws to recover for damages. This has caused complex, fragmented and inconsistent results, aggravated by the fact that such laws vary from state to state. For example, during 2002, numerous consumer class actions (as indirect purchasers) were brought in the wake of Judge Jackson's decision in *United States v. Microsoft*, 85 F. Supp. 2d 9 (D.D.C. 1999), *aff'd in part*, 253 F.2d 34 (D.C. Cir. 2001), alleging that consumers were injured by Microsoft overcharges. The determination as to whether consumers are entitled to bring such claims have been inconsistent, depending on whether a state had an *Illinois Brick* Repealer Law, and, if so, its scope. The complexity and the potentially uneven application of these diverse laws, being applied to the same conduct, creates the risk for divergent, and often duplicative, damage awards.

**Conclusion**

As the case always has been in the United States, enforcement of the competition laws across the globe is no longer a mere regulatory issue. Availability of monetary damages and procedures for class actions are slowly becoming the norm in many jurisdictions. At the same time, the European Commission has both spurred the growth of the substantive law and has

delegated critical jurisdiction to national authorities to implement the law. Undoubtedly, the combination of the national procedures for damages actions coupled with the more developed substantive laws of the Commission will create a more fertile environment for private actions in numerous jurisdiction. Judging from these trends, private enforcement of competition laws likely will continue to play a significant role in ensuring competitive markets and consumer welfare.