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Beyond Trinko and Twombly:

**The Role of Private Consumer Actions in Detecting and Providing
Remedies for Antitrust Violations**

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PRIVATE ANTTITRUST ENFORCEMENT POLICY GOALS – U.S.

- Congress and the Supreme Court have long recognized that private enforcement of antitrust laws is in the public interest.

“Every violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress ... This system depends on strong competition for its health and vigor, and strong competition depends, in turn, on compliance with antitrust legislation ... 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.’”

Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 262 (1972)

- In enacting Clayton Act § 4:

“Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations.”

Blue Shield of Virginia v. McCready, 457 U.S. 465, 472 (1982)

PRIVATE ANTITRUST ENFORCEMENT POLICY GOALS – E.U.

“ Damages actions for infringement of antitrust law serve several purposes, namely to compensate those who have suffered a loss as a consequence of anti-competitive behaviour and to ensure the full effectiveness of the antitrust rules of the Treaty by discouraging anti-competitive behaviour, thus contributing significantly to the maintenance of effective competition in the Community (deterrence). ”

European Commission Green Paper, *Damages Actions for Breach of the EC Antitrust Rules*, COM(2005) 672, December 19, 2005

“ The full effectiveness of Article [81] of the Treaty and, in particular, the practical effect of the prohibition laid down in Article [81(1)] would be put at risk if it were not open to any individual to claim damages for loss caused to him ... by conduct liable to restrict or distort competition.

Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.”

Case C-453/99 *Courage Ltd v. Bernard Crehan* [2001] ECR I-6297, ¶¶ 26-27

PRIVATE ENFORCEMENT IN THE U.S. : DEATH BY A THOUSAND CUTS?

- While there is currently no open attack on the private right of action, that right is under subtle attack and, with each cut, runs the risk of becoming dead letter for many private plaintiffs.
- This trend is alarming considering:
 - antitrust violations' cost to the economy;
 - the sharp drop in antitrust enforcement by the federal agencies in recent years, which makes private enforcement more essential than ever.

PRIVATE ENFORCEMENT IN THE U.S. : DEATH BY A THOUSAND CUTS?

- A key prong in this challenge is the application of a backdoor heightened “summary-judgment-style” pleading requirement to antitrust complaints.
 - *Trinko* and *Twombly*
- However, such an application flies in the face of the Federal Rules of Civil Procedure:
 - Fed. R. Civ. P. 9(b) limits heightened pleading requirements to fraud and mistake.
 - Extending heightened pleading requirements to other areas “*is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.*” *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993)
 - For purposes of determining a motion to dismiss under Fed. R. Civ. P. 12(b)(6), all factual allegations contained in the complaint must be accepted as true. *See Leatherman*, at 164 (1993)
 - On a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the court must make all reasonable inferences in the plaintiff’s favor. *See Bolt Elec., Inc. v. City of New York*, 53 F.3d 465, 469 (2d Cir. 1995)
- The backdoor approach also contravenes antitrust principles that alleged conduct need only be plausibly consistent with a conspiracy and that plaintiffs should not be required to provide proof of conspiracy at the pleading stage.

PRIVATE ENFORCEMENT IN THE U.S. : DEATH BY A THOUSAND CUTS?

1. *Trinko*

- The Supreme Court's 2004 decision in *Trinko* has already unreasonably raised the bar for the private plaintiff challenging single firm conduct by:
 - essentially rejecting the essential facilities doctrine;
 - interpreting the Telecommunications Act's saving clause so narrowly as to render it meaningless;
 - practically immunizing from antitrust liability any actual or potential monopolist operating in a regulated industry;
 - forcing those injured by the latter's conduct to seek redress from regulatory agencies that have no power to award damages.
- *Trinko* should never have been dismissed at the pleading stage
 - Even if "*Aspen Skiing is at or near the outer boundary of §2 liability*," a Court properly applying Rule 12 standards should have found that the complaint's allegation that defendants flouted the Tele. Act to protect their monopoly was sufficient to survive a motion to dismiss.

PRIVATE ENFORCEMENT IN THE U.S. : DEATH BY A THOUSAND CUTS?

2. *Twombly*

- Private plaintiffs' ability to challenge collusive conduct will in turn be unduly restricted if the Supreme Court finds for the Petitioners in *Twombly*.
- The *Twombly* petitioners have come up with a new trick that would allow defendants in private antitrust suits to avoid liability: require plaintiffs to essentially provide proof of their case at the pleading stage.
- Yet, the very nature of antitrust conspiracies is such that the evidence is in the possession of the defendants and is actively concealed. Without discovery, these conspiracies will never be exposed.
- The Second Circuit was correct in holding that "[i]f a pleaded conspiracy is implausible on the basis of the facts as pleaded -- if the allegations amount to no more than "unlikely speculations" -- the complaint will be dismissed." *Twombly v. Bell Atlantic*, 425 F.3d 99, 111 (2d Cir. 2005), quoting *DM Research v. College of American Pathologists*, 170 F.3d 53, 56 (1st Cir. 1999).
- "*But short of the extremes of "bare bones" and "implausibility," a complaint in an antitrust case need only contain the "short and plain statement of the claim showing that the pleader is entitled to relief" that Rule 8(a) requires.*" *Id.*

**PRIVATE ENFORCEMENT IN THE U.S. :
DEATH BY A THOUSAND CUTS?**

- So long as the conduct complained of is plausibly consistent with a conspiracy and plausibly inconsistent with competition once all reasonable inferences are given to the plaintiffs, plaintiffs should not be required to provide proof of conspiracy in order to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6).
- To hold otherwise would be to considerably weaken the deterrent effect of antitrust law and unreasonably restrict the right of victims of antitrust violations to seek and obtain compensation.
- Petitioners are advocating a backdoor heightened pleading standard where courts are invited to reject antitrust complaints based on conjecture that concerted action is possible.

PRIVATE ENFORCEMENT IN THE U.S. : DEATH BY A THOUSAND CUTS?

- The movement to restrict private enforcement is ideological.
- The myth of widespread frivolous antitrust litigation ignores the tremendous cost of such litigation. Few private plaintiffs can afford to bring bogus antitrust claims on the off-chance they might get some settlement money.
- There is, however, significant evidence that antitrust conspiracies are under-deterred by government enforcement:
 - A recent study cited by the American Antitrust Institute in its Amicus Brief in support of the Respondents in *Twombly* found that, since 1990, detected cartels have overcharged **25%** on average (See J.M. Connor and R.H. Lande, *How High Do Cartels Raise Prices: Implications for Optimal Cartel Fines*, 80 Tul. L. Rev. 513 (2005)).
 - The same study found that the most successful cartels have overcharged an average of **75%**.
 - The **10%** U.S. Sentencing Guidelines presumption is therefore wholly inadequate to deter most cartels.
 - In addition, it is an undisputed fact that many, perhaps most, cartels go undetected.

ENCOURAGING DEVELOPMENTS IN THE EU

The European Commission's commitment to the development of private damages actions in EU Member States is undeniable and demonstrated by a number of initiatives:

- Ashurst Study in 2004
- Staff Working Paper and Green Paper in 2005
- Public Consultation on the Green Paper in 2006
- Impact assessment study ahead of the White Paper
- White Paper to be released some time this year

ENCOURAGING DEVELOPMENTS IN THE EU

The European Court of Justice is also contributing to the development of a framework for the private enforcement of EU competition law in EU Member States, forcing the latter to adapt their legal systems accordingly:

- "1. A party to a contract liable to restrict or distort competition within the meaning of Article [81] of the Treaty can rely on the breach of that article to obtain relief (damages) from the other contracting party;*
- 2. Article [81] of the Treaty precludes a rule of national law under which a party to a contract liable to restrict or distort competition within the meaning of that provision is barred from claiming damages for loss caused by performance of that contract on the sole ground that the claimant is a party to that contract. "*

Case C-453/99 *Courage Ltd v. Bernard Crehan* [2001] ECR I-6297, ¶ 37

"Article 81 EC must be interpreted as meaning that any individual can rely on the invalidity of an agreement or practice prohibited under that article and, where there is a causal relationship between the latter and the harm suffered, claim compensation for that harm. "

Joined cases C-295/04 to C-298/04 *Manfredi and others v. Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-0000, ¶ 2

ENCOURAGING DEVELOPMENTS IN EU MEMBER STATES - UK

- The Enterprise Act 2002 introduced s. 47A into the Competition Act 1998, which allows any person who has suffered loss or damage as a result of an infringement of either UK or EC competition law to bring a claim for damages before a specialist court, the Competition Appeals Tribunal (“CAT”).
- Unfortunately, the provision only applies to so-called “follow-on” actions, i.e. actions that follow a final decision by a relevant competition authority (the OFT, a sectoral regulator or the European Commission) that UK or EC competition law has been infringed.
- Nonetheless, an important step has been taken with respect to s. 47A, with the first award of damages under that provision: £2million awarded to Healthcare at Home in November 2006, in an action against Genzyme.
- In addition, s. 47B allows consumer groups to bring “stand-alone” actions directly to the CAT pursuant to s. 47A on behalf of named individual consumers.

ENCOURAGING DEVELOPMENTS IN EU MEMBER STATES - GERMANY

- Section 33 of the GWB was amended in 2005 and now:
 - explicitly provides for the right of private persons to seek injunctive relief and damages for infringements not only of German competition law but also Articles 81 and 82 of the EC Treaty;
 - extends standing to “competitors and other participants in the market affected by the infringement;”
 - provides that a finding by the Federal Cartel Office, the European Commission, and even by another EU Member State’s competition authority that an infringement of competition law has occurred is binding on German civil courts.
- German courts are also signaling their willingness to entertain private damages actions for violations of competition law:
 - e.g. April 2004 decision of the Dortmund District Court awarding damages to a customer of the global vitamins cartel; and
 - current proceedings before the Düsseldorf District Court where the assignee of 29 victims of the cement cartel is claiming damages.

MAJOR OBSTACLES REMAIN

- In spite of advances made both before the Ashurst study and in the two and half years since, its diagnosis remains largely true today; the legal framework for damages actions for breach of competition law in the EU is characterized by “*astounding diversity and total underdevelopment.*”
- Major hurdles identified by the European Commission’s Green Paper remain in place, including:
 - Rules on damages and costs that do not create a sufficient incentive for injured persons to enforce their rights;
 - Absence or underdevelopment of class actions and representative actions;
 - Obstacles to access to evidence.

RESISTANCE TO CHANGE

- Unfortunately, the majority of the comments received by the European Commission were hostile to developments that would help victims of antitrust violations enforce their rights and be compensated for their losses such as mandatory disclosures, double damages and class actions.
- Many of these comments are the result of the concern that the EU is at risk becoming “like the U.S.”

“Q. Does the Commission want to introduce a US-style litigation culture in Europe?”

A. No - the Commission seeks to encourage a competition culture, not a litigation culture. The Commission is aware that there is a fear that fostering private damage actions might lead to a litigation culture and might increase the risk of unmeritorious claims being brought. However, the options put forward by the Commission for debate would not lead to a rise in unmeritorious litigation.”

Frequently asked questions regarding the Green Paper on damages actions for breach of EC Treaty anti-trust rules, European Commission MEMO/05/489, December 20, 2005.

CONCLUSION

- The rhetoric that is being used against private antitrust plaintiffs in the U.S., depicting them as money-grubbing and litigious, and accusing them of flooding the court system with unmeritorious claims, has unfortunately crossed the Atlantic.
- With *Trinko* yesterday and perhaps *Twombly* tomorrow, that rhetoric appears to be having considerable success in limiting the ability of victims of antitrust violations to seek compensation through the courts in the U.S.
- It would be unfortunate if that same rhetoric claimed the EU's nascent framework for the private enforcement of competition law as its next victim.