



Federal Trade Commission

Designing a Private Remedies System for Antitrust Cases – Lessons Learned from the U.S. Experience

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before the

16th Annual EU Competition Law and Policy Workshop

Fiesole, Italy

June 17, 2011

Thank you for inviting me to participate in your workshop. Today I want to share with you my own perspective—as a public enforcer and previously as a trial lawyer for private litigants—on the function and structure of a private remedies system for antitrust cases in the European Union. Consistent with the goals of this workshop, I hope that my remarks set down here on paper and what I discuss orally will stimulate debate, critique

* 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 this paper. A version of this speech will be published in PHILIP LOWE AND MEL MARQUIS, EDS., EUROPEAN COMPETITION LAW ANNUAL 2011: INTEGRATING PUBLIC AND PRIVATE ENFORCEMENT OF COMPETITION LAW. IMPLICATIONS FOR COURTS AND AGENCIES (Hart Publishing, Oxford and Portland, forthcoming 2012).

and brainstorming among the workshop participants regarding the topics of private remedies and collective redress in the EU.

I.

Let me start by summarizing what I understand to be the current state of play in the EU regarding private remedies for antitrust cases. As I see it, there are three elements. The first is that Vice-President and Commissioner for Competition Joaquín Almunia (and Commissioner Neelie Kroes before him) have determined to establish a system of private remedies in the EU in order to supplement public enforcement. One reason for having private enforcement as well as public enforcement is the fact that the EU has continued to grow through the accretion of Member States, which obviously enlarges the territorial scope of application of EU laws and hence increases the number of potential enforcement cases.¹ As a result, and as pointed out in an October 5, 2010 information note signed by Vice-President Almunia and his fellow Commissioners for Justice and Consumer Policy and submitted to the EU College of Commissioners, there needs to be a more decentralized enforcement of EU law, which logically raises the question of “whether further mechanisms of private enforcement should be added to the current system of EU remedies in order to strengthen the enforcement of EU law.”²

¹ Vice-President Viviane Reding, Vice-President Joaquín Almunia & Comm’r John Dalli, European 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>.

² *Id.* Professor and former Commissioner Mario Monti has made the same observation: “For a future, enlarged Community with 27 or 28 Member States, it is not a desirable—or even a viable—concept that the application of the EC competition rules should largely be limited to administrations acting as public enforcers.” Mario Monti, *Effective Private Enforcement of EC Antitrust Law*, in CLAUDIUS-DIETER EHLERMANN &

Another reason for having private enforcement as well as public enforcement is the European Court of Justice's 2001 pronouncement in *Courage Ltd. v. Crehan* that a private right of action "strengthens the working of the [EU] competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition."³ Private actions brought in the national courts "can [therefore] make a significant contribution to the maintenance of effective competition in the [EU]."⁴ Commissioner Kroes was presumably referring to the *Courage* decision when she said "that the European Court of Justice has been very clear when it pronounced that the right to damages is a necessary element to guarantee the full effectiveness of the [EU] competition rules."⁵ In her view, "[t]he Commission, as the guardian of the Treaty, is therefore required to take any action that is necessary to make that right a reality."⁶

The second element of the current state of play is that a system of "collective redress" is envisioned, which the October 5, 2010 information note describes as "a broad concept encompassing any mechanism that may accomplish the cessation or prevention

ISABELA ATANASIU, EDS. EUROPEAN COMPETITION LAW ANNUAL 2001: EFFECTIVE PRIVATE ENFORCEMENT OF EC ANTITRUST LAW 3 (2003).

³ Case C-453/99, *Courage Ltd. v. Crehan*, 2001 E.C.R. I-06297, ¶ 27 (2001); accord Case C-295/04 to C-298/04, *Manfredi v. Lloyd Adriatico Assicurazioni SpA*, 2006 E.C.R. I-06619, ¶ 91 (2006).

⁴ *Id.*

⁵ Comm'r Neelie Kroes, European 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>.

⁶ *Id.*

of unlawful business practices which affect a multitude of claimants or the compensation for the harm caused by such practices.”⁷ This concept emerges from the recognition that certain violations of EU law, such as infringements of EU competition law, may harm a large group of citizens and businesses in the EU, so as to make individual redress an ineffective means of stopping the violations or obtaining compensation for the resulting harms.⁸ Moreover, individual redress may produce different and inconsistent results in the national courts of the Member States. If a claim arises from a breach of EU law that affects all EU citizens in the same way, then the right to compensatory or injunctive relief available to each EU citizen for that breach should be the same, regardless of where the action is instituted.⁹

A couple of observations should be stressed at the outset about collective redress. One observation is that the concept of collective redress is *not new* in the EU.¹⁰ Rather, what is—or would be—new is a *coherent approach*, which means getting the Commission as a whole, the national authorities of the Member States, and the various stakeholders to agree on a common EU-wide approach.¹¹ To this end, the October 5,

⁷ Joint Information Note, *supra* note 1, at 4, ¶ 7.

⁸ *Id.* at 3, ¶ 4. *See also* Vice-President Joaquín Almunia, European 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>.

⁹ Almunia, *supra* note 8, at 4.

¹⁰ Joint Information Note, *supra* note 1, at 4-5, ¶¶ 8-9.

¹¹ *Id.* at 5, ¶¶ 10-11. The fact that there have been prior experiences in the EU with collective redress may arguably make it more difficult to adopt a coherent approach because constituencies and stakeholders may prefer a particular approach based on their own prior experiences.

2010 information note sketches out some core principles underlying an EU-wide approach but fundamental questions relating to a collective redress mechanism still loom on the horizon, such as who would be allowed to bring a representative action and whether participants would be allowed to opt in or to opt out.¹²

The other observation is that the concept of collective redress is *not confined* to infringements of EU competition law. It would also apply to other violations of EU law, such as environmental and consumer protection law. As a result, the process of developing a private enforcement for antitrust cases likely involves at least two steps: the Commission first must reach agreement on a set of common principles for collective redress, and after that, Vice-President Almunia will be able to present a specific proposal for antitrust damages actions that sets common standards and minimum requirements for the national authorities to implement in their courts.¹³

The third element of the current state of play is that both Vice-President Almunia and Commissioner Kroes have promised not to import perceived flaws in the U.S. system of private enforcement into the EU model.¹⁴ It is this promise that frames the discussion and debate today. So what I want to do is to give you a first-hand, insider account of what exactly are the flaws in the U.S. system, and what fixes or safeguards I would

¹² Almunia, *supra* note 8, at 6.

¹³ *Id.* at 5.

¹⁴ *See id.* at 6 (“Second, collective action in Europe has not led to abuse – and this is something we should be proud of. We must identify safeguards that will prevent importing a US-style litigation culture and ensure balance in our European approach for collective redress.”); Kroes, *supra* note 5, at 4 (“Let me also explain the safeguards our proposal puts in place. I would like to assure you we are not proposing anything like the US system. Not at all.”).

recommend be put into place in the EU to avoid the same problems and to allay concerns among constituencies and stakeholders about any type of collective redress mechanism.

II.

I would like to acknowledge that the current system in the U.S. is flawed in at least four respects, based on my experience in defending firms in many antitrust treble-damages class actions during the forty-plus years that I have practiced. A first flaw is the development of treble-damages antitrust class actions. This flaw was exacerbated by the proliferation of indirect purchaser class actions in a number of states.

When I started practicing antitrust law in 1965, antitrust treble-damages cases were rarely brought by classes of plaintiffs. They were instead brought by single plaintiffs. The trebling of damages (and an award of attorney's fees) under Section 4 of the Clayton Act¹⁵ was considered incentive enough to initiate a private antitrust lawsuit.¹⁶ According to court statistics, antitrust class actions gained some popularity in the 1970s

¹⁵ 15 U.S.C. § 15(a) (2009) (providing that “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee”).

¹⁶ *See, e.g., Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262, 266 (1972) (“By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as ‘private attorneys general.’”) (“The fact that a successful antitrust suit for damages recovers not only the costs of the litigation, but also attorney’s fees, should provide no scarcity of members of the Bar to aid prospective plaintiffs in bringing these suits.”); *Perma Life Mufflers, Inc. v. Int’l Parts Corp.*, 392 U.S. 134, 139 (1968) (recognizing “that the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws”); *Byram Concretanks, Inc. v. Warren Concrete Prods. Co.*, 374 F.2d 649, 651 (3d Cir. 1967) (“It is well known that a primary objective of the private treble-damage suit is to provide a means for enforcement of the anti-trust laws in addition to Government prosecutions.”).

but then declined dramatically in the 1980s.¹⁷ By the mid-1990s, however, class actions had again become the rule, not the exception.¹⁸ To quote Professor Steve Calkins, who was General Counsel to the Federal Trade Commission at the time he wrote these remarks, “Antitrust class actions are once more in vogue.”¹⁹

Not only did antitrust class actions experience a resurgence in the federal courts but many actions were being filed in the state courts as well, as a result of the so-called “*Illinois Brick* repealers” enacted by some states. On this point a bit of history is in order. In 1968, the Supreme Court held in *Hanover Shoe, Inc. v. United Machinery Corp.*²⁰ that a defendant in a treble-damages antitrust case could not assert a “passing-on” defense, which involved arguing that the plaintiff had passed on any illegal overcharge associated with its lease of shoe machinery from the defendant to consumers in the form of higher shoe prices, and therefore suffered no injury cognizable under the antitrust laws.²¹ In so holding, the Court expressed its concern that the passing-on defense, if carried to its logical conclusion, would shift the burden of private enforcement to the ultimate consumers (in this case, buyers of single pairs of shoes), who “would have only

¹⁷ See Stephen Calkins, *An Enforcement Official’s Reflections on Antitrust Class Actions*, 39 ARIZ. L. REV. 413, 416-17 (1997) (reporting some statistics on the number of federal court antitrust class actions filed in years 1972 to 1995).

¹⁸ *Id.* (showing a marked uptick in the number of antitrust class action filings in 1994 and 1995, not only in absolute numbers but also as a percentage of all federal class actions filed).

¹⁹ *Id.* at 419.

²⁰ 392 U.S. 481 (1968).

²¹ *Id.* at 487-88.

a tiny stake in a lawsuit and little interest in attempting a class action.”²² “In consequence,” the Court reasoned, “those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them.”²³ The effectiveness of private treble-damages actions as a mechanism for enforcing the antitrust laws would thereby be substantially reduced.²⁴

Although the Supreme Court has subscribed to the view that private treble-damages actions are an important means of enforcing the antitrust laws, it has also expressed concern with duplicative recoveries. Thus, in *Hawaii v. Standard Oil Co.*,²⁵ the Court held that the State of Hawaii could not bring a *parens patriae* action under Section 4 of the Clayton Act for injury to its economy from the defendants’ alleged conspiracy to restrain trade and to monopolize the market for refined petroleum products.²⁶ The Court explained that any alleged harm to Hawaii’s economy is in large part a reflection of the injuries to the “business or property” of Hawaiian consumers,²⁷ who have a right to sue on their own behalf under Section 4, and indeed, may join together in a class action to do so.²⁸ Accordingly, allowing Hawaii to sue separately in

²² *Id.* at 494.

²³ *Id.*

²⁴ *Id.*

²⁵ 405 U.S. 251 (1972).

²⁶ *Id.* at 252-53.

²⁷ *Id.* at 264.

²⁸ *Id.* at 266 (“Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture.”).

parens patriae would create a problem of duplicative recoveries,²⁹ which class actions avoid with specific rules for identifying an appropriate plaintiff-class and determining who is bound by the outcome of the action.³⁰

This takes us to 1977, when the Supreme Court held in *Illinois Brick Co. v. Illinois*³¹ that only the direct purchasers of a product or service have standing to sue for injury to their business or property flowing from allegedly illegal overcharges.³² The Court thus rejected the use of a “passing-on” theory by plaintiffs as well as by defendants; indirect purchasers could not come to court claiming that they too had been injured under the federal antitrust laws because part or all of the overcharge had been passed on to them by the direct purchasers.³³ Once again, the Court was concerned with the problem of multiple liability and duplicative recoveries,³⁴ which “would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.”³⁵

²⁹ *Id.* at 263-64.

³⁰ *Id.* at 266. It should be noted that the Congress, in 1976 and in response to *Hawaii v. Standard Oil*, amended the Clayton Act to permit states to bring *parens patriae* actions on behalf of their citizens. 15 U.S.C. § 15c(a)(1) (2009) (added to the Clayton Act as part of the Hart-Scott-Rodino Antitrust Improvements Act of 1976). But the Court’s fundamental concern with duplicative recoveries did not go away.

³¹ 431 U.S. 720 (1977).

³² *Id.* at 746.

³³ *Id.* at 735.

³⁴ *Id.* at 730-31.

³⁵ *Id.* at 737; *see also id.* at 741, 746-47.

In response to *Illinois Brick*, some states have passed laws known as “*Illinois Brick* repealers” that extend standing to indirect purchasers, including consumers.³⁶ Such laws have had the effect, of course, of subjecting an antitrust defendant to liability from multiple lawsuits by direct purchasers and indirect purchasers and duplicative recoveries—just as the Supreme Court had feared. An antitrust defendant’s exposure thus has sometimes far exceeded the treble-damages, which can put tremendous pressure on the defendant to settle a case regardless of its merit, and can lead to extortionate settlements.

A second flaw is the judicial rule that antitrust defendants who do not settle are subject to joint and several liability with no right to contribution from settling defendants.³⁷ As the Supreme Court explained, the fact that antitrust defendants are jointly and severally liable “simply ensures that the plaintiffs will be able to recover the full amount of damages from some, if not all, participants”; it does not imply that the courts have the power to order contribution when the Congress has not provided for such a remedy in the antitrust statutes.³⁸ While the Court may be right in its interpretation of the Sherman and Clayton Acts, without a right to contribution, a non-settling defendant could end up paying the full amount of a price-fixing judgment (less the pre-trebled

³⁶ For a recent survey of the different state responses to *Illinois Brick*, see *Sullivan v. DB Investments, Inc.*, 613 F.3d 134, 146-48 & nn.10-13 (3d Cir.), *reh’g granted & vacated* by 2010 U.S. App. LEXIS 18088 (3d Cir. Aug. 27. 2010).

³⁷ *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640, 646 (1981) (“We therefore conclude that Congress neither expressly nor implicitly intended to create a right to contribution.”) (“We are satisfied that neither the Sherman Act nor the Clayton Act confers on federal courts the broad power to formulate the right to contribution sought here.”).

³⁸ *Id.* at 646.

amounts of prior settlements). Such a result has also led to the prevalent view that class action outcomes, both litigated and settled, are excessive and unjustified.

A third flaw is an uneven “discovery” playing field for antitrust plaintiffs and defendants. Even in the beginning, a treble-damages plaintiff generally had an advantage over, say, a defendant firm like General Motors, because of the cost and burden that the latter bore in searching for, segregating and producing relevant documents.³⁹ A defendant also generally bore the larger share of the cost and burden in producing witnesses, because a large company would typically have multiple, knowledgeable managers⁴⁰ whereas a plaintiff, being an individual, would have relatively few, if any, knowledgeable witnesses.

Moreover, the cost and burden of document discovery increased exponentially for treble-damages defendants as compared to plaintiffs when “electronic discovery” became

³⁹ Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit refers to this problem as one of “asymmetric discovery burdens.” *See Thorogood v. Sears, Roebuck & Co.*, 624 F.3d 842, 849-50 (7th Cir.) (Posner, J.) (“An additional asymmetry, also adverse to defendants, involves the cost of pretrial discovery in class actions. . . . In most class action suits, including this one, there is far more evidence that plaintiffs may be able to discover in defendants’ records (including emails, the vast and ever-expanding volume of which has made the cost of discovery soar) than vice versa.”), *rehearing denied*, 627 F.3d 289 (7th Cir. 2010), *petition for cert. filed*, No. 10-1087 (U.S. Mar. 2, 2011); *Swanson v. Citibank, N.A.*, 614 F.3d 400, 411 (7th Cir. 2010) (Posner, J., dissenting) (“Behind both *Twombly* and *Iqbal* lurks a concern with asymmetric discovery burdens and the potential for extortionate litigation . . . that such an asymmetry creates. . . . In most suits against corporations or other institutions, and in both *Twombly* and *Iqbal*—but also in the present case—the plaintiff wants or needs more discovery of the defendant than the defendant wants or needs of the plaintiff, because the plaintiff has to search the defendant’s records (and, through depositions, the minds of the defendant’s employees) to obtain evidence of wrongdoing.”) (citations omitted). I will have more to say about *Twombly* and *Iqbal* in Part III *infra*.

⁴⁰ Rule 30(b)(6) of the Federal Rules of Civil Procedure provides that a corporate defendant is to be deposed through one or more officers, directors, managing agents, or other persons designated to testify about specified matters based on information known or reasonably available to the corporation.

de rigueur in the federal courts. That meant that a large defendant had to search and segregate all of its on-line, as well as its off-line documents, including emails.⁴¹ The disproportionality in burden and expense between plaintiffs and defendants was exacerbated when the courts generally held that discovery directed at individual, unnamed members of a class was truncated or prohibited.⁴²

A fourth flaw has been the emergence of numerous “opt-outs” in class action litigation. Rules 23(c)(2) and (c)(3) of the Federal Rules of Civil Procedure require that unnamed class members be given notice and an opportunity to opt out of a Rule 23(b)(3) class action for monetary relief before any judgment entered in such an action, favorable or unfavorable, can bind them as class members.⁴³ The reasons for opt-outs are many

⁴¹ *See, e.g., Swanson*, 614 F.3d at 411 (Posner, J., dissenting) (“With the electronic archives of large corporations or other large organizations holding millions of emails and other electronic communications, the cost of discovery to a defendant has become in many cases astronomical. And the cost is not only monetary; it can include, as well, the disruption of the defendant’s operations. If no similar costs are borne by the plaintiff in complying with the defendant’s discovery demands, the costs to the defendant may induce it to agree early in the litigation to a settlement favorable to the plaintiff.”).

⁴² *See, e.g., Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1556-57 (11th Cir. 1986) (disapproving the service of interrogatories on unnamed class members as a strategy to reduce class size and regarding the imposition of discovery sanctions for failure to respond as an impermissible, affirmative “opt-in” device); *Dellums v. Powell*, 566 F.2d 167, 187 (D.C. Cir. 1977) (acknowledging that discovery against absentee class members is not available as a matter of course, although exceptions can be made “at least when the information requested is relevant to the decision of common questions, when the interrogatories or document requests are tendered in good faith and are not unduly burdensome, and when the information is not available from the representative parties”); *Blackie v. Kushner*, 524 F.2d 891, 906 n.22 (9th Cir. 1975) (“A defendant does not have unlimited rights to discovery against unnamed class members; the suit remains a representative one.”); *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 341 (7th Cir. 1974) (“The taking of depositions of absent class members is—as is true of written interrogatories—appropriate in special circumstances. And, not unlike the use of interrogatories, the party seeking the depositions has the burden of showing necessity and absence of any motive to take undue advantage of the class members.”);

⁴³ FED. R. CIV. P. 23(c)(2) & (c)(3).

and varied. However, as far as corporate plaintiffs are concerned, a major factor is that large companies that would otherwise be class members sometimes decide they could do better if they “opted out” of the class and let their own attorneys represent them. Such a decision would lead to the possibility that a defendant in a class action might secure a defense verdict after a lengthy trial, only to be confronted by the prospect of multiple subsequent trials by plaintiffs who had “opted out” before the trial or judgment.

Here is the conundrum posed by opt-outs. This mechanism was preferred over an affirmative, “opt-in” requirement (which is used in some statutory, collective actions like claims under the Fair Labor Standards Act of 1938, for example)⁴⁴ for class actions because of the concern that “[r]equiring a plaintiff to affirmatively request inclusion would probably impede the prosecution of those class actions involving an aggregation of small individual claims, where a large number of claims are required to make it economical to bring suit.”⁴⁵ Specifically, the concern, as recounted by the Supreme Court in *Phillips Petroleum Co. v. Shutts*, was that “[t]he plaintiff’s claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually, nor would he affirmatively request inclusion in the class if such a request were required by the Constitution.”⁴⁶ (Based on this reasoning, the Court in *Phillips Petroleum*

⁴⁴ *See, e.g.*, *Ervin v. OS Rest. Servs., Inc.*, 632 F.3d 971, 976 (7th Cir. 2011) (concluding that “[i]t does not seem like too much [in a combined action involving federal FLSA claims and ancillary state law class claims] to require potential participants to make two binary choices: (1) decide whether to opt in and participate in the federal action; (2) decide whether to opt out and not participate in the state-law claims”).

⁴⁵ *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812-13 (1985).

⁴⁶ *Id.* at 813. *See also id.* at 813 n.4 (“[Requiring] the individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people—especially small claims held by small people—who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative

declined to impose an affirmative, opt-in requirement as one of the protections guaranteed by the Due Process Clause to out-of-state plaintiff class members who have no minimum contacts with the forum State but are nonetheless being subjected to the personal jurisdiction of the courts in that State.)⁴⁷

By contrast, plaintiffs who have sufficiently large or important claims, and have the wherewithal to hire their own attorneys, do not need the protections afforded by the opt-out mechanism. They are perfectly capable of filing suit on their own, and as the Court noted in *Phillips Petroleum*, they can therefore opt out of the class action if they wish.⁴⁸ In antitrust treble-damages class actions, direct purchasers who have standing to sue are more likely to fall into this camp; they are more likely to be sophisticated corporate plaintiffs who may well choose to opt out of the class action and to pursue relief on their own. (Contrast that with indirect purchasers that might sue under state law; these plaintiffs are more likely to be individual consumers whom the opt-out mechanism was meant to protect.) Because the opt-out mechanism does not distinguish between the needs of individual consumer plaintiffs and corporate plaintiffs, the class action vehicle fails to achieve its purpose of minimizing an antitrust defendant's exposure to multiple lawsuits and multiple liabilities. A defense verdict in an antitrust treble-damages class

step.”) (quoting Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 397-98 (1967)).

⁴⁷ *Id.* at 813-14 (“Petitioner’s ‘opt in’ requirement would require the invalidation of scores of state statutes and of the class-action provision of the Federal Rules of Civil Procedure, and for the reasons stated we do not think that the Constitution requires the State to sacrifice the obvious advantages in judicial efficiency resulting from the ‘opt out’ approach for the protection of the *rara avis* portrayed by petitioner.”). I will come back to the constitutionality of opt-in versus opt-out in Part IV *infra*.

⁴⁸ *Id.* at 813.

action does not mean that there will not be other lawsuits brought by plaintiffs—especially corporate plaintiffs—who have opted out.

III.

I now would like to describe the Supreme Court antitrust jurisprudence that these flaws in antitrust treble-damages class actions have spawned. The first consequence has been the fact that the Supreme Court has moved up the time that a federal court can appropriately dismiss a treble-damages action, including an antitrust class action, from the summary judgment stage to the pleadings stage.

In 1986, the Supreme Court handed down a trio of important cases addressing the standard for granting summary judgment under Rule 56 of the Federal Rules of Civil Procedure.⁴⁹ One of the cases, *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, involved an alleged conspiracy “to raise, fix and maintain artificially *high* prices for television receivers sold by [petitioners] in Japan and, at the same time, to fix and maintain *low* prices for television receivers exported to and sold in the United States[.]”⁵⁰ Essentially, the plaintiffs were claiming that the defendants had engaged in a predatory pricing conspiracy in the United States market—the only market that would be subject to regulation by the U.S. antitrust laws.⁵¹ The defendants moved for summary judgment, which the district court granted but the Third Circuit reversed.

⁴⁹ *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

⁵⁰ 475 U.S. at 578 (quoting *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 251 (3d Cir. 1983)) (emphases in the original).

⁵¹ *Id.* at 582 (“We begin by emphasizing what respondents’ claim is *not*. Respondents cannot recover antitrust damages based solely on an alleged cartelization of

The Supreme Court sided with the district court, holding that the plaintiffs had the burden, in responding to a summary judgment motion, to come forward with evidence raising a genuine issue of material fact concerning the existence of a predatory pricing conspiracy.⁵² Noting that a predatory pricing conspiracy is “by nature speculative” because it requires the alleged conspirators, presumed to be rational economic actors, “to forgo profits that free competition would offer them,”⁵³ the Court held that “if the factual context renders respondents’ claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.”⁵⁴ Such evidence must tend to exclude the possibility that the defendants underpriced the plaintiffs in order to compete for business “rather than to implement an economically senseless conspiracy.”⁵⁵

Matsushita therefore represented a relaxation of an earlier-held view “that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.”⁵⁶ Although motive and intent can and do indeed play “leading roles” in many antitrust cases, summary judgment is nonetheless appropriate if the evidence fails to reveal any plausible, rational motive to

the Japanese market, because American antitrust laws do not regulate the competitive conditions of other nations’ economies.”).

⁵² *Id.* at 586-87.

⁵³ *Id.* at 588.

⁵⁴ *Id.* at 587.

⁵⁵ *Id.* at 597-98.

⁵⁶ *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962).

engage in the alleged conduct, and if the defendants' conduct is "consistent with other, equally plausible [and benign] explanations."⁵⁷

In response to the flaws in antitrust treble-damages class actions, the Supreme Court has subsequently relaxed the standard for summary dismissal even further. In *Bell Atlantic Corp. v. Twombly*,⁵⁸ the Court was persuaded to apply the *Matsushita* plausibility standard to test the sufficiency of a complaint claiming that a group of incumbent local exchange carriers (ILECs) had conspired under Section 1 of the Sherman Act to charge inflated prices for local telephone and high-speed Internet services.⁵⁹ Specifically, the Court held that even under a liberal, notice-pleading standard, "[f]actual allegations must be enough to raise a right to relief above the speculative level,"⁶⁰ that is, they must "state a claim to relief that is plausible on its face."⁶¹ The Court did not limit this plausibility standard to antitrust cases either, as *Ashcroft v. Iqbal* later made clear.⁶²

The reasons for the Court's application of the plausibility standard to the pleading stage were laid out in *Twombly* and *Credit Suisse Securities (USA) LLC v. Billing*,⁶³ the latter case involving a pair of antitrust class actions challenging underwriting practices regulated by the federal securities laws. In *Twombly*, the Court's

⁵⁷ *Matsushita*, 475 U.S. at 596 (bracketed language added).

⁵⁸ 550 U.S. 544 (2007).

⁵⁹ *Id.* at 550-51.

⁶⁰ *Id.* at 555.

⁶¹ *Id.* at 570.

⁶² 129 S. Ct. 1937, 1949-50 (2009).

⁶³ 551 U.S. 264 (2007).

majority rejected Justice Stevens’s suggestion in dissent that groundless claims can be weeded out early in the discovery process through “careful case management”; the majority expressed the concern that “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [summary judgment or trial].”⁶⁴ This concern, of course, relates to the uneven “discovery” playing field that I have already mentioned.

In *Credit Suisse*, the Court made the additional observation that “antitrust plaintiffs may bring lawsuits throughout the Nation in dozens of different courts with different nonexpert judges and different nonexpert juries.”⁶⁵ In the Court’s view, there existed an “unusually high risk that different courts will evaluate similar factual circumstances differently” because the task of evaluating the evidence in order to distinguish permissible conduct from impermissible conduct in antitrust cases is necessarily nuanced and fact-bound.⁶⁶ The threat of serious “antitrust mistakes” (what we frequently call “false positives”) would cause antitrust defendants to avoid not only conduct that is legally forbidden but also conduct that is permitted or encouraged, out of fear of triggering an antitrust lawsuit and the risk of treble damages.⁶⁷ Once again, the Court was reacting to concerns posed by the prevalence of antitrust treble-damages class actions.

⁶⁴ 550 U.S. at 559.

⁶⁵ 551 U.S. at 281.

⁶⁶ *Id.* at 281-82.

⁶⁷ *Id.* at 282.

The second consequence is that the Supreme Court jurisprudence has threatened to “spill over” into and “infect” public antitrust enforcement proceedings. For one thing, *Matsushita* and *Twombly* articulated procedural standards under Rule 56 and Rule 12 of the Federal Rules of Civil Procedure, respectively, which apply across the board to all civil cases, including cases brought by the federal antitrust agencies, regardless of subject matter or claim. As I noted earlier, *Matsushita* was handed down as part of a trio of cases dealing with the summary judgment standard—*Celotex v. Catrett* and *Anderson v. Liberty Lobby*, both non-antitrust cases. Similarly, the teachings in *Twombly* carried over to *Iqbal*, a case involving the alleged deprivation of the constitutional rights of a detainee.

Furthermore, with the exception of the Federal Trade Commission’s Section 5 authority,⁶⁸ public and private plaintiffs enforce the same substantive antitrust laws (the Sherman and Clayton Acts). Thus, whenever the Supreme Court has reined in substantive law out of concerns about the negative impact of private antitrust litigation, those changes have affected public enforcement proceedings as well. *Credit Suisse* is a good example of that; there the Court essentially made a policy choice in favor of “the efficient functioning of the securities markets” and against “any enforcement-related need for an antitrust lawsuit,” which it viewed to be “unusually small.”⁶⁹ Similarly, in *Verizon Communications Inc. v. Trinko*,⁷⁰ the Court concluded that the existence of a regulatory structure governing telecommunications service providers means “that the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will

⁶⁸ 15 U.S.C. § 45 (2009).

⁶⁹ 551 U.S. at 283.

⁷⁰ 540 U.S. 398 (2004).

be less plausible that the antitrust laws contemplate such additional scrutiny.”⁷¹

Moreover, the *Trinko* Court was concerned, as in *Credit Suisse*, with the risk that antitrust enforcement (in this case, of Section 2) in the courts would produce costly false positives.⁷²

Lastly, the Supreme Court thus far has declined to say whether there is anything in the Constitution that requires “opt-out plaintiffs” to be able to re-litigate a case that the class has lost or settled. After holding in *Phillips Petroleum Co. v. Shutts* that an opt-out mechanism provides sufficient protection under the Due Process Clause—from the standpoint of *in personam* jurisdiction—to out-of-state class members who have no minimum contacts with the forum State, the Court had the opportunity in *Ticor Title Insurance Co. v. Brown*⁷³ to consider “whether a federal court may refuse to enforce a

⁷¹ *Id.* at 412.

⁷² *Id.* at 414 (“Against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs. . . . Mistaken inferences and the resulting false condemnations ‘are especially costly, because they chill the very conduct the antitrust laws are designed to protect.’ . . . Judicial oversight under the Sherman Act would seem destined to distort investment and lead to a new layer of interminable litigation, atop the variety of litigation routes already available to and actively pursued by competitive LECs.”) (citations omitted).

⁷³ 511 U.S. 117 (1994) (per curiam). As the Court’s opinion notes, this case related to 12 different, “tag-along” antitrust class actions that came on the heels of the Commission’s 1985 enforcement proceedings against six title insurance companies for allegedly conspiring to fix fees for title searches and title examinations in 13 states, including Arizona and Wisconsin. *Id.* at 118. See *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992). Those class actions, which included ones filed on behalf of title insurance consumers in Arizona and Wisconsin, were consolidated for pretrial purposes under the multidistrict litigation statute, 28 U.S.C. § 1407, and transferred to the Eastern District of Pennsylvania as MDL Case No. 633. The class representatives in these actions eventually settled their claims with the defendant title insurance companies, and the district court certified the classes under Rule 23(b)(1)(A) and (b)(2) and entered final judgment, overruling objections from the States of Arizona and Wisconsin that due process required that proposed class members have an opportunity to opt out—even for classes certified under Rule 23(b)(1) and (b)(2). See *In re Real Estate Title & Settlement*

prior federal class action judgment, properly certified under Rule 23, on grounds that absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf.”⁷⁴ After taking briefs and hearing oral argument, the Court voted 6 to 3, however, to dismiss the writ of certiorari as improvidently granted.⁷⁵

In dissent, Justice O’Connor (joined by Chief Justice Rehnquist, who wrote the opinion of the Court as an Associate Justice in *Phillips Petroleum*, and Justice Kennedy) pointed out that “[t]he [Ninth Circuit’s] decision below rests exclusively on a constitutional right to opt out of class actions asserting claims for monetary relief,” and not on whether the classes in MDL No. 633 had been properly certified under Rule 23(b)(1) and (b)(2) despite the presence of monetary claims.⁷⁶ (As I mentioned earlier in these remarks, claims for monetary relief are typically certified under Rule 23(b)(3), which requires that proposed class members have an opt-out right.) In Justice O’Connor’s view, the Court had to assume that MDL No. 633 had been properly certified

Servs. Antitrust Litig., 1986-1 Trade Cases ¶ 67,149 (E.D. Pa. 1986), *aff’d without opinion*, 815 F.2d 695 (3d Cir. 1987), *cert. denied*, 485 U.S. 909 (1988).

⁷⁴ *Ticor Title*, 511 U.S. at 120-21. After judgment had been entered in MDL No. 633, plaintiff Walter Brown filed a new class action on behalf of Arizona and Wisconsin title insurance consumers in the District of Arizona. The district court granted summary judgment to the defendant title insurance companies, holding that Brown and the class members, as parties to the prior class actions, were bound by the settlement and judgment in MDL No. 633 under the doctrine of res judicata. The Ninth Circuit reversed, holding that the application of res judicata to the money damage claims of class members who did not have an opportunity to opt out of the class in MDL No. 633 would violate due process. *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992).

⁷⁵ *Ticor Title*, 511 U.S. at 118. The Court subsequently had another opportunity to consider this constitutional question but again dismissed the writ as improvidently granted. *Adams v. Robertson*, 520 U.S. 83 (1997).

⁷⁶ *Ticor Title*, 511 U.S. at 126 (O’Connor, J., dissenting).

under Rule 23(b)(1) and (b)(2), and therefore should not have dodged the question of whether an opt-out right is constitutionally required by the Due Process Clause.⁷⁷

IV.

Lastly, I'd like to describe how I think the EU can fashion a private antitrust system that will work but is not flawed in the ways I have described. As a threshold matter, I want to emphasize that most plaintiffs' antitrust lawyers are, first and foremost, investors. That was true even in the "good old days" when private treble-damages actions were generally brought as individual actions instead of as class actions. So the trick is to incentivize them to invest (and thereby ensure a healthy private enforcement regime) while at the same time avoiding the features of treble-damages class action litigation that I (and more importantly, our Supreme Court) have considered pernicious. Here I give you seven suggestions.

The first four suggestions have to do with avoiding the problems we have experienced in the U.S. The first suggestion is to avoid "opt-out" class actions. Requiring that individuals or firms must instead "opt in" to a class (or other collective action lawsuit) will minimize extortionate settlements and eliminate follow-on "opt-out" actions for damages. In my view, requiring "opt in" instead of "opt out" does not raise the same due process concerns that the Supreme Court has avoided resolving. The constitutional question before the Court in *Ticor Title* was whether a proposed class member has to be given a choice—in that case, to opt out of the class—before he or she can be bound by any resulting settlement or judgment.

⁷⁷ *Id.* at 123-25.

What I am proposing here is that proposed class members indeed be given a choice—which should satisfy any due process concerns, but that the choice would involve affirmatively opting in to the class. This is not a new concept; as I observed earlier, there are some forms of collective action in the U.S. that use an opt-in mechanism (like claims under the Fair Labor Standards Act).⁷⁸ The EU could require that potential plaintiffs opt in to a collective action established to pursue claims for relief for violations of EU law. If a potential plaintiff were to choose not to opt in, then he or she would not have a remedy for the alleged violation of any EU law (although he or she may still be able to pursue individual relief for any related violations of the national laws of a Member State).

In this regard, a basic observation I would offer is that the EU’s pursuit of a collective action model of redress does not mean that the EU also has to embrace a representative model, which is what an opt-out class action embodies. Recall that the October 5, 2010 information note describes “collective redress” as “a broad concept encompassing any mechanism that may accomplish the cessation or prevention of unlawful business practices which affect a multitude of claimants or the compensation for the harm caused by such practices.”⁷⁹ The primary reason for an opt-out mechanism is that under a representative model, somebody one usually does not know (a plaintiffs’ antitrust attorney and his or her client, the class representative) has decided to bring an

⁷⁸ See *supra* note 44. It is worth noting that the Congress’s stated rationale for adding an opt-in mechanism to claims under FLSA was to “limit[] private FLSA plaintiffs to employees who asserted claims in their own right and [to] free[] employers of the burden of representative actions,” which had become excessive and were often brought on behalf of plaintiffs lacking a personal interest in the outcome. *Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 173 (1989).

⁷⁹ Joint Information Note, *supra* note 1, at 4, ¶ 7.

action on one's behalf. The opt-out is there to ensure that if one has no interest in the litigation, or wants to pursue the claims individually, one can choose not to be part of the class and to be represented by these people. By contrast, if collective action requires an individual decision from each potential plaintiff member to participate, then there is no need for an opt-out mechanism. Each participating plaintiff still benefits from the efficiencies and economies associated with a collective action model of redress, but the difference is that the participation is active, not passive.

A second suggestion is to ban “indirect purchaser” claims whenever they might result in multiple damage recoveries for the same injury. To be sure, overcharges arising from antitrust violations may sometimes be “passed on” to “indirect purchasers.” Moreover, it sometimes may be hard to determine whether that has happened short of trial. However, these concerns are outweighed by the prospect of multiple damage recoveries for the same antitrust injury, and the complexity of conducting a trial or numerous mini-trials—assuming the question of indirect purchaser status does not stand as an obstacle to class certification⁸⁰—to make that determination. This was the view of the Supreme Court in *Illinois Brick*, as I have recounted above.⁸¹

⁸⁰ See, e.g., *Sullivan v. DB Investments, Inc.*, 613 F.3d 134, 153 n.17 (3d Cir.) (“We briefly note that the indirect purchasers face factual obstacles to class certification notwithstanding the legal defects discussed above because competition in the market for rough gem diamonds waxed and waned during the class period. . . . Thus, the class, as currently defined, includes members that acquired diamonds in a market controlled by the CSO, members that purchased diamonds from competitors that were not participating in the CSO’s price-fixing activities, and members that have no antitrust injury whatsoever.”), *reh’g granted & vacated* by 2010 U.S. App. LEXIS 18088 (3d Cir. Aug. 27, 2010).

⁸¹ See *supra* notes 31-35 and accompanying text.

A third suggestion is to abandon the rule of joint and several liability with no right of contribution because it creates unnecessary downside with no countervailing benefits. Like indirect purchaser claims, this rule gives rise to the risk that defendants will end up paying more than their fair share for the harm caused by their alleged anticompetitive conduct. At the same time, this rule does not provide a necessary incentive to plaintiffs' antitrust attorneys to invest in private enforcement litigation; even without the rule, they should still be able to recoup their investment from a combination of settlements with some defendants and judgments against others.

A fourth suggestion is to permit discovery only upon a showing of good cause by the party seeking the discovery but provide, in the law or legislative history, that good cause will be conclusively presumed to exist, if that party cannot obtain the discovery sought from public law enforcement authorities (which may be prevented by law from sharing the fruits of their investigations).⁸² This approach yields two benefits.

First, it would minimize the asymmetric discovery burden that currently prevails in the U.S., which the Supreme Court has sought to alleviate in *Twombly* by allowing implausible claims for relief to be dismissed at the pleading stage.⁸³ In accordance with

⁸² For example, in the U.S., we have a statutory provision that entitles a state attorney general, who may decide to bring a follow-on civil action in *parens patriae*, to request that the Attorney General of the United States “make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under [the Clayton] Act.” 15 U.S.C. § 15f(b) (2009). The phrase “to the extent permitted by law” operates to exclude certain materials, such as grand jury materials, from disclosure except upon a showing of particularized need. *In re Ill. Petition to Inspect & Copy Grand Jury Materials*, 659 F.2d 800, 804 (7th Cir. 1981) (interpreting FED. R. CRIM. P. 6(e)(3)(C)(i)).

⁸³ In the U.S., some district courts have used the pendency of motions to dismiss brought under *Twombly* as a basis for staying discovery, so as to minimize the expense and burden to the defendants. *See, e.g., Dowdy & Dowdy P’ship v. Arbitron Inc.*, No. 2:09-cv-253 KS-MTP, 2010 U.S. Dist. LEXIS 108798, at *4 (S.D. Miss. Sept. 30, 2010).

my suggestion, plaintiffs would not have a right to virtually unlimited discovery. Instead, they would have to make some threshold showing as to the discovery they need and why they need it.⁸⁴

Second, my approach would encourage plaintiffs' attorneys to hitch private antitrust claims as much as possible to the results of government antitrust investigations. Their first source of discovery should be from the relevant public enforcement authorities, but if they cannot obtain the needed discovery through this channel, then they would have a good argument for having a national court in a Member State order that the discovery be provided by the defendants. And the defendants should have less to complain from the standpoint of burden because presumably they have already turned over most of the same information to the enforcement authorities.

My remaining three suggestions relate to how the EU can incentivize private enforcement so that it best complements and supports public enforcement efforts. First, I would limit private actions to actions that follow on public enforcement actions in the EU, including those public enforcement actions that are based on amnesty or leniency applications and grants. This would help ensure that someone else besides plaintiffs' counsel has done the investigative and trial work that counsel must ordinarily do in the U.S. Having someone else do the work (including gathering the relevant evidence—see

⁸⁴ In the U.S., some district courts have more aggressively applied the “proportionality principle” under Rule 26(b)(2)(C)(iii) of the Federal Rules of Civil Procedure (which takes into account whether “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues”) to ensure that discovery is proportional to the specific circumstances of an antitrust case. *See, e.g., Tamburo v. Dworkin*, No. 04 C 3317, 2010 U.S. Dist. LEXIS 121510, at *7-8 (N.D. Ill. Nov. 17, 2010).

my previous suggestion about discovery) should be a powerful incentive for plaintiffs' antitrust attorneys to invest in private collective action litigation.

Second, I would recommend that the EU specifically provide that prejudgment interest dating back to the beginning of the conduct challenged be awarded to prevailing plaintiffs. In the U.S., the Clayton Act permits courts to award prejudgment interest in their discretion,⁸⁵ but it is honored more in the breach than in the observance. By making an award of prejudgment interest mandatory, the EU (and its member States) could help ensure that most damage awards equal or exceed treble-damages awards in the United States, which would promote convergence on the private enforcement front. Judging by the incentives that existed in the United States before class actions came into vogue, this too should incentivize investment in private actions, notwithstanding the measures described above.

Third, I would disallow "loser pays" rules. This would mean that the most an investor in an antitrust lawsuit could lose would be his or her investment, which could also help incentivize investing. As you may know, in the U.S. the prevailing "American rule" provides that win or lose, litigants bear their own litigation expenses, with the exception of only certain limited categories of costs that can be taxed against the losing party.⁸⁶ The American rule applies to civil actions brought under Section 4 of the

⁸⁵ 15 U.S.C. § 15(a) (2009) ("The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances.").

⁸⁶ See FED. R. CIV. P. 54(d); 28 U.S.C. § 1920 (2009).

Clayton Act; the “cost of suit” that may be awarded under Section 4 has been interpreted by courts as limited to taxable costs.⁸⁷

* * *

These are my thoughts and suggestions as a public enforcer and previously a trial lawyer for private litigants. I look forward to our discussion and debate.

⁸⁷ *See, e.g.*, *Reazin v. Blue Cross & Blue Shield, Inc.*, 899 F.2d 951, 981-82 (10th Cir. 1990); *Illinois v. Sangamo Constr. Co.*, 657 F.2d 855, 865-66 (7th Cir. 1981).