Federal Trade Commission

Does the EU Need a System of Private Competition Remedies to Supplement Public Law Enforcement?

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before the

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As you all know, the European Commission has been considering the adoption of a system of private, collective remedies in order to "supplement" the current public law enforcement system for infringements of EU competition law.[2] I have previously described at length the flaws that I think

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* The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor, Henry Su, for his invaluable assistance in preparing these remarks.

[1] For American readers who may not be familiar with this organization: la Ligue Internationale du Droit de la Concurrence (International League for Competition Law).

[2] *Commission Staff Working Document – Public Consultation: Towards a Coherent European Approach to Collective Redress* ¶ 1.1, SEC (2011) 173 final (Feb. 4, 2011), *available at* http://ec.europa.eu/justice/news/consulting_public/0054/ConsultationpaperCollectiveredress4

exist in the U.S. private enforcement system and how the EU may be able to avoid those flaws.[3] The focus of my remarks today is different. It is that no matter what the EU does in the realm of collective redress, this effort may be misguided because the underlying premise is flawed. I would suggest that a system of private competition remedies is not needed to supplement public law enforcement. Indeed, a private enforcement system may in fact hinder,

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February2011.pdf (framing "collective redress as a possible instrument to strengthen the enforcement of EU law"); Vice-President Viviane Reding, Vice-President Joaquín Almunia & Comm'r John Dalli, Eur. Comm'n, Towards a Coherent European Approach to Collective Redress, Joint Information Note (Oct. 5, 2010), at 3, ¶ 3, http://ec.europa.eu/transparency/regdoc/rep/2/2010/EN/2-2010-1192-EN-1-0.Pdf; Vice-President Joaquín Almunia, Eur. Comm'n, Common Standards for Group Claims Across the EU, Address at the University of Valladolid School of Law (Oct. 15, 2010), at 4, http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/554&format=PDF&aged=1&language=EN&guiLanguage=en; Comm'r Neelie Kroes, Eur. Comm'n, Collective Redress—Delivering Justice for Victims, Address at the ALDE Conference (Mar. 4, 2009), at 4, http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/88&format=PDF&aged=1&language=EN&guiLanguage=en.

I do recognize that the EC has also made clear in its current draft Guidance Paper on quantifying harm in damages actions, as well as in its 2005 Green Paper and its 2008 White Paper on damages actions, that private damages actions also serve a goal of ensuring that everyone who has suffered harm due to an infringement of Article 101 or 102 TFEU is justly compensated for that harm. *See Directorate-General for Competition, European Commission, Draft Guidance Paper – Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union* ¶ I.A.1 (June 2011), *available at* http://ec.europa.eu/competition/consultations/2011_actions_damages/draft_guidance_paper_en.pdf; *Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules* § 1.1, at 2, COM (2008) 165 final (Apr. 2, 2008), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0165:FIN:EN:PDF; *Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules* § 1.1, at 4, COM (2005) 672 final (Dec. 19, 2005), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0672:FIN:EN:PDF. In making these remarks I don't take issue with this goal (except to note that private, treble damages actions can lead to overcompensation for reasons I have previously stated, *see infra* note 3); here I am addressing only the stated goal of using private damages actions and collective redress mechanisms as a means of supplementing public enforcement of EU competition law.

[3] J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Designing a Private Remedies System for Antitrust Cases—Lessons Learned from the U.S. Experience, Remarks at the 16th Annual EU Competition Law & Policy Workshop (June 17, 2011), http://www.ftc.gov/speeches/rosch/110617roschprivateremedies.pdf.

rather than help, the public authorities in their enforcement of competition laws.

On these points I speak from four perspectives. The first is as an antitrust trial lawyer practicing in the U.S. for about 40 years. The second is as an antitrust counselor to big (in other words, dominant) firms in the U.S. for roughly the same period. The third is as a Commissioner at the Federal Trade Commission in the sixth year of my tenure. I will speak from each of these perspectives in turn. I will then conclude by giving you my thoughts on the line of cases from the European Court of Justice concerning private damages actions for infringements of EU competition law.

I.

Over the course of my career in private practice, I handled both civil and criminal antitrust cases. The civil cases have included treble damage actions (both class actions and actions that were not class actions), as well as antitrust actions for injunctive relief. Suffice it to say, I have litigated antitrust claims in a broad and diverse spectrum of forums and settings.

With this experience in hand, let me describe first on the array of penalties and sanctions that can result from an antitrust violation in the U.S. today. First and foremost, there are the federal criminal penalties for per se violations like price-fixing and bid-rigging.[4] Individual defendants found

[4] 15 U.S.C. §§ 1, 3(a) (2009).

guilty of committing such violations are invariably jailed and fined,[5] with the jail time and fines varying according to the volume of commerce involved.[6] Furthermore, individual defendants are subject to fines ranging from a minimum of $20,000 to a maximum of $1 million,[7] and corporations can be fined up to $100 million.[8]

Second, there is the possibility of criminal prosecution in the 50 states of the U.S. because the Double Jeopardy Clause in the Fifth Amendment to the U.S. Constitution does not bar those prosecutions.[9] This is so because the "dual sovereignty" doctrine recognizes the states as separate and independent sovereigns from the federal government, each with the inherent power and authority to separately prosecute defendants for violations of its

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[5] U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(1), introductory cmt. 4(d) (2010) (describing the Guidelines' approach of underscoring the seriousness of antitrust offenses by providing for at least a short period of imprisonment for individual offenders); U.S. SENTENCING GUIDELINES MANUAL § 2R1.1 cmt. background (2010) ("Substantial fines are an essential part of the sentence."); United States v. Rattoballi, 452 F.3d 127, 135 (2d Cir. 2006) (vacating a sentence to one-year home confinement because it represented a substantial deviation from the recommended Guidelines range).

[6] U.S. SENTENCING GUIDELINES MANUAL §§ 2R1.1(b)(2), (c) & (d) (2010).

[7] 15 U.S.C. §§ 1, 3(a) (2009); U.S. SENTENCING GUIDELINES MANUAL § 2R1.1(c)(1) (2010).

[8] 15 U.S.C. §§ 1, 3(a) (2009). The Antitrust Criminal Penalty Enforcement and Reform Act of 2004 (ACPERA) increased the maximum term of imprisonment from three to ten years, the maximum fines for individuals from $350,000 to $1 million, and the maximum fines for corporations from $10 million to $100 million. Pub. L. No. 108-237, tit. II, § 215, 118 Stat. 665, 668 (2004); *see* 15 U.S.C. § 1 note (2009). The federal Sentencing Guidelines were amended accordingly in 2005. *See* U.S. SENTENCING GUIDELINES MANUAL amend. 678 (Nov. 1, 2005).

[9] U.S. CONST. amend. V ("… nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; …"). The Double Jeopardy Clause is conceptually similar to the EU principle of *ne bis in idem*. *See* Case T-59/02, Archer Daniels Midland v. Comm'n, 2006 E.C.R. II-3627.

own antitrust laws.[10] (Incidentally, this doctrine does not apply, however, to U.S. territories like Puerto Rico because their territorial antitrust laws emanate from the same sovereign, i.e., the federal government, as the federal antitrust laws.[11])

Third, there is the possibility of "debarment" under federal or state laws, which, if it occurs, will disqualify a firm from doing business with specified government entities. In particular, the Federal Acquisition Regulation (FAR) defines as one cause for automatic debarment "a conviction of or civil judgment for— … (2) Violation of Federal or State antitrust statutes relating to the submission of offers[.]"[12] Even a mere charge of collusive bidding can be enough for a federal agency to initiate debarment proceedings under a catch-all provision of the FAR that encompasses "any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor."[13] Similarly, a state agency may debar a firm that is under investigation or the subject of an indictment

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[10] *See, e.g.,* Heath v. Alabama, 474 U.S. 82, 88–89 (1985); United States v. Lanza, 260 U.S. 377, 382 (1922).

[11] Puerto Rico v. Shell Co. (P.R.), Ltd., 302 U.S. 253, 264 (1937) (holding that prosecution under Puerto Rico's antitrust laws would not give rise to a danger of a second prosecution and conviction under the Sherman Act, which also applies to U.S. territories, 15 U.S.C. § 3(a)).

[12] 48 C.F.R. § 9.406-2(a)(2) (2010).

[13] 48 C.F.R. § 9.406-2(c) (2010); Leitman v. McAusland, 934 F.2d 46, 50–51 (4th Cir. 1991) (affirming agency debarment decision that was made based upon substantial evidence of collusive bidding submitted in a debarment proceeding).

for bid rigging, provided that the firm is given notice of and an opportunity to be heard in debarment proceedings.[14]

Fourth, whether or not an antitrust offense is per se illegal, there is always a threat of costly, civil, class-action litigation initiated under federal and/or state laws. As I have said elsewhere, regardless of its merits, class action litigation has a potential of forcing settlement on extortionate terms because if it is initiated under federal law, defendants face the prospect of joint and several liability without a right to contribution.[15] Furthermore, defendants can also be sued by indirect purchasers under various state laws, which means that their potential, aggregate exposure may far exceed the treble damages recoverable by class members who are direct purchasers.[16]

In contrast to what I have just described, the legal landscape for punishing, deterring and redressing antitrust violations was markedly different more than 40 years ago, when I started practicing antitrust law. In 1965, individuals were rarely jailed because per se violations were treated as misdemeanors carrying a maximum prison term of only one year,[17] and

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[14] N.Y. State Asphalt Pavement Ass'n, Inc. v. White, 532 N.Y.S.2d 690, 694–95 (N.Y. Sup. Ct. 1990).

[15] Rosch, *supra* note 3, at 10–11.

[16] *Id.* at 10.

[17] It was not until 1974, with the passage of the Antitrust Procedures and Penalties Act, that a violation of the Sherman Act (Sections 1, 2 or 3) became a felony, punishable by a maximum prison term of three years. Pub. L. No. 93-528, § 3, 88 Stat. 1706, 1708 (1974).

individual and corporate fines were capped at $50,000.[18] The U.S. Sentencing Guidelines, under which prison terms and fines escalate as the volume of commerce increases, were still two decades away from being on the books.[19] Hardly any state prosecutions or debarments occurred.[20] Antitrust class actions (and indeed, class actions generally) were still in their infancy,[21] and when they did occur, defendants were not burdened with the disproportionate costs stemming from electronic discovery, and the potential liability resulting from joint and several liability and indirect purchaser class actions, both of which generally produce extortionate private settlements today.[22]

In sum, there may have been a case to be made back in 1965 that a system of private law enforcement was necessary to "supplement" public

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[18] The Antitrust Procedures and Penalties Act of 1974 also increased the fines from $50,000 to $1 million for a corporation and $100,000 for any other person. *Id.* There have been additional increases since then. *See supra* note 7.

[19] The Sentencing Guidelines came into being a result of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, § 212(a)(2), 98 Stat. 1837, 1989–90 (1984) (codified as amended at 18 U.S.C. § 3553(a)(4) & (b) (2009)), which created a U.S. Sentencing Commission to promulgate guidelines for the district courts to use in sentencing.

[20] A LEXIS search of reported state court decisions issued in the 1960s uncovered only a handful of cases, mostly brought in two states—California under the Cartwright Act and New York under the Donnelly Act.

[21] On this point, I would commend to your reading a detailed analysis by U.S. District Judge Jack Weinstein (perhaps best known for his treatise on the Federal Rules of Evidence) of the relative merits of class actions versus other procedural devices (i.e., joinder, intervention, consolidation, test cases, and administrative litigation) for redressing wrongs that affect many people. Dolgow v. Anderson, 43 F.R.D. 472, 480–88 (E.D.N.Y. 1968). Although he concluded that the class action vehicle was appropriate for that particular securities fraud case before him, Judge Weinstein gave due consideration to the fact that the "[a]dministrative process often provides the best alternative to a class action." *Id.* at 482.

[22] *See* Rosch, *supra* note 3, at 10–12.

enforcement of the antitrust laws.[23] Today, however, I wonder whether any private remedy system is truly necessary to supplement the array of public antitrust law enforcement tools available at the federal and state levels, let alone the expensive kind of private remedy system we have in the U.S. That may be just too much unnecessary "piling on."

The same skepticism and caution arguably apply to the EU as well.[24] For one thing, the civil penalties currently assessed for price-fixing by the European Commission and the Member States far exceed any sanction that

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[23] *See, e.g.,* 3M Co. v. N.J. Wood Finishing Co., 381 U.S. 311, 318 (1965) ("Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws.") (construing the interplay of Sections 5(a) and 5(b) of the Clayton Act, 15 U.S.C. §§ 16(a) & 16(b) (1964), on collateral estoppel and tolling, respectively) (Section 5(b) is now codified at 15 U.S.C. § 16(i)); Rutherford v. United States, 365 F.2d 353, 356 n.3 (9th Cir. 1966) ("Fines in criminal antitrust cases are limited to $50,000 and it is often subsequent civil actions which make such conduct truly unprofitable and deter future violations."); Philadelphia Housing Auth. v. Am. Radiator & Std. Sanitary Corp., 269 F. Supp. 540, 542 (E.D. Pa. 1967) ("At the outset, it becomes critical to note that the private treble damage action was designed by Congress to serve a dual purpose. Congress intended that those injured by antitrust violations recover their damages. In addition, the treble recovery mechanism was '… intended to use private self-interest as a means of enforcement …' of the antitrust laws.") (quoting Bruce's Juices v. Am. Can Co., 330 U.S. 743, 751 (1947)).

[24] *See, e.g.,* Michael J. Frese, *Fines and Damages Under EU Competition Law—Implications of the Accumulation of Liability* 26 (Amsterdam Ctr. for L. & Econ., Working Paper No. 2011-05, Apr. 26, 2011) (expressing the view that "[t]he uncoordinated accumulation of liability in public and private enforcement proceedings could lead to inefficient over-deterrence … [which] may arise or be exacerbated when one form of liability is piled on top of another form of liability"), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1788141; Jeroen Kortmann & Christof Swaak, *The EC White Paper on Antitrust Damage Actions: Why the Member States Are (Right to Be) Less Than Enthusiastic*, 30 EUR. COMPETITION L. REV. 340, 344–46 (2009) (describing a potential danger of overcompensation through (1) representative actions that "are allowed to proceed without any credible prospect of providing redress to individual victims," (2) presumptions that would a defendant in the position of both having to prove and disprove the "passing on" of overcharges, and (3) use of simplified rules for estimating the loss resulting from overcharges (e.g., assuming that a price-fixing cartel on average produces an overcharge of ten percent)).

was imposed four decades ago.[25] That said, with the notable exception of the U.K.,[26] the European national competition authorities have not punished per se illegal conduct with imprisonment of individual offenders.[27] Is that—or should that be—a meaningful difference between the public law enforcement systems in the U.S. and the EU?

On this question, Judge Douglas Ginsburg and Joshua Wright have contended that nothing short of incarceration for individual defendants will

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[25] *See* EUR. COMM'N, DIR. GEN. COMPETITION, CARTEL STATISTICS 1.5 & 1.6 (updated July 14, 2011) (showing that with one exception (the vitamins cartel in 2001), the ten highest fines per case and per undertaking since 1969 are all from 2007–10), http://ec.europa.eu/competition/cartels/statistics/statistics.pdf (last visited Aug. 4, 2011); John M. Connor, *Has the European Commission Become More Severe in Punishing Cartels? Effects of the 2006 Guidelines*, 32 EUR. COMPETITION L. REV. 27, – (2011) (Dec. 13, 2010 manuscript at 14) (concluding that "[t]he severity of 2007–2009 cartel fines under the EC's 2006 Guidelines is more than five times higher than those figured under the previous 1998 Guidelines"), *manuscript available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1737885&rec=1&srcabs=1762046.

[26] *See Concluded Prosecutions – Marine Hose*, OFFICE OF FAIR TRADING, UNITED KINGDOM, http://www.oft.gov.uk/about-the-oft/legal-powers/enforcement_regulation/prosecutions/marine-hose (last visited Aug. 4, 2011). The Irish Competition Authority has also obtained jail sentences against convicted offenders but those sentences have been suspended. *See DPP v. Denis Manning*, THE COMPETITION AUTHORITY, REPUBLIC OF IRELAND, http://www.tca.ie/EN/Enforcing-Competition-Law/Criminal-Court-Cases/Irish-Ford-Dealers-Association.aspx (last visited Aug. 4, 2011); *Citroen Dealers Association*, THE COMPETITION AUTHORITY, REPUBLIC OF IRELAND, http://www.tca.ie/EN/Enforcing-Competition-Law/Criminal-Court-Cases/Citroen-Dealers-Association.aspx (last visited Aug. 4, 2011). Estonia has criminal laws against cartel behavior but I am not aware of any cases that have resulted in jail time. Germany has sentenced defendants to jail time, but only under its laws that criminalize bid-rigging. *See* Gregory C. Shaffer & Nathaniel H. Nesbitt, *Criminalizing Cartels: A Global Trend?*, 12 SEDONA CONF. J. (forthcoming Fall 2011) (manuscript at 16), *manuscript available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865971.

[27] *See* Shaffer & Nesbitt, *supra* note 26 (manuscript at 15–17) (reviewing developments in the EU and its Member States); Lewis Crofts, *White-Collared*, MLEX MAGAZINE, Apr.–June 2011, at 8, 9 ("Currently, the European Commission doesn't target executives, either with criminal or administrative fines. Therefore, it is [up] to EU states to come up with solutions. For some this can be personal fines, for others it can be disqualification from holding directorships. For a few it can mean imprisonment. But, despite the apparent choice, most of the tools are largely untested.").

deter the occurrence of hard-core offenses.[28] They argue that the imposition of stiff corporate fines is simply a tax on the shareholders, and it will do little to deter price-fixing and the like.[29] But that is not self-evident. As I understand it, in Europe the imposition of fines is accompanied by the loss of a job (or jobs, if multiple individuals were involved), and in the case of a corporate director who could have prevented the individual's wrongdoing, the loss of a corporate directorship.[30] This is not to speak of the public opprobrium that attaches to any criminal sanction.[31] So it is not altogether clear that the European public competition law enforcement system needs private remedies (which do not include incarceration) as an added deterrence of criminal competition law violations.

In fact, far from "supplementing" the efforts of federal authorities to enforce the antitrust laws, private antitrust lawsuits (including those

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[28] Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, 6 COMPETITION POL'Y INT'L 3, 16 (Autumn 2010).

[29] *Id.* at 18.

[30] *See, e.g.,* Company Directors Disqualification Act, 1986, c. 46, § 9A (Eng.) (as amended by the Enterprise Act, 2002, c. 40, § 204(1) & (2) (Eng.)) (requiring a court to enter a competition disqualification order against an individual who serves as a director of a company if his or her company has committed a breach of competition law, and the court considers the individual's conduct as a director renders him or her unfit to be concerned in the management of the company); Andreas Stephan, *Disqualification Orders for Directors Involved in Cartels*, 2 J. EUR. COMPETITION L. & PRAC. (forthcoming 2011), Advance Access published Aug. 2, 2011, doi: 10.1093/jeclap/lpr046, at 2, 5 (highlighting the significant role of competition disqualification orders to effective deterrence, given "the realisation that corporate fines do not directly punish individual decision makers; and the failure of national criminal offences to complement enforcement at the EU level," as well as a significant obstacle to their use given OFT's stated position not to apply for such orders against directors participating in leniency programs).

[31] *See* Andreas Stephan, *Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain*, 5 COMPETITION L. REV. 123, 144 (Dec. 2008) ("The sanction most favoured by respondents is the naming and shaming of both price-fixing firms and individuals.").

brought by state authorities) may instead conflict with, or frustrate, such efforts. The U.S. experience is instructive. Consider, for example, the potential impact of private antitrust lawsuits for injunctive relief that are sometimes brought in the wake of a decision by the Federal Trade Commission or the Antitrust Division not to challenge a transaction or practice. Even though there has not been any public enforcement action, private plaintiffs' lawyers still have a powerful incentive to seek injunctive relief anyway: attorney's fees are awarded if they win (and sometimes even if they lose).[32] And in any event, the prospect of escaping the clutches of federal authorities only to be sued for injunctive relief by private plaintiffs may cause defendants to enter into settlements, or to undertake other litigation-provoked responses, that have nothing to do with the merits.[33]

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[32] In contrast to Section 4(a) of the Clayton Act, which awards a reasonable attorney's fee to an antitrust plaintiff suing for treble damages only if he successfully obtains a final judgment finding that he was "injured in his business or property by reason of anything forbidden in the antitrust laws," 15 U.S.C. § 15(a) (2009), Section 16 of the Clayton Act awards a reasonable attorney's fee to an antitrust plaintiff suing for injunctive relief "against threatened loss or damage by a violation of the antitrust laws" as long as he "substantially prevails" in the action, even though there may not be a final judgment. 15 U.S.C. § 26 (2009). *See* Va. Academy of Clinical Psychologists v. Blue Shield of Va., 543 F. Supp. 126, 132 (E.D. Va. 1982). An antitrust plaintiff "substantially prevails" in an action if he receives "at least some relief" on the merits of his claim by judicial determination, or if his lawsuit is deemed a "significant catalyst" that causes a defendant to change its position, and the defendant's change in position was required under the law. City of Chanute v. Williams Natural Gas Co., 31 F.3d 1041, 1047–48 (10th Cir. 1994).

[33] *See, e.g.,* Advocacy Org. for Patients & Providers v. Mercy Health Servs., 987 F. Supp. 967, 970 (E.D. Mich. 1997) ("If the injunction is granted improvidently, defendants will have to renegotiate the merger, and perhaps the merger will not be consummated. In short, this court finds that plaintiffs are attempting to throw a monkey wrench into the merger at a very late stage in the game.") (denying plaintiffs' belated motion for a TRO to block a merger that neither the FTC nor the DOJ had challenged).

For this reason, I would not encourage the EU, were it to adopt a collective redress system, to include provisions relating to private injunctive relief as well as compensatory relief. I know that you have, in the past, asked the EC to explain why its 2008 White Paper

Consider also the case of a state attorney general who wants to run for governor or some other higher political office, and thus is more interested in full employment in his or her state than enforcing the antitrust laws. Acting in self-interest, he or she may challenge a transaction or practice that is efficiency-enhancing and thus in the interest of consumers.[34] In other words, politics may sometimes play a more dominant role in the choices made with respect to antitrust law enforcement at the state level than at the federal level. Indeed, that is arguably true of Member State competition law enforcement too. After all, the EC devotes a substantial amount of its effort and budget to challenging allegedly illegal "state aid."[35]

II.

Let me put on my antitrust counselor's hat on now. The problem I see with counseling big firms in an environment in which there is a system of

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focuses on damages and omits any discussion of injunctive relief. LIDC Working Group on Private Damage Remedies, LIDC Comments on the Commission's White Paper on Damage Actions for Breach of the EC Competition Rules [COM (2008) 165 Final], at 15 (July 15, 2008), *available at* http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/lidc_en.pdf. I would suggest to you that a good reason for focusing only on damages is the risk that private injunctive relief will be misused to induce settlements that are not based on the merits of the underlying claims.

[34] *See, e.g.,* Fred S. McChesney, *Economics* Versus *Politics in Antitrust*, 23 HARV. J. L. & PUB. POL'Y 133, 141 (1999) ("Early in the Clinton administration, Nevada's senators used the threat of antitrust to compel Northwest Airlines to abandon its announced plans to begin air service from Reno, Nevada to three West Coast cities. New airline connections were doubtlessly a desirable event for Nevada's citizens, but new service also meant that Northwest would compete head-to-head with Nevada-headquartered Reno Air."); William H. Page, *Microsoft and the Public Choice Critique of Antitrust*, 44 ANTITRUST BULL. 5, 53–54 (1999) (observing that according to some, the initials "AG" stand for "aspiring governor" and that the "state AGs have an incentive to make enforcement choices in light of the effect of those choices on the wealth of their state, not the United States as a whole").

[35] *See generally State Aid Control*, EUR. COMM'N, DIR. GEN. COMPETITION, http://ec.europa.eu/competition/state_aid/overview/index_en.html (last visited Aug. 5, 2011).

private law enforcement is that it is well-nigh impossible to counsel those firms about what they can and cannot do with any certainty or predictability.

Please do not get me wrong. I was one of the ringleaders at the Federal Trade Commission for opposing the Antitrust Division's 2008 Report on single-firm conduct under Section 2 of the Sherman Act, which asserted that big firms wanted and needed more protection against "Type 1 error"—economist-speak for "over-enforcement" of the antitrust laws.[36] In a written statement issued by Commissioners Pamela Jones Harbour, Jon Leibowitz and myself, we publicly criticized the Report for placing the interests of firms with monopoly or near-monopoly power ahead of the interests of consumers, and for seriously overstating the level of legal, economic and academic consensus regarding Section 2.[37]

As we explained in the statement—and I in a subsequent speech, one of the Report's failings was its undue emphasis on the risk of over-enforcement of the antitrust laws and its downplaying of the risk of under-

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[36] U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008), *available at* http://www.justice.gov/atr/public/reports/236681.pdf, *subsequently withdrawn* (2009); *see* Press Release, Christine A. Varney, Asst. Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Justice Dep't Withdraws Report on Antitrust Monopoly Law (May 11, 2009), http://www.justice.gov/atr/public/press_releases/2009/245710.pdf.

[37] Statement, Pamela Jones Harbour, Jon Leibowitz & J. Thomas Rosch, Comm'rs, Fed. Trade Comm'n, Harbour, Leibowitz and Rosch Statement on the Issuance of the Section 2 Report by the Department of Justice 1–2 (Sept. 8, 2008), *available at* http://www.ftc.gov/os/2008/09/080908section2stmt.pdf.

enforcement.[38] Both risks should be of equal concern, and that is what I am talking about here—the danger that a private law enforcement system will lead to either Type 1 (over-enforcement) or Type 2 (under-enforcement) error, both of which hamper efforts to counsel big firms on what they can and cannot do with any certainty or predictability. Here is why.

Unlike a public law enforcement system, a private enforcement system depends (almost) exclusively (leaving aside, for the moment, alternative dispute resolution mechanisms such as arbitrations) on the judicial branch for its administration. In the U.S., the judicial branch recruits as decision makers generalist judges and lay juries, neither of whom necessarily have any experience with—much less expertise in—antitrust law or economics. And yet, these are the people who have been charged with the primary responsibility of applying antitrust doctrines and rules to the facts and circumstances put before them. To be sure, there is the possibility of appellate review. But the factual record, the theories, and the arguments are always presented first to the judges and juries sitting in the trial courts.

As you are aware, our U.S. Supreme Court has warned that as long as private plaintiffs can seek broad discovery from generalist judges, and treble damages from lay juries, there are bound to be errors in decision making.[39]

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[38] *Id.* at 3; J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Thoughts on the Withdrawal of the DOJ Section 2 Report, Remarks Before the IBA/ABA Conference on Antitrust in a Global Economy 7–8 (June 25, 2009), http://www.ftc.gov/speeches/rosch/090625roschibareport.pdf.

[39] Credit Suisse Secs. (USA) LLC v. Billing, 551 U.S. 264, 281–82 (2007) ("Further, antitrust plaintiffs may bring lawsuits throughout the Nation in dozens of different courts with different nonexpert judges and different nonexpert juries. In light of the nuanced nature of

Accordingly, the Court has fashioned substantive rules,[40] as well as procedural rules,[41] to reduce those errors. I have also explained that because courts are more sensitive to shielding parties from documents and testimony that may be the best evidence about their intentions, eliminating the threat of private, treble damage lawsuits may mitigate those concerns.[42] But the

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the evidentiary evaluations necessary to separate the permissible from the impermissible, it will prove difficult for those many different courts to reach consistent results. And, given the fact-related nature of many such evaluations, it will also prove difficult to ensure that the different courts evaluate similar fact patterns consistently."); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 560 n.6 (2007) ("The judicial officer always knows less than the parties, and the parties themselves may not know very well where they are going or what they expect to find. A magistrate supervising discovery does not—cannot—know the expected productivity of a given request, because the nature of the requester's claim and the contents of the files (or head) of the adverse party are unknown.") (quoting Frank H. Easterbrook, *Discovery As Abuse*, 69 B.U. L. REV. 635, 638–39 (1989)). *See* LIDC Comments, *supra* note 33, at 5 ("The U.S. experience clearly suggests that the growth and widespread use of private antitrust actions has substantially increased the legal uncertainty that enterprises face with regard to substantive rules; and this uncertainty has caused courts to respond by making decisions that limit antitrust rules or impose additional procedural burdens on plaintiffs.") (citing *Credit Suisse*, 551 U.S. at 281–82).

[40] *See, e.g.,* Pac. Bell Tel. Co. v. linkLINE Commc'ns, Inc., 555 U.S. 438, –, 129 S. Ct. 1109, 1121 (2009) (rejecting a price squeeze claim because it would require a generalist court to "simultaneously to police both the wholesale and retail prices to ensure that rival firms are not being squeezed," and it would leave firms with "no safe harbor for their pricing practices") (explaining that antitrust law needs clear rules that courts can easily administer and lawyers can explain to their clients); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408, 414–15 (2004) (rejecting a rule that requires a dominant firm to share the source of its advantage with rivals because it would require a generalist court to "act as [a] central planner[], identifying the proper price, quantity, and other terms of dealing—a role for which [it is] ill suited"). *See* LIDC Comments, *supra* note 33, at 5.

[41] *Credit Suisse*, 551 U.S. at 275–76, 282 (articulating and applying a "clear repugnancy" or "clear incompatibility" standard to spare antitrust courts from making "unusually serious mistakes" in punishing under the antitrust laws conduct that may be permitted or even encouraged under the securities laws); *Twombly*, 550 U.S. at 559 (requiring that a complaint contain allegations plausibly suggesting the existence of a conspiracy under Section 1 so that antitrust defendants can be spared the potentially enormous expense of discovery in cases where there is no "reasonably founded hope" that the discovery process will uncover any relevant evidence of an antitrust violation). *See* LIDC Comments, *supra* note 33, at 5.

[42] J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, The Great Doctrinal Debate: Under What Circumstances Is Section 5 Superior to Section 2?, Remarks Before the N.Y. State Bar Association Annual Antitrust Conference 15–16 (Jan. 27, 2011), http://www.ftc.gov/speeches/rosch/110127barspeech.pdf.

substantive and procedural rules that the Court has fashioned arguably cannot eliminate completely the errors with which it has been concerned; as long as there is a private enforcement system, there arguably will be enough competition cases brought such that some "bad law" is bound to result.[43] Unlike a public law enforcement system in which cases are carefully selected with concerns for a clear articulation of enforcement policy, a careful development of antitrust doctrine, and the public interest, a private enforcement system without similar checks and balances arguably taxes the judicial system beyond its limits, thereby increasing the error rate in the courts.

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[43] Justice Stephen Breyer perhaps expressed this concern best in his dissent in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*:

> I recognize that scholars have sought to develop checklists and sets of questions that will help courts separate instances where anticompetitive harms are more likely from instances where only benefits are likely to be found. … But applying these criteria in court is often easier said than done. … *And resale price maintenance cases, unlike a major merger or monopoly case, are likely to prove numerous and involve only private parties.* One cannot fairly expect judges and juries in such cases to apply complex economic criteria without making a considerable number of mistakes, which themselves may impose serious costs.

551 U.S. 877, 917 (2007) (Breyer, J., dissenting) (emphasis added). Justice Breyer, who wrote the majority opinion in *Credit Suisse,* joined the majority in *Twombly* and *Trinko*, and wrote a concurrence in *linkLINE*, represents the Harvard School of antitrust intellectual thought that includes Professors Phillip Areeda and Donald Turner. In contrast to the Chicago School, the Harvard School is arguably more concerned with institutional competence and administrability—i.e., leaving aside whether an antitrust rule finds support in neoclassical economics, can the rule be competently and efficiently administered by the antitrust courts (judges and juries alike) without making either Type 1 or Type 2 errors? That is the common theme that pervades the U.S. Supreme Court's cases in *linkLINE*, *Credit Suisse*, *Twombly* and *Trinko*, and creates an inflection point in *Leegin*. *Compare Leegin*, 551 U.S. at 900–04 (discarding the per se rule against resale price maintenance based on Chicago School neoclassical economics) *with id.* at 914–18 (Breyer, J., dissenting) (voicing the Harvard School concern that while economics can inform antitrust law, antitrust decisions are made not by economists but by judges and juries left to make their own determinations about which are the "beneficial sheep" and which are the "antitrust goats").

Additionally, the Court's rules "slop over" and "infect" public law enforcement because in the U.S. (as well as the EU) public and private law enforcement authorities enforce the same statutes.[44] Of course, trying criminal or civil competition cases to lay juries does not occur in the EU. But, under the best of circumstances, private plaintiffs in the EU would generally seek discovery and remedies from judges or magistrates handling matters other than competition matters.[45] Thus, as in the U.S., an increase in the number of competition cases (brought by private lawyers who are not obliged to bring cases that are only in the "public interest") is arguably bound to

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[44] *Compare* 15 U.S.C. §§ 4, 9, 25 (2009) (public enforcement) *with* 15 U.S.C. §§ 15(a), 26 (2009) (private enforcement); *see* Frese, *supra* note 24, at 6 ("Articles 101 and 102 TFEU can also be relied on in [private enforcement] proceedings before the national courts."). I believe that my colleague Bill Kovacic, despite the fact that he wrote separately in response to the Antitrust Division's Section 2 Report, shares my concern of a "slop over," as evidenced by the following statement:

> If, as I believe, judicial perceptions of overreaching by private suits are narrowing the zone of substantive liability, public agencies eventually may be unable to do their job. This consideration points to the need for a deeper empirical examination of how the operation of private rights actually affects business decision making and how public agencies can prosecute cases without carrying burdens that courts have imposed on private litigants to cure perceived deficiencies in the system of private rights.

Statement, William E. Kovacic, Chairman, Fed. Trade Comm'n, Modern U.S. Competition Law and the Treatment of Dominant Firms: Comments on the Department of Justice and Federal Trade Commission Proceedings Relating to Section 2 of the Sherman Act 8 (Sept. 8, 2008), http://www.ftc.gov/os/2008/09/080908section2stmtkovacic.pdf.

[45] *See* Marius Maciejewski, Pol'y Dep't A: Econ. & Scientific Pol'y, European Parliament, *Overview of Existing Collective Redress Schemes in EU Member States* 40 (July 2011) (summarizing which Member States use ordinary courts to hear collective redress and which ones use designated courts), http://www.europarl.europa.eu/document/activities/cont/201107/20110715ATT24242/20110715ATT24242EN.pdf.

result in the creation of "bad law"—a concern that you have previously voiced.[46]

Compounding that problem in the U.S. is the fact that there are 13 regional federal courts of appeals, plus one Supreme Court,[47] which has as one of its responsibilities the resolution of conflicts among the lower courts of appeals by a writ of certiorari.[48] However, the latter Court rarely decides antitrust cases (particularly cases involving single firms) definitively. Even in the *Brooke Group* case, where it undertook to define the elements of predatory pricing definitively, the Supreme Court left unanswered the critical question what was "below cost" pricing.[49] Antitrust law is in even more disarray where the Supreme Court has not undertaken to decide an issue but has instead left that task to the regional appellate courts. For example, whether and to what extent "price bundling" is lawful or unlawful depends on which circuit court a firm ends up in (and it is not always the firm's choice when private litigation is involved).[50] The same is true of "loyalty discounts"

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[46] LIDC Comments, *supra* note 33, at 5 ("If private actions become a major element of the European legal scene (as the White Paper seems to encourage), the Commission may well have to try to deal with the existence of substantial diversity of decisions by national courts, especially under Article [101(3)] and Article [102].").

[47] *See* U.S. CONST. art. III, § 1 (establishing one Supreme Court); 28 U.S.C. § 41 (2009) (establishing 13 judicial circuits).

[48] 28 U.S.C. § 1254(1) (2009); SUP. CT. R. 10(a).

[49] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222 n.1 (1993) (declining to resolve a conflict among the lower courts over the appropriate measure of cost).

[50] *Compare* Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 903 (9th Cir. 2008) ("Accordingly, we hold that the exclusionary conduct element of a claim arising under § 2 of the Sherman Act cannot be satisfied by reference to bundled discounts unless the discounts result in prices that are below an appropriate measure of the defendant's costs."), *with*

and even "exclusive dealing." The law is unsettled as to all of these "single firm" practices (as well as others).[51]

To be sure, the appellate court systems in the EU and the U.K. are more centralized than they are in the U.S. It may be that the General Court and European Court of Justice will reduce this cacophony better than our Supreme Court has done. But a lot of judges still sit on each court.[52] As long as the current practice in Europe of favoring, if not requiring, a consensus decision prevails, uncertainty will be reduced. But once the practice does not apply—and it may not if a system of private remedies results in an exponential increase in the numbers of appeals—then "Katie bar the door," as we say in the U.S.[53]

LePage's Inc. v. 3M Co., 324 F.3d 141, 155 (3d Cir. 2003) (en banc) ("The principal anticompetitive effect of bundled rebates as offered by 3M is that when offered by a monopolist they may foreclose portions of the market to a potential competitor who does not manufacture an equally diverse group of products and who therefore cannot make a comparable offer."), *cert. denied*, 124 S. Ct. 2932 (2004).

[51] *See generally* Rosch, *supra* note 42, at 5–6.

[52] The Court of Justice has 27 judges (one per Member State), who are assisted by eight advocates-general. The Court generally convenes as a Chamber of three or five judges. *The Court of Justice of the European Union*, EUROPA, http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm (last visited Aug. 10, 2011); *Court of Justice – Presentation – Composition*, CURIA, http://curia.europa.eu/jcms/jcms/Jo2_7024/#composition (last visited Aug. 10, 2011). The General Court has at least one judge per Member State, but there are no permanent advocates-general. Most of the time, the General Court convenes as a Chamber of three judges to hear cases; sometimes, however, a single judge or a Chamber of five judges will sit to hear a case. *General Court – Presentation – Composition*, CURIA, http://curia.europa.eu/jcms/jcms/Jo2_7033/#compos (last visited Aug. 10, 2011). If a case is of sufficient complexity or importance, both Courts may convene a Grand Chamber of 13 judges or as a full court. *Id.*

[53] Although this expression is singularly American in its usage, it may have originated in the U.K., with the story of Catherine Douglas, aka "Kate Barlass," who tried to save King James I from attack by discontented subjects by barring the door with her arm. *See Katy Bar the Door*, THE PHRASE FINDER, http://www.phrases.org.uk/meanings/213750.html (last visited Aug. 8, 2011).

III.

Now let me put on my public enforcement hat. As I say, I have been a Federal Trade Commissioner now for close to six years. In this role, I am both a prosecutor and a judge.[54] That is to say, I am responsible for voting on whether or not to challenge transactions or practices as to which there is a "reason to believe" that the transaction or practice is illegal and contrary to the public interest. Beyond that, the Commission sits in judgment on all transactions or matters that are challenged and litigated in administrative (called "Part 3")[55] proceedings before an Administrative Law Judge. From this unique perspective as a prosecutor/judge, let me make the following observations.

First, let's state the obvious: the addition of a private system for enforcing competition laws has added nothing directly to public *criminal* enforcement of those laws in the U.S. The reason for that is simple: there is no private mechanism for enforcing a purely criminal antitrust violation in the U.S.[56] Criminal penalties and related remedies are entrusted solely and

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[54] *See generally* J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, So I Serve as Both a Prosecutor and a Judge—What's the Big Deal?, Remarks Before the American Bar Association Annual Meeting (Aug. 5, 2010), *available at* http://www.ftc.gov/speeches/rosch/100805abaspeech.pdf.

[55] *See* Fed. Trade Comm'n, Rules of Practice for Adjudicative Proceedings, 16 C.F.R. pt. 3 (2011).

[56] The Crime Victims' Rights Act, however, provides victims of antitrust crimes with certain rights in the context of the criminal proceedings, including active participation in those proceedings. 18 U.S.C. § 3771(a) (2009); *In re* Acker, 596 F.3d 370, 372–73 (6th Cir. 2010).

exclusively to the Antitrust Division of the Department of Justice.[57] Indeed, even the Federal Trade Commission is not authorized to enforce criminal statutes in the U.S. When we discover criminal violations in the course of our work we notify the Antitrust Division and they take it from there.[58]

It has been argued by plaintiffs' lawyers and economists that treble damage actions (particularly class actions) that follow criminal indictments and challenges by the Antitrust Division are a useful adjunct to public law enforcement of per se illegal offenses in the U.S. Indeed, I have heard it argued that the treble damage remedies that are obtained in those "follow on" private actions are an even greater deterrent—based on estimated, aggregate amounts of payments made by defendants—than individual jail time and criminal fines obtained by the Antitrust Division.[59]

I am afraid I don't buy it. There are two reasons for this. First, the private "follow on" actions that used to be filed routinely have dwindled in number since our Supreme Court's decision in the *Twombly* case. In that case

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[57] 28 C.F.R. § 0.40(a) (2010).

[58] 15 U.S.C. §§ 46(k) & 56(b) (2009).

[59] *See, e.g.,* Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws* 31 (U. Balt. Legal Stud. Res. Paper No. 2010-08, Mar. 5, 2010) ("Perhaps more surprisingly, there is evidence that private antitrust enforcement does more than DOJ criminal enforcement to deter anticompetitive behavior."), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1565693. *But see* Ilya Segal & Michael Whinston, *Public vs. Private Enforcement of Antitrust Law: A Survey* 14 (John M. Olin Program in L. & Econ., Stanford L. Sch., Working Paper No. 335, Dec. 2006) ("A key problem with the empirical direction is that the *benefits* of private litigation are difficult to observe. While we may observe some cases where litigation stopped some socially undesirable actions, we do not observe most cases in which such actions were deterred by the *threat* of litigation."), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=952067.

the Court substantially heightened the bar that private plaintiffs must surmount in order to survive a motion to dismiss at the outset of a case.[60] Since more of the Antitrust Division's criminal cases do not currently go after the "low hanging fruit" afforded by traditional "smoke-filled room" cases involving hard-core price-fixing agreements, *Twombly* has taken a toll on the number of follow-on private actions.[61]

Second, Rule 23 (b) (3) of the Federal Rules of Civil Procedure requires that before a treble-damage class action can be certified by a court as a class action for settlement or other litigation purposes, the plaintiff must demonstrate that the private class action mechanism is a "superior" method of adjudication.[62] Based on my own experience, this burden is impossible to meet once public law enforcement authorities at either the federal level or the state level have challenged the transaction or practice and sought consumer redress. There are a few reasons why this is so.

To begin with, as I have elsewhere observed, private plaintiffs' antitrust lawyers, including particularly class action lawyers, are "investors" more than anything else.[63] That means that invariably a goodly portion of the

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[60] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

[61] *See* J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Antitrust Issues Related to Benchmarking and Other Information Exchanges, Remarks Before the ABA Section of Antitrust Law and ABA Center for Continuing Legal Education's Teleseminar on Benchmarking and Other Information Exchanges Among Competitors 7–10 (May 3, 2011), http://www.ftc.gov/speeches/rosch/110503roschbenchmarking.pdf.

[62] FED. R. CIV. P. 23(b)(3).

[63] Rosch, *supra* note 3, at 22.

cash paid by a defendant (or defendants) in settlement is paid to the plaintiffs' lawyers instead of to consumers for redress. By contrast, the funds available for consumer redress are not similarly dissipated in cases prosecuted by federal or state enforcement authorities. Additionally, in their eagerness to settle cases as investors, private plaintiffs' lawyers have been willing to compensate consumers with "coupons" redeemable from defendants for a fraction of the cost that those defendants would have had to incur were they to pay a cash settlement.[64] By contrast, there have been few, if any, such "coupon" settlements struck by government lawyers in recent years.

In summary, the fact that private plaintiffs' lawyers are investors in their clients' treble damages lawsuits creates incentives that are not necessarily aligned with either the interest of ensuring that consumers receive full compensation for the antitrust wrongs, or the interest in ensuring that damages awards hit the purses of defendants hard enough to have a meaningful deterrent effect. It is arguable that defendants see the prospect of negotiating with private plaintiffs' lawyers over cash and coupon settlements to be more appetizing than the prospect of negotiating with public prosecutors over plea agreements that include substantial fines and possible jail time. Furthermore, although some public prosecutors may be motivated

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[64] *See* J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Striking a Balance? Some Reflections on Private Enforcement in Europe and in the United States, Remarks Before the International Chamber of Commerce Annual Meeting 20–21 (Sept. 24, 2008), http://www.ftc.gov/speeches/rosch/080924strikingbalance.pdf. "A coupon settlement is a settlement where the defendant creates a right for class members to obtain a discount on future purchases of the defendant's products or services." Geoffrey P. Miller & Lori S. Singer, *Nonpecuniary Class Action Settlements*, 60 LAW & CONTEMP. PROBS. 97, 102 (1997).

by their own career or political aspirations, they cannot ignore the public interest, as they can be sure that the press and the electorate may eventually scrutinize their actions.

The juxtaposition of private actions and public law enforcement proceedings that are occurring in parallel highlights the different incentives at work and raises the question under Rule 23(b)(3) whether the private class action mechanism is in fact a superior method of adjudication. When one also considers the fact that we in the U.S. now have the Crime Victim Rights' Act,[65] which affords victims of antitrust (and other federal) crimes certain rights to have input and participate in ongoing criminal proceedings, and to have "full and timely restitution" as provided by law, one has to question whether private law enforcement addresses any longer a need that public law enforcement does not provide. Or, as some commentators have asked, whether private law enforcement merely threatens to hinder or disrupt the public law enforcement process.[66]

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[65] 18 U.S.C. § 3771(a) (2009). *See supra* note 56.

[66] *See, e.g.,* John M. Majoras & Eric P. Enson, *The Crime Victims' Rights Act: Its Impact on Plea Negotiations with the Antitrust Division*, ANTITRUST SOURCE, Dec. 2010, at 4–5 ("[I]n most cases, trying to block a plea agreement because it is not broad enough may be an obvious attempt to gain a tactical advantage in related civil litigation, rather than an exercise of legitimate rights under the CVRA. The fact that these efforts are orchestrated by lawyers who have filed civil claims regarding the same conduct makes the purpose of these efforts seemingly clear."), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Dec10_Majoras12_21f.authcheckdam.pdf.

IV.

What would happen in the EU if a private system of collective enforcement were adopted is anybody's guess. The EC has not adopted any such system yet, although16 Member States, at present count, have done so.[67] As I see it, the gating question is whether the EU and its Member States are willing and able to shift—markedly—from the current dual system of public law enforcement via the administrative process of the EC and the national competition authorities, and private law enforcement via the judicial process of the courts of the Member States, to a more integrated and tightly coordinated system.[68] Such a shift may well ask too much of the Member States, in terms of ceding their autonomy and national identity for the sake of a unitary system—a concern that you have expressed.[69] Beyond that, such a shift may well require an organic change in how the EU is structured because it may require a revision of the basic principles that currently govern the relationship between the EU and the Member States with respect to the enforcement of competition laws. Let me explain.

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[67] *See* Maciejewski, *supra* note 45, at 5.

[68] *See* Frese, *supra* note 24, at 39 (advocating that the EU "devise coordination or equalisation mechanisms for liability").

[69] LIDC Comments, *supra* note 33, at 1–2 ("Most LIDC Members believe that matters which relate to civil procedures in individual Member States generally should not be amended by way of general European legislation or guidance, just because they happen to raise issues when applied in the competition law context. The civil procedure codes of the different Member States are the product of long term development based on culture and experience.") & 17–18 ("While competition claims are important to the EU, they are still only part of a broader picture in which the Member States' courts seek to do justice among parties under rules and processes that have been developed on the basis of accumulated experience.").

The 2001 decision in *Courage Ltd. v. Crehan*[70] involved a referral by the Court of Appeal of England and Wales (Civil Division) to the Court of Justice for preliminary rulings on certain questions involving Article 101 TFEU (then Article 85 of the Treaty of Rome).[71] Specifically, the U.K. national court wanted to know whether one of its citizens, Bernard Crehan, could rely on a breach of Article 101 in his counterclaim for damages flowing from an allegedly per se illegal contractual arrangement tying the exclusive purchase of Courage-supplied beer to a pub lease, to which he was admittedly a party. The Court of Justice answered yes, observing that if a citizen were precluded from seeking damages for loss flowing from anticompetitive contracts, then that might jeopardize the "full effectiveness" of Article 101 and its prohibitions against tying arrangements.[72] Stated differently, "actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community. There should not therefore be any absolute bar to such an action being brought by a party to a contract which would be held to violate the competition rules."[73]

Although it thus recognized some *potential* benefits flowing from private enforcement—such that an "absolute bar" to such actions would be unwise and unpalatable, the Court of Justice took care to make clear that the

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[70] Case C-453/99, Courage, Ltd. v. Crehan, 2001 E.C.R. I-06297.

[71] To avoid confusion, I will refer to the Articles by their current enumeration in the TFEU.

[72] *Courage*, 2001 E.C.R. I-06297, ¶ 26.

[73] *Id.* ¶¶ 27–28.

forums and procedural rules governing private actions would be left up to the Member States, subject only to the principles of equivalence (that is, the rules may not be less favorable to actions based on Community law than to similar actions based on domestic law) and effectiveness (that is, the rules may not "render practically impossible or excessively difficult" the exercise of rights under Community law).[74]

The 2006 decision in *Manfredi v. Lloyd Adriatico Assicurazioni SpA*[75] is similar to *Courage* in both its procedural posture and its holdings. Again the Court of Justice got the matter by referral—this time from an Italian national court, the Giudice di pace di Bitonto (loosely, a magisterial justice of the peace with jurisdiction over small civil claims). Answering questions similar to those raised in *Courage*, the court responded with the same points made previously in *Courage*, i.e., (1) that an individual is entitled to seek compensation for an infringement of Community competition law (this time an allegedly unlawful information exchange involving insurance companies to facilitate the coordination and fixing of prices for civil liability auto insurance premiums, in violation of Article 101 TFEU (then Article 81 EC)), (2) but that the Member States have significant leeway to designate the

[74] *Id.* ¶ 29.

[75] Joined Cases C-295/04 to C-298/04, Manfredi v. Lloyd Adriatico Assicurazioni SpA, 2006 E.C.R. I-06619.

courts and to prescribe the rules for hearing such claims, subject only to the principles of equivalence and effectiveness.[76]

One question addressed to the Court of Justice in *Manfredi* bears particular mention. The Italian national court wanted to know whether Article 101 required the court, on its own motion, to award punitive damages to an antitrust plaintiff if it were to determine that the compensable damages awardable in an action are lower than the economic advantage gained by the infringing party.[77] Wearing its enforcement hat, the Italian court's thinking was that punitive damages might be used to push the damage award above the amount of the defendant's economic advantage, thereby providing some measure of deterrence to the adoption of anticompetitive agreements prohibited under Article 101.[78]

The Court of Justice did not "take the bait," however—as we say here in the U.S. Notwithstanding its pronouncements about the role of private damages actions contributing to the effective enforcement of Community competition laws, the Court of Justice dodged the question, stating instead that it was up to the courts of each Member State to set the criteria for determining damages, subject only to the principles of equivalence and

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[76] *Id.* ¶¶ 59–64, 70–72.

[77] *Id.* ¶ 20 (question no. 4).

[78] *Id. See also id.* ¶ 83 ("By this question, the national court asks, in essence, whether Article 81 EC must be interpreted as requiring national courts to award punitive damages, greater than the advantage obtained by the offending operator, thereby deterring the adoption of agreements or concerted practices prohibited under that article.").

effectiveness.[79] Accordingly, Article 101 could not be read to require the imposition of punitive or exemplary damages in private actions,[80] and a Member State would be well within its sovereignty to forbid the award of punitive or exemplary damages based on a national policy against unjust enrichment, for example.[81]

In summary, although the Court of Justice has ostensibly recognized in *Courage* and *Manfredi* some potential enforcement benefits flowing from private damages actions brought in the national courts under Article 101 TFEU, it has also all but ensured that such benefits will be few and far between, given the application of the principles of equivalence and effectiveness. Neither principle has respect for Community law or deterrence as an underlying goal; instead, they merely ensure that Member States cannot squelch private damages actions brought for infringements of Community law. Borrowing a gardening analogy in which lawsuits are seeds that take root and grow into plants, the principles of equivalence and effectiveness simply make clear to Member States that they have to give Community-based seeds the same amount of sun, water and fertilizer as they give seeds they have planted themselves, and that they cannot allow the soil to get so hard that it will be "practically impossible or excessively difficult" for Community-based seeds to take root. Importantly, however, there is no

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[79] *Id.* ¶ 92.

[80] *Id.* ¶ 93.

[81] *Id.* ¶ 94. *See also* Case C-453/99, Courage, Ltd. v. Crehan, 2001 E.C.R. I-06297, ¶ 30.

requirement regarding how the plants should be trained, pruned, or pollinated so as to yield the desired fruits of law enforcement.

As long as the principles of equivalence and effectiveness remain the only limitations on what Member States can do vis á vis private damages actions, one cannot reasonably hope for a private law enforcement system that effectively supplements the public law enforcement system already in place in the EU.[82] As Michael Frese has observed in a recent paper, public law enforcement actions in the Member States are subject not only to principles of equivalence and effectiveness, but also to principles of proportionality and dissuasiveness.[83] Dissuasiveness, of course, refers to the deterrence aspect of public law enforcement. Moreover, as Frese has also observed,[84] the principles of equivalence and effectiveness translate into positive, rather than negative, obligations on Member States with respect to public law enforcement: (1) they must penalize infringers of Community law in the same way that they penalize infringers of national law; (2) they must proceed against infringements of Community law with the same diligence

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[82] As I have made clear in footnote 2 above, my remarks here don't take issue with the goal of using private damages actions to provide those harmed by infringements of EU competition law with just compensation. With respect to the goal of providing compensation, I would tend to agree with the LIDC that consumer redress for damages presents essentially a procedural matter for the Member States to address under their respective civil codes. LIDC Comments, *supra* note 33, at 6.

[83] Frese, *supra* note 24, at 10. *See* Case 68/88, Comm'n v. Hellenic Republic, 1989 E.C.R. 02965, ¶ 24 ("For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.").

[84] Frese, *supra* note 24, at 10.

that they would bring to bear in enforcing corresponding national laws; and (3) they must take all measures necessary to guarantee the application and effectiveness of Community law, using the national laws, regulations and administrative provisions at their disposal.[85]

Given the stark contrast between the EU principles that govern private law enforcement actions and those that govern public law enforcement actions, I wonder whether it will be possible to merge and harmonize them into a unitary system, and whether it is even worth the effort to try. The risk here is that the EU will end up with a system in which the benefits of a private enforcement regime are outweighed by the attendant costs—for example, excessive interference with public law enforcement proceedings. Indeed, we may have seen a harbinger of this problem in the Court of Justice's recent decision in *Pfleiderer AG v. Bundeskartellamt*.[86]

In *Pfleiderer*, the German Federal Cartel Office had successfully concluded an investigation and imposed fines against three members of an alleged cartel that fixed prices and restricted output on décor paper. Pfleiderer AG, a purchaser of decor paper for engineered wood, alleged that it had been damaged by the cartel's conduct and sought from the Cartel Office access to all materials in the files of the three décor paper manufacturers, including documents relating to the leniency applications submitted by the

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[85] *Hellenic Republic*, 1989 E.C.R. 02965, ¶¶ 22–23, 25.

[86] Case C-360/09, Pfleiderer AG v. Bundeskartellamt, 2011 E.C.R. –, 2011 ECJ EUR-Lex LEXIS 908 (June 14, 2011), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009J0360:EN:HTML.

respondents. Pfleiderer wanted to use the requested materials to bring a private damages action against the respondents. The Cartel Office granted the request only in part, denying access to the leniency procedure materials. Pfleiderer challenged this decision in the Amtsgericht (Local Court) in Bonn, which ruled in its favor but stayed the decision pending a referral to the Court of Justice.[87]

The question on referral asked whether any provisions of Community competition law precluded private parties allegedly damaged by cartel conduct from obtaining access to leniency applications and related submissions in aid of their civil-law claims.[88] As framed, this question focused on the interplay between private law enforcement and public law enforcement, and specifically, the extent to which the former might unnecessarily interfere with the latter. In the absence of common Community rules on leniency procedures or rights of access, the Court of Justice once again saw fit to leave the resolution of the matter to the Member States, subject only to the principles of equivalence and effectiveness.[89] Specifically, the Member States would have to perform their own "weighing exercise" to balance the competing interests of public law enforcement in facilitating investigations through the use of leniency programs that are protected from disclosure, and private law enforcement in facilitating damages claims

[87] *Id.* ¶¶ 9–15.

[88] *Id.* ¶ 18.

[89] *Id.* ¶¶ 23–24, 30, 32.

through access to information obtained by national competition authorities from respondents.[90]

In my view, this "weighing exercise" will be by no means an easy task for any court or tribunal, and as I have suggested earlier, there is inevitably the palpable risk that a court or tribunal will get it wrong and make "bad law," especially if a large number of private damages actions are brought. You, too, have previously shared the EC's view of the importance of protecting the confidentiality of leniency applications (and settlement discussions as well) from disclosure in private litigation, for fear that disclosure will undermine the effectiveness of these enforcement programs.[91] Given the significant strides that the EU, like the U.S., has made in the field of public cartel enforcement, I have to wonder whether it is worth the risk of chilling the proven effectiveness of leniency programs in the hope that private damages actions might make some contribution to the maintenance of effective competition in the EU. Perhaps that is why, with a few notable exceptions, many nations have not followed America's lead by embracing a private regime to "supplement" public enforcement of their competition laws.[92]

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[90] *Id.* ¶¶ 25–29.

[91] LIDC Comments, *supra* note 33, at 12.

[92] *See* Segal & Whinston, *supra* note 59, at 1.