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Consumers' right of action in antitrust cases

Current problems and future solutions

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Nordic co-operation

Nordic co-operation, one of the oldest and most wide-ranging regional partnerships in the world, involves Denmark, Finland, Iceland, Norway, Sweden, the Faroe Islands, Greenland and Åland. Co-operation reinforces the sense of Nordic community while respecting national differences and similarities, makes it possible to uphold Nordic interests in the world at large and promotes positive relations between neighbouring peoples.

Co-operation was formalised in 1952 when *the Nordic Council* was set up as a forum for parliamentarians and governments. The Helsinki Treaty of 1962 has formed the framework for Nordic partnership ever since. The *Nordic Council of Ministers* was set up in 1971 as the formal forum for co-operation between the governments of the Nordic countries and the political leadership of the autonomous areas, i.e. the Faroe Islands, Greenland and Åland.

Table of Contents

Preface

Consumers are frequently suffering financial losses due to anti-competitive behaviour. For instance, when consumers buy a product from a price cartel, they are generally paying 20–30 % more than they would if the prices had formed freely without the cartel agreement distorting the competitive process. This type of collusion is contrary both to article 81 of the EC Treaty and various national provisions.

Pursuant to general tort law principles and competition law itself, private parties have a right of redress for antitrust damages in all the Nordic countries. However, with a few exceptions,[1] neither consumers nor their representatives are currently pursuing such claims. Consequently, consumers are not being compensated for their losses.

The Nordic Council of Ministers therefore decided to fund a project on the subject. The project was set up and supervised by the Steering Group on Legal Issues under the Committee on Consumer Issues. The project started spring 2005 and was concluded autumn 2006.

The ambition of the project was twofold: to analyse the main obstacles to redress of consumers' antitrust damages; and to provide possible solutions to the problems consumers and their representatives face when pursuing such claims.

The participants in the project group were:

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At an EU level, the right of private parties to damages in competition cases has explicitly been acknowledged by the European Court of Jus-

[1] Neytendasamtökin, the Consumer Association of Iceland, is currently involved in an antitrust damages action against an oil company

tice.[2] The European Commission examined in a recent Green Paper the obstacles faced by private parties claiming damages.[3]

The aim of this report is to provide both national and EU institutions with specific recommendations on how to facilitate consumers' antitrust damages claims.

2 Case C-453/99, [2001] ECR 6297, at paras. 19-27.

3 Green Paper on Damages Actions for Breaches of the EC Antitrust Rules COM (2005)672 final, Section III.

Summary

English

This report examines the right of consumers to bring actions for damages and/or restitution under current European and Nordic competition legislation. The report aims to propose answers to the fundamental question of how to ensure that consumers achieve compensation for the damages that they suffer.

The focus is on consumer protection under competition law, including the rules laid down in Articles 81 and 82 of the EC Treaty and the corresponding legislation at a national level.

Consumers benefit from well-functioning markets. Since competition law infringements harm the market mechanism, all competition law infringements ultimately harm consumers. In some cases consumers are harmed directly, but most frequently the financial loss is indirect (e.g. when consumers buy products from a retailer and there is a cartel operating upstream at the wholesale level). It is difficult to trace the effects of infringements to the requisite legal standard when consumers are harmed indirectly.

There are many different types of competition law infringements. From a consumer's point of view, price cartels are the most harmful. Experience shows that on average a price cartel may lead to a price increase of around 10%.

At the EC level, competition law gives individual rights to citizens, including a right to compensation for antitrust damages. In the Nordic countries the legal basis varies. In Finland, Norway, Iceland and Denmark the legal basis is provided by the general principles of tort law. In Sweden on the other hand, there is a specific provision on the right to damages (cf. Section 33 of the Swedish Competition Act)

There are two categories of consumers that are harmed by competition law infringements: consumers who have bought products at a higher price or of inferior quality; and consumers who could not afford to buy the overpriced product (deadweight loss).

The report argues that compensation of consumers is a necessary prerequisite for efficient antitrust enforcement. One of the strongest arguments in favour of consumer suits is the deterrent effect they have on companies. However, actions for compensation can be costly, and this runs contrary to the main goal of competition law: an efficient allocation of resources. The costs of consumer suits should therefore be minimised.

In general, private antitrust suits have been rather rare in Europe compared to the US, where more than 90% of antitrust litigation is made up of private actions.

One of the main problems with consumer suits for antitrust damages is organising the plaintiffs. In situations where a large number of consumers have only suffered small losses individually, consumers do not have a financial incentive to bring suit. This means that it is essential to find a way of organising consumers through some kind of class or representative action. Although many of the Nordic countries have proposed or implemented rules on class actions, the issue is whether these instruments will be used to bring claims for antitrust damages. The report points out that financial risk coupled with lack of funding may serve as an obstacle to the efficient use of collective actions. Another option to consider is whether compensation could be integrated in some sort of public enforcement regime, either by the competition authorities or by some other type of public body.

Another difficulty the consumer plaintiff faces is in proving that the infringement actually took place. As a consequence the use of consumer's lawsuits will primarily be limited to so-called "follow-on litigation", i.e. cases brought after the public enforcement system has detected the infringement and a binding decision has been obtained.

General tort law principles specify that, in order to receive redress, the plaintiff must establish an infringement, a financial loss and a causal link between the two. Consumers are often harmed indirectly. It is difficult to know whether the intermediaries have passed on the overcharge to the ultimate consumer, or if the intermediaries have absorbed the monopoly price themselves. The passing on challenge constitutes a basic problem with antitrust suits. If you allow both the intermediary and the ultimate consumer to bring actions for damages, there is a risk that the infringing company will have to pay double compensation. Federal U.S. case law has solved this problem by not allowing indirect purchasers to bring claims for damages. Nordic law tends to limit liability by requiring that causation is direct. There is a risk that the losses incurred by consumers as indirect purchasers might be considered too remote in the Nordic countries. The question is whether it is possible to introduce some form of assumption regarding passing on. Economic theory demonstrates that, in many cases, antitrust injuries are passed on to the consumers. On this basis, one could introduce a rule assuming that consumers *are* hurt in cases where anti-competitive conduct has produced adverse effects on competition upstream.

The calculation of damages is a general dilemma in tort law. The problem is most serious in cases regarding price cartels, where the question is what the market price would have been if there was no cartel. Experience shows that a cartel is normally able to obtain a 10% overprice. This raises the question of whether damages could be standardised, e.g.

that the damage could be calculated as a fixed percentage of the actual price, unless the defendant provided evidence to the contrary.

Furthermore, once the overcharge has been fixed with reasonable certainty, the issue arises of what is the most efficient way of compensating consumers. It is costly to distribute funds among a large number of consumers, each of which has suffered only a small amount of damage. A solution could be to impose mandatory price-cuts, but the problem is that the consumers who have already paid the excessive price are not necessarily the ones who benefit from lower prices in the future. In addition, ordering the upstream defendant to cut prices over a period of time will not necessarily benefit the ultimate consumer.

Suomi

Raportti tarkastelee kuluttajien oikeutta nostaa kanne vahingoista ja/tai saada vahingonkorvausta nykyisen Euroopan ja Pohjoismaiden kilpailulainsäädännön nojalla. Raportin tavoitteena on esittää vastauksia peruskysymykseen, miten kuluttajat voivat saada korvausta kärsimiinsä vahinkoihin.

Keskeisenä on kilpailuoikeuden mukainen kuluttajasuoja, joka sisältää EY:n perustamissopimuksen artikloissa 81 ja 82 ja vastaavassa kansallisen tason lainsäädännössä määritellyt säännöt.

Kuluttajat hyötyvät hyvin toimivista markkinoista. Koska kilpailuoikeuden rikkomukset vahingoittavat markkinamekanismeja, kaikki kilpailuoikeuden rikkomukset vahingoittavat viime kädessä kuluttajaa. Joissakin tapauksissa kuluttajille koituu vahinkoa suoraan, mutta useimmiten taloudelliset menetykset ovat epäsuoria (esim. kun kuluttajat ostavat tuotteita suoraan jälleenmyyjältä ja kartelli on ketjun yläpäässä tukkukauppatasolla). Rikkomusten seurausten jäljittäminen vaaditun oikeudellisen normin mukaisesti on vaikeaa, kun kuluttajiin kohdistuva vahinko on epäsuoraa.

Kilpailulainsäädännön rikkomuksia on monen tyyppisiä. Kuluttajan näkökulmasta hintakartellit ovat vahingollisimpia. Kokemus osoittaa, että hintakartelli saattaa nostaa hintoja keskimäärin suunnilleen 10 %:n verran.

EY:n tasolla kilpailulainsäädäntö antaa yksilölliset oikeudet kansalaisille, mukaan lukien oikeuden korvauksiin kartellien aiheuttamista vahingoista. Oikeusperusta vaihtelee Pohjoismaissa. Suomessa, Norjassa, Islannissa ja Tanskassa oikeudellinen perustan muodostavat vahingonkorvausoikeuden yleiset periaatteet. Ruotsissa toisaalta on erityinen lauseke oikeudesta vahingonkorvauksiin (ks. Ruotsin kilpailunrajoituslain § 33)

Kuluttajat, joille koituu vahinkoa kilpailulainsäädännön rikkomuksista, voidaan jakaa kahteen eri ryhmään. Ensiksi, kuluttajat, jotka ovat ostaneet tuotteita korkeampaan hintaan tai heikompilaatuisia tuotteita; toi-

seksi, kuluttajat, joilla ei ole varaa ostaa ylihintaista tuotetta (tehokkuustappio).

Raportti todistaa, että kuluttajille annettava vahingonkorvaus on välttämätön edellytys kartellienvastaisten lakien noudattamiseksi tehokkaasti. Eräs vahvimmista perusteista kuluttajien nostamien kanteiden puolesta on varoittava vaikutus, mikä niillä on yrityksiin. Toimet vahingonkorvauksen saamiseksi saattavat kuitenkin olla kalliita, mikä on vastoin kilpailulakien päätavoitetta: pyrkimys tehokkaaseen voimavarojen kohdentamiseen. Kuluttajien nostamien kanteiden kustannukset tulisi näin muodoin minimoida.

Yleisesti ottaen, yksityiset kartellinvastaiset kanteet ovat olleet varsin harvinaisia Euroopassa verrattuna Yhdysvaltoihin, jossa yli 90 % kartellienvastaisista oikeudenkäynneistä on yksityisiä kanteita.

Yksi kuluttajien nostamien kanteiden pääongelmista kartellienvastaisissa korvauksissa on saada kantajaosapuoli järjestäytymään. Tilanteessa, jossa suuri määrä kuluttajia on henkilökohtaisesti kärsinyt ainoastaan vähäisiä tappioita, kuluttajille ei ole taloudellisesti kannustavaa nostaa kannetta. Toisin sanoen, on keskeistä, että olisi keino organisoida kuluttajat jonkinlaisen ryhmä- tai representative action -tyyppisen kanteen avulla. Vaikka monet Pohjoismaista ovat ehdottaneet tai toteuttaneet sääntöjä ryhmäkanteille, on epävarmaa käytetäänkö kyseisiä keinoja esittämään vaateita kartellinvastaisiin korvauksiin. Raportti osoittaa, että taloudellinen riski yhdistettynä rahoituksen puutteeseen saattaa olla esteenä joukkokanteiden tehokkaalle käytölle. Toinen harkitsemisen arvoinen vaihtoehto on, onko mahdollista integroida korvauskysymys jonkinlaiseen toimeenpanojärjestelmään joko kilpailuviranomaisten tai jonkin toisen tyyppisen julkisen elimen avulla.

Toinen kantajan kohtaama vaikeus on todistaa, että rikkomus on todella tapahtunut. Sen seurauksena kuluttajan kanteiden käyttö rajoitetaan pääasiassa niin sanottuun "jatko-oikeudenkäyntiin", ts. oikeustapauksiin, jotka on pantu vireille sen jälkeen, kun julkinen toimeenpanojärjestelmä on havainnut rikkomuksen ja sitova päätös on hyväksytty.

Yleiset vahingonkorvausoikeuden periaatteet edellyttävät, että kantajan on näytettävä toteen rikkomus, taloudellinen menetys ja syy-yhteys näiden kahden välillä korvauksen saadakseen. Kuluttajiin vahinko kohdistuu usein epäsuoraan. On vaikea tietää, ovatko välittäjät siirtäneet ylihinnan loppukuluttajalle vai ovatko välittäjät kärsineet monopolihinnan aiheuttaman vahingon itse. Siirto muodostaa perusongelman kartellinvastaisissa oikeudenkäynneissä. Mikäli hyväksytään, että sekä välittäjä että loppukuluttaja nostavat kanteen vahingoista, syntyy riski, että rikkovan yrityksen on maksettava kaksinkertainen korvaus. Yhdysvaltain liittovaltion ennakkotapausoikeus on ratkaissut tämän ongelman kieltämällä epäsuoria ostajia vaatimasta vahingonkorvauksia. Pohjoismainen oikeus pyrkii rajoittamaan korvausvelvollisuutta vaatimalla, että syy-yhteys on suora. On olemassa riski, että kuluttajiin kohdistuneet vahingot, heidän

toimiessaan epäsuorina ostajina, katsottaisiin liian etäisiksi Pohjoismaissa. Kysymys on, olisiko mahdollista esittää jonkin muotoinen oikeusolettama koskien siirtoa. Talousteoria osoittaa, että kilpailusäännösten loukkaukset siirtyvät monissa tapauksissa kuluttajille. Tätä taustaa vasten voidaan esittää sääntö, joka olettaa, että kuluttajia *on* vahingoitettu, edellyttäen, että kilpailunvastainen menettely on vaikuttanut kilpailua haittaavasti ketjun yläpäässä.

Miten laskea vahingot, on yleinen pulma vahingonkorvausoikeudessa. Ongelma on vakavin hintakartellien suhteen, jolloin kysymys on siitä, mikä markkinahinta olisi ollut, jos kartellia ei olisi ollut. Kokemuksen perusteella kartellin on mahdollista yleensä veloittaa normaalisti 10 % ylihintaa. Tästä nousee kysymys voitaisiinko vahingonkorvaukset standardisoida, esim. niin, että vahinko voitaisiin laskea kiinteänä prosenttimääränä varsinaisesta hinnasta, ellei vastaaja esitä vastakkaisia todisteita.

Lisäksi, kun ylihinta on määritetty kohtuullisen varmasti, nousee kysymys, mikä on tehokkain keino maksaa korvauksia kuluttajille. Korvausten jakaminen suurelle määrälle kuluttajia, joista kukin on kärsinyt vain vähäistä vahinkoa, on kallista. Ratkaisuna voisi määrätä pakollisia hinnanalennuksia. Tässä on se ongelma, että kuluttajat, jotka ovat maksaneet ylihintaa eivät edes ole välttämättä niitä, jotka hyötyvät alemmista hinnoista tulevaisuudessa. Toiseksi, määräämällä ketjun yläpään vastaajaa pudottamaan hintoja tietyn ajan kuluessa ei välttämättä hyödytä loppukuluttajaa.

Norsk

Denne rapporten omhandler forbrukeres rett til erstatning og/eller restitusjon etter europeisk og nasjonal konkurranserett. Rapportens formål er å foreslå løsninger til det grunnleggende spørsmålet om hvordan forbrukere kan få kompensert sitt økonomiske tap ved konkurranseovertredelser.
Fokuset er på konkurranserettslig forbrukerbeskyttelse under Romatraktatens artikler 81 og 82 samt tilsvarende nasjonal lovgivning.

Forbrukerne drar fordel av velfungerende markeder. Overtredelser av konkurranselovgivningen skader markedsmekanismen og vil derfor også skade forbrukerne. Noen ganger lider forbrukerne et direkte økonomisk tap, men som regel er de økonomiske konsekvensene mer indirekte (f.eks. når forbrukere kjøper produkter fra en detaljist og prissamarbeidet er på forhandlernivå). Å godtgjøre at tapet er veltet over på forbrukeren, kan være vanskelig dersom det er mellomliggende salgsledd mellom forbrukeren og overtrederen.

Det er mange typer konkurranseovertredelser. Fra forbrukerens synsvinkel er prissamarbeid det mest skadelige. Erfaring viser at et priskartell fører til en gjennomsnittlig økning av prisene på 10 prosent.

EU-konkurranseretten gir borgerne individuelle rettigheter, som inkluderer rett til erstatning for konkurranseskade. Det rettslige grunnlag på nasjonalt plan varierer. I Finland, Norge, Island og Danmark er det rettslige grunnlaget generelle erstatningsrettslige prinsipper. I Sverige følger det av konkurranselagen § 33.

Det er to kategorier forbrukere som lider tap som følge av konkurranseovertredelser: For det første – de forbrukerne som har kjøpt produkter til en høyere pris eller dårligere kvalitet, for det andre – de forbrukerne som ikke har råd til å kjøpe produktet (dødvektstap).

Rapporten argumenterer med at kompensasjon av forbrukerne er en nødvendig forutsetning for et effektivt system for håndhevelse av konkurransereglene. Å gjøre det enklere for forbrukere å forfølge sine erstatningskrav ved konkurranseovertredelser vil ha en betydelig preventiv effekt. Å kjøre slike saker vil imidlertid være kostbart, og dette kan være i strid med konkurransereglenes hovedformål: en effektiv bruk av samfunnets ressurser. Kostnadene knyttet til gjennomføringen av erstatningskrav bør derfor begrenses.

Et av hovedproblemene med søksmål for skadeserstatning i konkurransesaker er hvordan man organiserer saksøkersiden. Forbrukere har ikke økonomiske incentiver til å bringe krav inn for domstolene da kravene som regel er av liten økonomisk verdi. Dette innebærer at en eller annen kollektiv søksmålsform er nødvendig. De fleste nordiske land har foreslått eller implementert regler om kollektive søksmålsformer. Det er imidlertid et uavklart spørsmål om disse instrumentene vil benyttes til å forfølge krav på erstatning for konkurranseskade. Rapporten fremhever at den økonomiske risikoen sammenholdt med fraværet av en finansieringsmodell fungerer som et hinder for effektiv bruk av gruppesøksmål. En annen mulighet rapporten diskuterer, er om forbrukernes erstatningskrav kan integreres i den offentlig håndhevelsen, enten av konkurransemyndighetene eller andre offentlige organer.

Andre utfordringer forbrukeren møter, er å bevise hvorvidt overtredelse av konkurransereglene faktisk fant sted. Som en konsekvens av dette vil erstatningssøksmål som regel være begrenset til saker der konkurransemyndighetene har fattet vedtak om at konkurransereglene er overtrådt.

Etter alminnelig erstatningsrettslige prinsipper må saksøker bevise at det foreligger en overtredelse, at det foreligger et økonomisk tap, og at det er en årsakssammenheng mellom overtredelsen og det økonomiske tapet. Det økonomiske tapet forbrukerne lider, er gjerne indirekte i den forstand at det går gjennom ett eller flere salgsledd. Å bevise at merprisen ikke absorberes av tidligere salgsledd, men overføres til forbrukeren, kan være vanskelig. Hvis man tillater både den direkte kjøperen og senere omsetningsledd å kreve erstatning for økonomisk tap, er det en risiko for at overtrederen må betale dobbel kompensasjon – først til kjøperen, deretter til senere omsetningsledd og forbrukeren. I USA er denne problemstillingen løst ved ikke å avskjære erstatningskrav fra s.k. "indirekte kjøpe-

re", dvs. senere omsetningsledd og forbrukere. Det er kun den opprinnelige kjøperen som kan fremme et slikt krav. I nordisk sammenheng er det et generelt prinsipp at erstatningsansvaret begrenses til direkte tap. Det er fare for at forbrukeres tap som indirekte kjøpere anses som en følgeskade og derfor ikke er erstatningsmessig. En mulig løsning vil kunne være å introdusere en presumsjon for at overpris veltes over på etterfølgende omsetningsledd og forbrukerne. Ifølge økonomisk teori vil det økonomiske tapet i de fleste tilfeller overføres til forbrukerne i siste instans.

Å beregne det økonomiske tapet er en generell erstatningsrettslig problemstilling. I forbindelse med priskarteller er dette særlig vanskelig. Man må spørre seg hvilken pris det ville vært i markedet uten prissamarbeidet. Erfaring viser at et kartell tar i gjennomsnitt 10 prosent mer enn aktører i et marked uten prissamarbeid. Tapet kunne derfor standardiseres som en gitt prosentandel av prisen, med mindre saksøkte godtgjorde at overprisen var lavere.

Når overprisen er fastsatt med rimelig sikkerhet, gjenstår spørsmålet om hvordan man på en mest mulig effektiv måte kan kompensere forbrukerne. Å fordele erstatningssummen på en stor gruppe forbrukere er kostnadskrevende. En mulig løsning er å pålegge overtrederen å sette ned prisene. Denne løsningen skaper imidlertid andre problemer. For det første er det ikke nødvendigvis de som betalte overpris, som får kompensasjonen. For det andre vil ikke forbrukeren nødvendigvis dra fordel av en prisreduksjon. Avhengig av markedssituasjonen vil gevinsten kunne beholdes av mellomliggende omsetningsledd.

1. Introduction

This report examines the right of consumers to bring actions for damages and/or restitution under current European competition legislation. The report goes beyond legal concepts such as action in tort and/or restitution, and aims to propose answers to the fundamental question of how to achieve compensation for damages suffered by consumers. Some of the solutions put forward below would thus require considerable amendments to "traditional" concepts of tort law.

In Section 4, we briefly state the law as it currently stands and give the status of the use of remedies before European courts. In Section 5, we identify relevant obstacles likely to reduce the use of remedies by the consumer side.

In Sections 6, 7 and 8, various ways of improving compensation for consumers are put forward. Substantive and procedural issues are discussed in turn.

The European Commission has recently issued a Green Paper on damages actions for breach of the EC antitrust rules.[4] This report makes reference to and comments on the Green paper where appropriate, although the analysis has been carried out on an independent basis.

[4] COM(2005) 672 final (19 December 2005) accompanied by a Commission Staff Working paper, SEC(2005) 1732.

2. Current status

2.1 Competition law

This section looks at consumer protection under competition law (anti-trust law) in the narrow sense. In this sense, "competition law" means the legal rules protecting the market from artificial restrictions of competition created by market operators.

More specifically, this includes the rules laid down in Articles 81 and 82 of the EC Treaty, in addition to the corresponding legislation at a national level. Most EU and EEA countries operate harmonised competition laws, the basis and inspiration for which is the US Sherman Act.

Article 81 spells out the "cartel-prohibition", whereby any agreement, combination or concertation with the object or effect of restricting competition is prohibited, provided that it is not justifiable on other grounds (efficiency defence). Article 81 partly reproduces Section 1 of the Sherman Act. The main target of the provision is cartels, i.e. competitors that covertly fix prices or allocate customers/territories.

Article 82 sets out a prohibition of the abuse of a dominant position, i.e. where companies having market power act unilaterally to harm the competitive process and/or exploit customers in an unreasonable way. Abuses may be of several kinds, although most may be grouped as either anticompetitive (exclusionary) conduct or exploitative conduct. Typical forms of abuses are predatory price cutting, refusals to deal, tying and loyalty rebates. Article 82 equates to Section 2 of the Sherman Act.

In general, *all* competition law infringements ultimately harm consumers. This is due to the fact that competition law infringements harm the market mechanism, and hence harm consumers, who benefit from well-functioning markets. Consumers may be harmed directly, but most frequently indirectly. Most competition law infringements are remote from the ultimate consumer, with their immediate victims being the competitors or customers of the offenders, through which the competitive process is restricted. In turn, the reduced intensity of competition creates a less favourable market output than would be obtained in the alternative scenario without the infringement.

This is typically the case with cartels among manufacturers of raw-materials, where the overcharge is normally passed on to the ultimate consumer through the production and distribution chain.

It is also worth noting that quite a few forms of infringement – most typically the abuse of a dominant position – can *benefit* consumers in the short term, while the harmful effects (normally exclusion of competitors) occur in the longer term. This is typically the case for predatory price-

cutting. Consumers are not adversely affected until competition is restricted and the remaining operator raises his price above the competitive level.

These issues demonstrate that it might prove difficult to detect infringements, as the effects are indirect and not always immediate. Furthermore, where an infringement has been detected and a sanction has been imposed, it is difficult to establish exactly who has been hurt by the infringement and how. Although economic theory and experience show that it is the consumer who ultimately bears the burden, it is difficult to trace the effects of infringements to the requisite legal standard. Several solutions to these problems are discussed below.

From a consumer point of view, it is arguably price cartels which are most harmful. Furthermore, a functioning price cartel could be considered to be fraud, in that companies pretending to compete have made agreements *inter se* on what to charge. This amounts to a striking breach of confidence. Experience has shown that on average a price cartel may gain an increase in price in the range of 20–30 %, meaning that each consumer who has bought the product has suffered a corresponding loss.[5]

In addition, exploitation from dominant companies is also likely to harm consumers. This is typically the case where the company charges unreasonably high prices.

2.2 A right to damages?

A question which has been disputed in Europe over the years is whether infringements of competition law can give rise to an action in damages. At an EU level, this was recently answered in the affirmative by the European Court of Justice. The Court based its reasoning on the fact that EC competition law gives rights to citizens. Such rights are subject to the EC law requirement of efficient and equivalent protection before national courts. The requirement of protection includes a right to damages.

The leading case on this point is Courage, where the relevant parts read:

> "…the Treaty has created its own legal order, which is integrated into the legal systems of the Member States and which their courts are bound to apply. The subjects of that legal order are not only the Member States but also their nationals. Just as it imposes burdens on individuals, Community law is also intended to give rise to rights which become part of their legal assets. Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations

[5] See e.g. OECD: Hard Core Cartels, Third Report On The Implementation Of The 1998 Recommendation (http://www.oecd.org/dataoecd/58/1/35863307.pdf), Section 3.1 Estimates of Harm Caused by Cartels, referring to Connor, John M. (2004), "Price-fixing Overcharges: Legal and Economic Evidence", American Antitrust Institute Working Paper No. 04-05 (Draft available at http://www.antitrustinstitute.org/recent2/355.pdf).

> which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions …
>
> Secondly, according to Article [3(1)(g)], Article [81] of the Treaty constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market ….
>
> Thirdly, it should be borne in mind that the Court has held that Article [81](1) of the Treaty and Article [82] of the EC Treaty produce direct effects in relations between individuals and *create rights for the individuals concerned which the national courts must safeguard*…
>
> It follows from the foregoing considerations that any individual can rely on a breach of Article [81](1) of the Treaty before a national court even where he is a party to a contract that is liable to restrict or distort competition within the meaning of that provision.
>
> As regards the possibility of seeking compensation for loss caused by a contract or by conduct liable to restrict or distort competition, it should be remembered from the outset that, in accordance with settled case-law, the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals….
>
> 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 a contract or 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."[6]
>
> Consequently: The legal basis for the right of action is not disputed, and rights created by EC competition law are subject to the EU principle of efficient protection. A right to damages is a necessary prerequisite for such protection.

Under national competition law, the legal basis varies. Some countries have chosen to adopt specific rules in their national laws, while in others the legal basis for the claim is constituted by general principles of tort law. For example, this is the case for Norway, Denmark, France, UK and Italy. The legal basis is not disputed in any country. Specific provisions on a right to damages are found in e.g. Sweden (33§ konkurrenslagen) and Germany (Gesetz gegen Wettbewerbsbeschränkungen § 33). According to studies commissioned by the EC, there are various approaches in the Member States with regard to a requirement of fault.[7]

The US solution, where an express statutory right to damages has been laid down in the Sherman Act is worth mentioning here. This includes the right to threefold recovery – i.e. that the actual loss is tripled (so-called treble damages). There is no requirement of fault under this provision.

The provision (Sherman Act Section 4, Clayton Act Section 7) reads:

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[6] Case C-453/99, [2001] ECR 6297, at paras. 19-27.

[7] See the treatment of the topic in the Commission Staff Working Paper, Annex to Green paper on Damages Actions for Breaches of the EC Antitrust Rules, COM (2005)672 final, Section III.

> "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."[8]

As for the question about causation and calculation of damages, these are not subject to specific regulation, but must be decided on the basis of the general principles of tort law. The position is similar in the US, but case law has established a laxer standard governing the calculation of damages.

2.3 Consumer suits and competition policy

This section sets out the main arguments for and against consumer remedies in competition law. The aim is to point out that compensation to consumers is indeed a necessary requirement of efficient antitrust enforcement.

There are two groups of consumers harmed by competition law infringements. Firstly, of course, consumers who have bought a product and suffered from a higher price or an inferior quality, as the case may be. Secondly, consumers who could not afford to buy the product, and who have thus lost a benefit they were willing to pay for. This group of consumers represents the deadweight loss. When discussing compensation to consumers, both groups must be borne in mind, although focus is normally put on the first group. An ideal compensation mechanism would also compensate the latter, although this is difficult to achieve within the remedy of tort.

An overall goal of competition policy is to maximise welfare in society. This means to promote an efficient use of available resources. In this respect, a euro for the producers has the same value as a euro for the consumers. An example of this is the so-called efficiency defence in merger proceedings – if efficiency gains outweigh the deadweight loss, the concentration should be authorised.

From such a perspective, one might question whether consumers are worthy of legal protection under current antitrust law at all. This is due to two facts: that it might be argued that the consumer interest in competitive prices is not of concern to competition policy (as opposed to the efficient use of resources); and that providing compensation to consumers is costly, and thus in opposition to the efficiency goal. Put another way, only resources contributing to a more efficient enforcement of competition law should be spent.

[8] 15 USC 15.

Most competition law regimes in Europe are not based on a "pure" efficiency standard, but include consumer welfare as a relevant concern. In particular, this is demonstrated by the EC competition regime, where consumer interests are mentioned explicitly in the relevant articles of the Treaty. Most Member States have adopted harmonized national competition laws. Accordingly, consumer protection must be regarded as an independent goal of competition law throughout Europe. This means that consumer interests represent an interest worthy of legal protection.

The strong impact of consumer interests is demonstrated by EC competition policy. As early as in 1973, when considering whether to grant a consumer organisation leave to intervene before it, the Court of Justice stated that:

> "Since it is the particular objective of the union to represent and protect consumers, it can show an interest in the correct application of community provisions in the field of competition, which not only ensure that the common market operates normally but which also tend to favour consumers."[9]

Despite the fact that consumer interests must be regarded as worthy of legal protection, the impact of efficiency considerations should not be overlooked. At least two direct implications might be identified:

Firstly, consumer suits should arguably be framed in such a way as to promote compliance with competition rules. Consequently, they should have a *deterrent effect*. This reasoning appears to exclude solutions where consumer compensation is achieved, for example, by means of hypothecation of parts of fines to consumers, or other solutions where governmental funds etc. are used. Such solutions would promote compensation, but the costs associated with them would not be justified by more efficient enforcement and increased compliance.

This being said, arguably the mere fact that a consumer suit is lodged against a company would have a deterrent effect, above all because of fear of loss of goodwill. This is particularly true if a functioning system of compensation is established. Although it is difficult to measure, this effect cannot be disregarded and, in my opinion, constitutes a strong argument in favour of consumer suits.

Secondly, the use of resources associated with consumer suits should be minimised. In theory, the use of resources can only be justified if it contributes to a more efficient market output, e.g. by increasing compliance with the rules. However, if used in order to exclude consumer suits, such an argument runs counter to the fact that the Court of Justice has expressly stated that consumer protection constitutes a relevant goal, and that the competition rules grant subjective rights to individuals. The fact that achieving the level of protection is costly is not an argument against protection *in se*. On the other hand, it seems reasonable to conclude that

[9] Joined cases 41 etc./73, [1973] ECR 1465.

consumer protection should be achieved as cheaply as possible. This aspect is discussed further below in connection with the various solutions put forward.

2.4 Use of remedies

Compared to the US, where it is said that more than 90% of antitrust litigation is made up of private actions, private antitrust suits have been rather rare in Europe. There have been several out of court settlements, but only a few final judgements awarding damages for infringements. We are not aware of any successful consumer actions for damages.

Article 15(2) of Regulation 1/2003 requires Member States to forward to the Commission a copy of any written judgment made by a national Court relating to the application of Article 81 or 82 of the EC Treaty. Such judgments are published on the website of DG Comp.

None of the countries included in the reference group (i.e. Norway, Sweden, Finland, Iceland and Denmark), have reported successful competition claims by consumers. In recent years, there have been several settlements in response to antitrust litigation in the Nordic countries, but these are not in the public domain. Hence, the use of the remedy in damages is limited, and it seems reasonable to assume that successful actions have been limited to business plaintiffs. This is a strong indication that reforms are necessary in order to provide consumers with a workable remedy.

3. Identification of problems

3.1 Introduction

In this section, we try to identify the main challenges and obstacles to consumer lawsuits relating to competition law infringements. A claim in damages would normally have three phases: fault – causation – remedy. Within each phase, we discuss both substantive and procedural challenges. The three phases are discussed in turn.

First, however, we discuss issues related to the plaintiff. Finally, we discuss questions that are not of a strictly legal nature, i.e. questions relating to knowledge and awareness.

3.2 The plaintiff. Standing

Any successful lawsuit requires a motivated and equipped plaintiff. With respect to competition law, there are basically two issues relating to the plaintiff that can be problematic.

First, in situations where a large number of consumers have suffered small losses individually, none of them will have a realistic incentive to bring suit. Bringing suit is associated with a high risk, in particular with regard to lawyers' fees. This is particularly true in antitrust proceedings, as the cases tend to be complicated and often require extra judicial expertise.

In order to provide effective protection of such consumer interests, it is essential to find a way to organise the consumers. This can be done by means of a class-action, but this is not the only option available. Any solution that would either eliminate the risk associated with suits, or provide compensation without the consumer having to actively bring suit, would promote consumer protection.

Second, if consumers are to bring suit, they must be granted standing. The issue of standing (*locus standi*) does not, however, seem to constitute a real obstacle in the Nordic countries, as opposed to in the US, for example.[10] Whole classes of plaintiffs are not excluded, and as a general rule, if you say you have a claim, your case would be allowed to go to trial on its merits.

[10] Under federal antitrust law, an example is consumers having purchased a “price-fixed” product through a middleman. Such “indirect customers” are not granted standing under the rule of Illinois Brick, see further details below.

However, except for countries where class-action legislation has been implemented, there seems to be a lack of suitable procedural instruments safeguarding the collective interests of consumers. It is a paradox that while this collective interest is protected by the public enforcement of competition rules, the protection offered does not extend to the compensation for losses already suffered. Against this backdrop, one of the main challenges is to develop mechanisms capable of offering compensation to the victims of antitrust injuries.

One way of ensuring this is of course class-actions, which make it possible to join individual consumers together in a suit based on traditional tort law. Other options should not, however, be excluded. As long as the overriding goal is to offer protection, one should also consider whether the issue of compensation could be integrated into the existing regime of public enforcement. Arguments relating to this issue are further discussed below.

3.3 Fault, existence of infringement

It seems clear from the case-law cited above that there is no relevant doubt regarding the legal basis for claims for damages and/or restitution.[11] But although the legal basis is clear – i.e. the right to claims in damages is not disputed – lack of knowledge may be one factor that may partly explain the infrequent use of competition law remedies. This issue is discussed in 8 below.

There are, however, other problems related to the issue of whether an infringement has taken place, both on the substantive and the procedural level.

As regards fault, one may question whether a requirement of fault (as opposed to strict liability) would deter prospective plaintiffs. There is support in case-law from the Court of Justice that a requirement of fault has been regarded as contrary to the principle of efficient legal protection.[12] This point is also raised in the Commission Working Paper.[13]

There is limited experience of private actions under EC competition law, and it is difficult to judge whether a requirement of fault (the infringement being negligent or intentional) constitutes a *de facto* barrier to private action. Experience from public enforcement demonstrates that the infringement would normally in itself be sufficient to establish fault. The same seems to be true in tort law actions, at least with the way the requirement of fault is applied in the Nordic countries. Except in cases

[11] It should be noted that there is no case-law which explicitly authorises a claim in restitution for third parties under EC competition rules. However, bearing in mind the principle of efficient legal protection, it is unlikely that such a claim would be refused if it constituted an expedient and efficient way of ensuring compensation for an infringement.

[12] See case C177/88 Dekker, [1990] ECR 3941, at paras 24-25.

[13] See Working Paper, at paras 106 et seq.

where an excusable error of fact or law is present, the mere infringement constitutes a fault leading to responsibility. At least in Norway, it might be up to the defendant to adduce evidence that such a mistake is present. On account of this, we doubt that a requirement of fault constitutes a serious obstacle to successful consumer lawsuits.

However, it is clear that strict liability would simplify proceedings, thus contributing to more efficient enforcement. In addition, a clear rule on strict liability would arguably have a strong pedagogical effect. This being said, since the effect of fault as a requirement is not obviously negative, and a requirement of fault constitutes a very basic feature of most national systems of tort law, the option of introducing strict liability is not discussed further here.

At the *procedural level*, the question is whether the consumer plaintiff has a realistic chance of proving that the infringement actually took place. Arguably, the problem is less of an issue in cases of abuse of dominant position, where the question of the unlawful conduct is judged on the basis of observable factors such as prices, refusals to deal, discrimination etc, but far more acute when it comes to price fixing through hidden cartels, for instance.

Clearly, it is unrealistic to expect groups of consumers to be able to uncover infringements and to track down the conspirators on their own. The problem of detecting infringements is the basic reason for the wide powers enjoyed by the competition authorities. Save for cases where the infringement is clear-cut and "visible", e.g. geographic discrimination or unfairly high prices, the use of consumer lawsuits will be limited to so-called "follow-on litigation", i.e. cases brought after the public enforcement system has detected the infringement and generally after a binding judgment has been obtained.

Where a case has been investigated by the public enforcers, it is clear that valuable evidence will be in the possession of the authorities, regardless of whether a final decision has been reached or not. Various solutions which would allow consumers to benefit from evidence gathered by the competition authorities should be explored. It is also worth considering whether consumers could rely directly on decisions or judgments that have found infringements as a basis for claims for recovery. Furthermore, one could consider the possibility of public enforcers being obliged to claim recovery on behalf of consumers as a part of the enforcement agenda. These options are discussed further in 7. Other potential solutions to the problem of proof, going beyond "assistance" from the competition authorities, are discussed in 6.

3.4 Causation. Passing on

When a competition authority imposes a fine for competition law infringements, the authority does not need to identify in detail the consequences of the infringements. Normally, a mere finding of infringement suffices, although in some cases the finding of infringement presupposes that some form of anticompetitive effect (actual or potential) has been proven.

This is different for a private plaintiff claiming compensation. The private plaintiff must establish an infringement, a loss and causal link between the two. In a typical competition case, the challenge is to identify and quantify the economic effects of the infringement. This task is extremely difficult.

Nordic law on causation and tort is based on the principle of *conditio sine qua non*. This means that injuries that would not have occurred *but for* the infringement are recoverable. On the face of it, the problematic issue in competition litigation seems to be a procedural one, i.e. proving the effects of the infringement. However, the issue of causation raises problems of a substantive nature as well. Nordic law tends to limit liability by requiring that causation be direct. As competition law infringements are usually capable of sending a "ripple-effect" through the economy, the question arises of whether this limitation under current tort law runs the risk of jeopardising recovery claims from persons not directly trading with the infringers.

Cartel enforcement in Europe over the last forty years has demonstrated that cartels occur most frequently upstream – i.e. in the market for raw-materials and various inputs in the production of goods and services. Cartels at the distribution and/or retail level seem rarer. In these cases, consumers are *indirect customers* of the cartel members. This implies that consumers only are hurt where overprices are "passed-on" to the consumers by the intermediary. In these situations, the consumer plaintiff faces considerable problems in proving damages. In addition, it is not clear how the question about remoteness of damages can be solved by applying traditional principles of tort law. The overall trend seems to be that the requirements of causation are relatively strict.

The passing on challenge constitutes a basic problem with antitrust suits. Under the federal antitrust statute of the USA, the Supreme Court has established a rule excluding indirect customers (with some exceptions) from coverage. This rule is based on two landmark decisions of the US Supreme Court. In the first, Hanover Shoe of 1968, the Supreme Court held that a defendant could not escape a claim for damages by asserting that the plaintiff had passed the overcharge on to its customers.[14] The "defensive" use of passing on was thus ruled out.

[14] Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968).

The logic behind this decision partly explains the 1977 decision in Illinois Brick:[15] If a defendant cannot make "defensive" use of passing on, then why should an indirect purchaser be able to make "offensive" use of it by asserting that he has suffered a loss because an overcharge has been passed on to him? Thus, in Illinois Brick, the Supreme Court refused to grant standing to customers only harmed indirectly by the overcharge. The result of the two decisions is consequently that the passing on phenomenon is ignored, and that the direct customer may benefit from treble damages even where the overcharge has eventually been absorbed by an ultimate consumer.

The US solution is primarily based on two arguments: Effective antitrust enforcement and avoidance of "double jeopardy" for the defendant. Furthermore, the Supreme Court has stated that proceedings relating to passing on (i.e. tracing the overcharge) are overly complicated.

The judgement of the Supreme Court in Illinois Brick was, and still is, controversial. The Supreme Court position has led several states to issue legislation specifically granting indirect customers standing to sue for damages, so-called "Illinois Brick repealers".[16] These are discussed below under 5.2.

In this respect, attention is also drawn to Option 22 as put forward in the Commission Working Paper, which reads: "The passing on defence is excluded and only direct purchasers can sue the infringer." This option would introduce the US solution in Europe. From a consumer perspective, it should be avoided as it will deny recovery to large groups of victims.[17]

The problem is closely related to the issue of proving "what happened" to the overcharge, i.e. whether it was passed on or not. It is also true that one of main arguments of the US Supreme Court was that the passing on issue made antitrust litigation complicated and ineffective.

In the Nordic countries, the question of coverage for indirect purchasers is treated as an ordinary question of causation. It does not seem possible, under the current state of the law, to establish a fixed rule as in the US. However, the approach to so-called "tredjemannsskade" (damages derived from an intermediary), seems to imply some form of presumption that losses suffered by indirect customers are excluded from coverage. In practice, there is a risk that the result for consumers would be close to that obtained under US federal law, although each case must be assessed on its own merits. This indicates a need for legislative initiatives.

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[15] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

[16] As one commentator has put it: "Far from eliminating indirect purchaser claims from the landscape, Illinois Brick simply galvanised state legislatures and shifted the action in indirect purchaser suits from federal to state courts." (Edward D. Cavanagh: Illinois Brick: A Look Back and a Look Ahead, 17 Loy. Consumer L. Rev 1(2004), at 27).

[17] See however the statement made at para. 184, allowing for an exception guaranteeing consumer standing.

It is, however, difficult to solve the problem by granting the consumers a right to damages. The problem here is the middleman and his potential damages claim. If both indirect and direct customers sue, there is a risk that the same damage will be covered twice, something which would be problematic when seen from the defendant's perspective. Put another way, in order to avoid double jeopardy, the criteria applying both to the direct and indirect customers must be "symmetric", i.e. work in such a way that a successful claim from the one would exclude claims from the other, insofar as it would amount to coverage of the same damage.[18] Possible solutions are discussed below.

Causation and passing on also raises procedural questions, first and foremost about proof.[19] A typical antitrust infringement harms the competitive process of the market. This makes it essential to establish with a sufficient degree of certainty what the market conditions would have been *but for* the unlawful conduct. As indicated above, it is problematic to rely on the authorities, as they do not normally need to scrutinise and/or quantify the adverse effects on the market in order to impose a sanction or make a cease-and-desist order. The question here is thus whether the problem might be solved, for instance, by way of presumptions, shifting the burden of proof or adjusting the standard of proof etc. In US law, for example, there is a clear trend that once infringement is established, the requirement for proof of causation is set at a low level. Similar solutions seem possible to establish in Europe, although a legislative initiative might be required.

3.5 Remedy. Quantification and form of damages

The calculation of damages is an unavoidable problem within tort law. The main problem within a traditional tort law approach is in calculating the level of damages. This is closely linked to the issue of causation discussed above (existence vs. amount of damages). Again the challenge is to prove what would have been the economic outcome of the transaction *but for* the infringement. Furthermore, Nordic judges tend to adopt a precautionary attitude when calculating damages, i.e. they are inclined to "be on the safe side". There is no doubt that the challenges of collecting evidence, in combination with the attitude of judges constitutes a significant barrier to full coverage.

The problem is arguably most serious for price cartels, where the question is what the market price would have been but for the cartel. This normally requires other potential factors that affect the market price to be eliminated. In cases of abuse of a dominant position, the task is some-

[18] Although experience arguably demonstrates that the risk of multiple recoveries may have been exaggerated.

[19] Cavanagh, cit., makes the observation that "as we work our way down the distribution chain, the monetary incentives to sue decrease while the difficulties in proof increase exponentially."

times easier, in particular where the quantification includes normative elements, as is the case for unreasonably high prices, for example. However, other forms of abuse might pose identical problems, e.g. predatory price cutting and other forms of exclusionary conduct, where the relevant question is what the competitive price would have been if the company excluded had remained on the market.

Although an analysis of the gain stemming from the infringement is carried out in public competition law proceedings (as one element relevant to the calculation of a fine), this does not always correspond to losses suffered by consumers. In addition, such analyses will not necessarily meet the required standards of proof in civil proceedings, as they are carried out for different purposes. Again, this means that problems should ideally be solved within the framework of the civil proceedings, e.g. by adjusting the standard of proof.

However, one should not exclude the potential for solutions on the substantive level. On this point, there seems to be a tension between the concepts of tort law – individual identifiable harm – and the effects of competition law infringement. The problem is therefore fundamental in its nature, stemming from the need to calculate the precise amount of compensation. The issue of calculation is further discussed below under "standardisation of damages".

Furthermore, once the overcharge has been fixed with reasonably certainty, the question arises of what is the most efficient way of compensating consumers. Damages are currently granted as a lump sum. Where individual persons have suffered considerable losses, this is an effective and safe means of recovery. Where a large circle of consumers have suffered only a small or even negligible damage, this method of compensation is less efficient, in that administration and transaction costs reduce the effective payment considerably.

The issue is therefore whether there are other realistic ways of compensating consumer victims, e.g. by way of mandatory price cuts or rebates on repurchases. This is also related to the point on calculation discussed above. Arguably, there should be some form of symmetry between the nature of the damages and the nature of the recovery. As calculation of damages is troublesome, a solution where this is not required would be preferable. This is discussed in 5.3.

3.6 Awareness, knowledge and pedagogical challenges

Most consumers are not aware that they can potentially claim for damages resulting from competition law infringement. Indeed, the same is true for the legal profession, as well as the authorities (although DG Comp has recently emphasised this aspect of competition law enforce-

ment in its Green Paper on Damages). On this point, the lack of a clear and explicit legal basis for recovery claims is fundamental.

Provided that the procedural and substantive mechanisms are present, knowledge is a necessary prerequisite in order to give incentives to bring suit. Furthermore, widespread knowledge among consumers of the harm stemming from competition law infringements would reinforce the deterrent effect of competition law prohibitions, as infringements would create an even more negative focus on offenders.[20]

Increased knowledge of competition law more generally would also be likely to help uncover illegalities, as consumers would report potential infringements to the authorities more frequently.

It is clear that there is a pedagogical challenge regarding awareness and knowledge. Some of the tools that can be used in this area are discussed in Section 9 below.

3.7 Conclusions

The discussion has detected several problems related to consumer lawsuits under competition law. An important challenge, and a question that must be answered, is whether the overriding goal of ensuring compensation to consumer victims of competition law infringements should be realised within a traditional system of tort law, or whether new and specially adapted mechanisms should be introduced. Under the traditional tort law approach, the victims themselves must claim compensation before a court, and adduce the required evidence on fault, causation and loss.

With regard to consumer action following competition law infringements such a system raises several problems, first and foremost related to proof.

One might question whether lack of evidence really constitutes a valid explanation for the infrequent use of consumer suits. Other factors might be relevant as well. However, there seems to be a wide consensus that questions relating to evidence form a basic and important obstacle for more effective private antitrust enforcement. This is also evidenced by US case law, where the courts have explicitly applied laxer standards of proof to certain questions.

The problem of proving damages occurs on all levels of the case: Fault – causation – remedy. In addition, consumer interests are collective in nature, something which requires specially designed procedural instruments in order to achieve efficient protection.

Measures to improve the potential for consumer recovery – if one is to work within the framework of traditional tort law – need to be targeted at

[20] Demonstrated by the "claim your money back" campaign launched by the Swedish newspaper Expressen after the SAS/Maersk cartel was uncovered.

easing the burden the traditional system imposes on the plaintiff, and facilitating effective organisation of consumers. Furthermore, certain issues of a substantive nature, first of all the question about causation and remoteness, may deserve particular regulatory initiatives in order to avoid legal uncertainty.

However, one should not lose sight of the fact that there might other options available outside the traditional scope of tort law, although such solutions may require more extensive regulatory measures. In the following sections, both options are considered. We have chosen to discuss substantive and procedural steps separately.

4. Potential solutions – substantive issues

4.1 Introduction

In this section, we examine potential substantive solutions to the problems identified above. These are primarily related to causation and calculation of damages. The discussion starts with the passing on issue, and continues with questions regarding the calculation and form of damages.

4.2 Passing on and causation

The basic question regarding passing on is whether a general rule to eliminate the problem of proving what exactly "happened to" the overcharge should be implemented. Furthermore, the status of claims from indirect purchasers has not yet been tried before a court, and the protection of these groups thus seems unclear. On this point, we have been asked

- to assess whether indirect customers *de lege lata* have standing, and
- propose solutions that ensure that indirect customers are not automatically excluded from coverage.

At the outset, it is recalled that the solution under Federal US Antitrust is to deny indirect purchasers standing. This rule rests on several policy arguments, the key to which is to avoid complex litigation and to increase the effectiveness of enforcement action by restricting coverage to the plaintiffs who are regarded as the most suited – i.e. the direct purchasers. Although the rule does not deny standing to consumers as such, it effectively bars the majority of potential law suits.[21]

It should, however, be noted that a majority of the states, under state law, have introduced so-called "Illinois Brick repealers", i.e. legislation allowing damage suits from indirect purchasers under state antitrust law.[22] The main driving force behind these rules is the aim of compensating consumers. The exclusion of indirect consumers from coverage under

[21] As a matter of fact, the US Supreme Court refused to deny standing to consumers in Reiter v. Sonotone (442 US 330 (1979).

[22] See for statistics Kevin O'Connor: Is the illinois Brick Wall Crumbling?, 15-SUM Antitrust 34, for a criticism see John E. Lopatka/William H. Page: Indirect Purchaser Suits and the Consumer Interest, 48 Antitrust Bull. 531 [2004], for a discussion of various options for solving the problems created by specific state statutes see Cavanagh, cit.

the Illinois Brick rule, gave rise to strong reactions immediately after the decision. The paradox that the *real* beneficiaries of antitrust law were cut off was evidenced by Justice Brennan's dissent in Illinois Brick, making reference to fairness and compensation, and valuing "reasoned estimation" over unachievable precision in apportioning damages.[23] State law "repealers" are thus based on compensation, contrary to the federal rule which primarily rests on deterrence.

This legislative power on the part of the states has been recognised by the US Supreme Court in California v. ARC America, holding that "There is no claim that the federal antitrust laws expressly pre-empt state laws permitting indirect purchaser recovery."[24]

Nineteen states, in addition to the District of Columbia and Puerto Rico have statutes explicitly permitting actions by or on behalf of indirect purchasers.[25] Another 17 states permit recovery on the basis of state consumer protection law or state unfair trade practices statutes. Apparently, there is a trend in US state legislation to provide for protection of indirect purchasers. This means that the federal rule of Illinois Brick has effectively been undermined at the state level, particularly if the fact that the 36 states authorising such suits cover more than 70 % of the US population is taken into consideration.

According to commentators, these state law "repealers" have created many of the problems which the US Supreme Court wanted to avoid when formulating the Illinois Brick rule, e.g. the risk of "massive multiparty litigation involving many levels of distribution and including large classes of ultimate consumers remote from the defendants".[26] According to Lopatka and Page, the indirect customer rules under state law actually contradict the very goal of efficiency under antitrust law.[27]

With this criticism in mind, one should examine the experience that can be drawn from the current rules under state law before turning to the proposition of a similar regime at the European level.

Commentators have opposed the state rules on indirect customers' recovery basically for two reasons. The first, typically argued by Chicago

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[23] Id.730-35.

[24] 490 US 93, 101.

[25] See e.g. Code of Alabama, § 6-5-60: "Any person, firm, or corporation injured or damaged by an unlawful trust, combine or monopoly, or its effect, direct or indirect, may, in each instance of such injury or damage, recover the sum of $500 and all actual damages from any person, firm, or corporation creating, operating, aiding, or abetting such trust, combine, or monopoly…", CaliforniaBus. & Prof.Code § 16750: "Any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter, may sue therefore in any court having jurisdiction in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and to recover three times the damages sustained by him or her, interest on his or her actual damages…". Some states limit the indirect purchaser recovery to *parens patria* suits, see e.g. Idaho Code, § 48-108(2): "The attorney general also may bring a civil action in the name of the state, as parens patriae on behalf of persons residing in this state, to secure monetary relief as provided under this chapter for injury directly or indirectly sustained by those persons because of any violation of section 48-104 or 48-105, Idaho Code…". Further references in Cavanagh, cit. footnote 4.

[26] 431 US 720, 740 (1977).

[27] Cited supra.

school scholars, is that it jeopardised the overriding goal of antitrust enforcement: Optimal deterrence. The relevance of this criticism is, however, unsure, as there is no authority for optimal deterrence being the sole goal of antitrust enforcement. In a European context, denial of recovery for classes of plaintiffs would also arguably contradict the clear expressions of the Court of Justice that the competition rules confer rights on private parties, rights that must be protected by the national courts.

Another and more serious argument is that the indirect consumers' class-actions do not provide for a proper compensation of victims and can indeed give no compensation at all. This argument is worth exploring further. Basically, it relates to the functioning of the *class-action* institute as such, and should thus be considered alongside section 7.6. below. For the sake of completeness, the arguments are reproduced here.

According to Lopatka and Page, this is so for two reasons:

> "It turns out that, in two key procedural contexts, courts have repeatedly found indirect purchaser class-actions wanting as mechanisms for compensating consumers. First, courts have frequently refused to certify indirect purchaser classes, particularly putative classes consisting of consumers, because individual issues predominate over class issues. Second, courts that have certified these kinds of classes have found, after the cases have settled, that they cannot in fact provide compensation to consumers. The remedy provisions instead resort to costly cy pres measures that pay damage awards to groups who did not pay any overcharge. In the end, indirect purchaser litigation provides precious little compensation to consumers."

According to the authors, the classes of indirect customers often fail to meet the tests laid down for the certification of a class. This is i.a. the case because one may not apply one uniform model for calculating the harm made to the individual members of the class. Legal requirements – although varying between the states – that there are issues common to the class, and that these issues are predominant, have proven difficult to meet. For direct purchasers, both the question of illegal conduct and the question of the fact and amount of injury represent issues common to the class. This is not the case for indirect customers, where issues relating to causation might be different for the different class members. On these grounds, certification of indirect classes has been denied in a number of cases.

These arguments cannot, however, be automatically transferred into a European context. Issues of certification must necessarily be resolved under national law on class-actions, and suitable mechanisms for consumer class-actions under competition law must be provided.

The other argument relates to distribution of settlement funds. First, it has been submitted that the redistribution of funds collected by the class represents a higher cost than the compensation as such. Second, it has been argued that the level of recovery is in many cases too small for con-

sumers to bother claiming it. Thirdly, attempts to distribute funds to consumers involve gross approximations of real harm.

Experience shows that, in many cases, courts have distributed funds under the cy pres doctrine. This means typically that part of the fund is donated to worthy causes. For example,. in the case of Toys R Us, the fund was used to distribute millions of dollars worth of toys to children nationwide. The Microsoft case, a settlement which ultimately was refused due to underfunding, would have included the donation of vouchers for the purchase of software by schools. Other examples include the donation of funds to treatment for disabled children.[28]

The actual experience with indirect customer class-actions under US state law is thus not entirely positive. Possible options in order to avoid similar problems occurring under a European regime are discussed further below.

Returning to the substantive question of passing on, there do not seem to be considerable variations between the Nordic countries as regards the current state of the law. The question is governed by the general principles of tort law, and each case is assessed on its merits.

In the case of Norway, the main rule is that only damages representing "a specific and proximate interest" (translation of "konkret og nærliggende interesse"), are recoverable, a rule which may be compared to the common law concept of "proximate cause". The essence is that the line of causation must be immediate. In the assessment, many factors may be relevant, such as the degree of fault, whether the damage was foreseeable, risk assessments etc.[29] The other Nordic countries operate similar rules on causation.

Although Nordic judges seem to have taken a strict approach to the question of causation, the fact that an overcharge has been passed-on will not automatically exclude the consumer from coverage. A clear line of causation must, however, be established.

On this basis, it is arguably not necessary to introduce a rule "guaranteeing" consumers a damage claim. The risk of cut-off legislation seems fairly low. On the other hand, one must be aware of legislation having a similar effect, e.g. the (now abolished) Swedish rule that only undertakings/competitors had standing to sue, and the (current) Section 18A of the Finnish Competition Act, where recovery is reserved for business plaintiffs, thus excluding consumers.[30]

An argument in favour of an explicit right to damages for indirect customers is the need to avoid litigation on the question of whether losses derived from an intermediary are subject to recovery at all. Legislation might also prove necessary in order to supersede restrictive attitudes

[28] See for further cases and references Lopatka and Page, cit.

[29] See Rt 1955.852, Rt. 1973.1268, Rt. 2000.1756.

[30] A damage action might be possible under general principles of tort law, but no successful suits have been lodged so far.

among judges – although this is rather an argument on the pedagogical level.

Overall, however, we doubt that it would be necessary to introduce substantive rules governing the question of passing on. Consumers do have a right to damages, provided that factual causation is present. Arguments that indirect consumers are outside the scope of protection for the reason that their injury is derived from an intermediary would not be valid.

The position is thus that indirect customer claims are possible under substantive law. Making these claims operational does, however, seem challenging.

The point here is that passing on indeed is hard to prove, as a matter of factual causation. It is also true that a line of judgements where the claims from indirect customers are dismissed would both deter future law-suits and give a signal to judges. Over time, there is thus a risk that consumers might face a *de facto* exclusion. This raises the question of potential solutions to the more factual side of the passing on problem.

If one is to operate within the framework of traditional tort law, it is difficult to avoid the problem of passing on. The issue touches upon the very basic principle of tort law, that causation between the wrongdoing and the economic loss has to be established.

However, from a legal point of view, there are different ways of handling questions about causation. On the one hand, it is clear that not all damages caused by the wrongdoing are recoverable. On the other, it is clear that factual causation might be established by means of legal presumptions or rules on the burden and/or standard of proof.

The question is first whether it is possible to introduce some form of presumption regarding passing on. (Issues of proof are considered below). Economic theory demonstrates that antitrust injuries in many cases will be passed-on to the consumers, and will not be absorbed by the intermediary. On this basis, one could propose the introduction of a rule on presumption that consumers *are* hurt, provided that anticompetitive conduct has produced adverse effects on competition upstream.

This being said, one should bear in mind that economic theory demonstrates that the actual "rate" of passing on is dependent on several conditions. These are basically whether the overcharge affects variable or fixed costs, the conditions of competition downstream (a monopolist would in some cases absorb the overcharge himself), and the time-horizon to be assessed.

Given that economic theory teaches that passing on, in a situation where rational behaviour is presumed, depends on the facts of the case, it is doubtful whether a rule of presumption would receive support.

One could possibly consider introducing a rule whereby consumers were entitled to damages, regardless of whether causation was demonstrated or not. Such a solution would, however, contradict the very basic

principle of causation in the law of tort. This would also have a bearing on the principle that a wrongdoer should not pay twice for the same damage. If *both* the immediate customer and the indirect consumer sued, the offender would run the risk of having to pay the overcharge back twice. For these reasons we doubt that it would be possible to obtain the necessary support.

The arguments put forward above, in addition to the US experience as described, indicate that the solution is difficult to find within the traditional mechanisms of tort law. A more tempting proposal is to make use of government intervention, e.g. by a consumer agency or another body, which would be free to distribute sums recovered in the way they saw fit. This, in combination with some "cut-off" rule of *direct* customer, would arguably provide workable solutions both to the problem of apportioning the overcharge among the different levels of distribution, and to the problems of distributing settlement funds. A solution along these lines is developed further below under 7. A solution where consumer compensation is provided for by public suits should not bar individual claims from consumers, choosing to "opt-out" from the public law-suit.

4.3 Standardisation of damages?

For certain types of competition law infringements, the question of how to calculate damages is essential. This is especially true for hidden cartel arrangements, where the challenge is to establish with a sufficient degree of probability the "but-for price", i.e. what the market price would have been but for the cartel arrangement. The same is true for the long-term effects of predatory pricing and other exclusionary conduct. In fact, for most antitrust injuries it is necessary to establish a "but-for" situation, and even to establish a "but-for" development of the market. This task is complex and costly.

> For a discussion of methods of calculating damages, see the survey in the Commission Working Paper, page 38 et seq. Such methods have the common feature that they are sensitive to the inputs, as are all economic models. Making judges more familiar with them would of course facilitate their use, but experience from the US of "economics in the courtroom" is not entirely positive. The use of such methods is not discussed further here.

In other situations, the amount of damage done is a question of a normative nature, i.e. in the case of "unreasonably high prices", where the judgement of what is unreasonable determines the question of damages.

Experience shows that a cartel would normally be able to overcharge by 10 percent. This raises the question of whether damages could be standardised, for example by setting the damages as a fixed percentage of the actual price paid.

Such a solution would avoid the problem of calculating damages, but would not resolve questions of causation, i.e. it would still be necessary to establish that the infringement actually had the adverse effects representing the damage. (The *existence* of damages would have to be proven, while the *amount* of damages would be fixed). Proving the fact of injury might also be a complex task, although not as difficult as calculating the exact amount. However, the marginal effort involved in ascertaining an amount with reasonable certainty is not necessarily large, once fact of injury has been proven.

On the other hand, it seems clear that standardisation would create stronger incentives to bring suit. Furthermore, standardisation would avoid complex litigation over the exact amount of the damages, making it possible for the plaintiff to focus resources on other issues.

There are, however, certain problems associated with standardisation. It is clear that the potential outcome for offenders varies considerably between different forms of infringements. There is no empirical evidence of the 10 percent overcharge effect for other forms of infringements than price fixing. This fact demonstrates that a fixed rate of damages could not necessarily apply to all forms of infringements. If one rate with *universal application* was to be fixed, it would arguably have to be lower than 10 percent.[31] However, such a rule could deprive consumers of compensation in cases where the actual overcharge was higher. If one were to fix a special rate for price fixing, one would have to define the term "price fixing" very precisely. Again, this would create new problems – in particular it would introduce new issues into the litigation. Furthermore, it is doubtful whether the empirical evidence is strong enough to articulate a general rule, even for specific infringements like price-fixing.

Under Option 19 of the Green paper, the commission proposes to issue guidelines on the quantification of damages. Apparently, such guidelines would spell out the principles and tools for quantifying damages. However, the guidelines could also include normative elements, e.g. presumptions of minimum damages for various forms of infringements.

However, it must be regarded as doubtful whether standardisation of damages, in the form of fixed rates for different infringements, would be a feasible way of assuring the compensation of consumers. In the Nordic countries, a judge may use his discretion to fix the amount of damages if the amount is disputed (ex aequo et bono).[32] According to the Commission study, this possibility applies in a number of jurisdictions.[33]

A better way to deal with the problem is arguably through a more liberal use of this approach. The important point here is to provide compensation – while at the same time avoiding running into complex economic assessments of what the hypothetical market price would have been in the

[31] See Connor, cit. note 2 above, for findings of average illegal overcharges.
[32] For Norway, cf. Tvistemålsloven § 192, for Sweden 35 kap 5 § Rättegångsbalken.
[33] Working Paper, para 137 et seq.

absence of the infringement. One should also note that the passing on problem adds to these challenges, as one will, after having assessed the amount overcharged, have to trace the overcharge down the distribution chain. This is a strong indication that if compensation is the goal, one cannot apply too strict a test when assessing damages.

If one went beyond traditional tort law, one could base the damages on the gain achieved by the infringers, and arguably link consumer recovery to public enforcement.[34] One option would be to hypothecate parts of fines imposed to consumer compensation. The possibility of public agencies aiding consumers is discussed in greater detail below. It is, however, important to note that such public involvement may provide solutions to the challenges discussed in this section.

If standardisation is chosen as the preferred approach, the standard rate should not be binding on the courts, but it should rather be introduced as a rebuttable presumption. This would be necessary in order to avoid unreasonable results. For instance, the rule could be that the damages would be set at 10 percent unless the defendant adduced evidence that it was lower.

4.4 Form of damages

A general feature of tort law is that damages are normally paid as a one-off settlement. In antitrust cases – and in particular in cases where the ultimate loss is borne by consumer – any infringement will harm a large number of victims, each individual victim having suffered only a small or negligible amount of damage. Providing compensation in such cases is costly, time-consuming and is hardly in conformity with competition law's stated aim of promoting efficiency. Although the ideal solution would be to apportion damages among consumers so as to compensate the losses of individual consumers, this seems difficult to achieve in the real world.

The question therefore arises whether it would be possible to grant damages in an alternative form that would eliminate the apportionment problem while at the same time ensuring the effective compensation of victims. Such alternative forms could also contribute to reducing the problem of assessing the amount of damages.

It could be argued that there should be symmetry between the nature of the damage and the nature of recovery. As antitrust infringements harm the market, and produce adverse effects for a large number of purchasers, it is logical to assume that recovery should work in a similar way, i.e. by benefiting the market and creating a positive outcome for a large number of players.

[34] See also Option 15 of the Green paper.

One way of achieving this would be to impose a mandatory price-cut on the offenders. In order to work within the system of tort law, the amount and period of time would have to be linked to the damage caused by the infringement. After the amount of damage had been calculated, the mandatory price-cut imposed by the court could be seen as an easy way of distributing the award among the members of the group. Thus, a price-cut would not be very different from an ordinary damage award – it would be the mode of payment which would differ. Actually, in my view and at least under Norwegian law, it is doubtful whether this solution would have to be based on specific legislation. Although the general rule under Norwegian law is that damages are awarded as a lump sum, there is nothing in tort law prohibiting other forms of damages from being awarded.

There are, however, problems associated with this solution. The first one is that the consumers purchasing the product in the future are not necessarily the same people who paid the overcharge in the first place. This will necessarily depend on i.a. the nature of the product. E.g. is it a car or a sandwich? While the car is an investment that is meant to last several years, the latter constitutes a purchase made daily or at least frequently. A mandatory price-cut imposed on car importers for past price fixing is unlikely to compensate the victims.

Of course, one may choose to accept this effect, if one considers the consumers as a group rather than as a number of individual victims. Arguably, if price-cuts were imposed regularly in antitrust proceedings, individual consumers would one way or another be compensated – although not necessarily by the offenders who originally harmed them. This solution seems logical, because the recovery would work more or less in a similar way to the harm caused by the infringements. However, it is doubtful whether the solution would be compatible with basic principles of tort law. Furthermore, there is no tradition of such "cy pres" awards in European courts. If this approach were to be adopted, it would therefore require legislation empowering judges to make such awards.

Secondly, in cases where an original harm has been passed on to consumers through an intermediary, ordering the upstream offender to cut prices over a period of time would not necessarily benefit the ultimate consumers. No guarantee exists that the price cut would be passed on to the consumers. Rather, the beneficiaries would be the shareholders of the intermediaries, unless passing on was made mandatory by the order. This does not, however, seem realistic. In the US, where the damages claim is restricted to direct customers, it has been argued that the solution to the passing on problem indeed benefits the indirect customer as well, because the intermediary passes back the damage award to the consumer. However, this assumption has also been heavily criticised. This is due to the obvious fact that the "passing back rate" depends on the same variables and thus uncertainties as the "passing on rate". These arguments demon-

strate that mandatory price-cuts are more suitable when applied directly to the ultimate consumers, and less suitable as a solution to upstream infringements.

Thirdly, ordering a price-cut could have an impact on competition. If a company is ordered to cut the prices applied to its ordinary production and sale of a product, it will inevitably force other competitors to decrease their prices in order not to lose customers. Indirectly, price cuts would thus "punish" other competitors as well. Furthermore, for a price cut to have any real effect, prices need to be set below the level that would otherwise have been the market price. The potential for a price cut is thus dependent on the conditions of competition in the market. Most economists and competition lawyers are sceptical about intervening in a market through price regulation. In order to "compensate" future consumers, a better solution seems to be to create workable competition in the market.

These arguments show that the effects of mandatory price-cuts as a remedy are not entirely positive. This form of remedy seems, however, most suited to markets where one dominant company has exploited consumers by overcharging.

Other forms of damages can also be considered. If the main problem is the distribution of the award within the group of consumers, one could think of awarding the amount to the group as a whole. Such forms of compensation could also allow a more gain-based approach to the question of calculating damages. The idea is thus that the gain achieved by the infringement is "passed back" to the consumers as a group.

Such collective compensation could be made in the form of improving consumer protection through other activities (e.g. by financial support to promote consumer interests). One typical activity would be to introduce measures in order to restore effective competition in the market, e.g. by increasing transparency by information campaigns directed towards consumers. (Such compensation would in the longer run also have the potential to cancel out the damage made to specific consumers, if they were to benefit from more effective competition or were put in a position to make more efficient use of the competitive process).

The discussion demonstrates that there may be other ways of compensating consumers than through traditional lump sum damage awards. Both mandatory price cuts and "cy pres" awards that distribute damages on the basis of reasonableness or for the protection of collective consumer interests could be considered. Although not to the exclusion of the use of traditional damages where appropriate, the legislative framework should provide for such options.

The success of such remedies is dependent on suitable procedural mechanisms. It is doubtful whether such remedies may be successfully implemented by way of class-actions, in that the "reward", i.e. the potential upside of bringing suit (a class-action) would be less direct than is the

case with "traditional" damages. On this point, it is necessary to distinguish between collective actions (a claim brought on behalf of an affected group), representative actions (a claim brought by a representative organisation, e.g. a consumer organisation) and actions brought on behalf of consumers by a public agency, e.g. a consumer agency. Arguably, the remedy would be less efficient within a collective action, as the group representative would lack incentives to bring suit, unless compensated particularly, e.g. by entitlement to a percentage of the award made. However, such solutions would arguably facilitate unmeritorious or speculative claims.

A better option might be to couple "collective compensation" with representative actions, i.e. for consumer organisations to bring suits on behalf of their members. The damage award could be given to the organisation, although it should be dedicated to activities benefiting consumers regardless of membership. (This could be supervised by an external auditor).

A third option would be to integrate such remedies into public enforcement, or to reserve them for consumer agencies. Such options seem, however, less attractive than the potential of increasing the fine and hypothecating parts of it to promotion of consumer interests in the market adversely affected.

This mechanism would also require some form of coordination with suits brought by consumers, in order to avoid double jeopardy.

4.5 Conclusions

As regards substantive solutions to the problems identified in 4.5, the focus has been on the calculation of damages and alternative forms of compensation. If one works within traditional compensation-based tort law, the problem of quantifying damages is unavoidable. As tort law inevitably focus on individual damage suffered by individual consumers, it is difficult to suggest approaches that would clearly facilitate consumer recovery.

This is different if instead the damage is defined as a collective harm suffered by the consumer community as a whole. With this in mind, damages can more easily be calculated on the basis of the overcharge gained by the infringers. "Collective compensation" may involve other remedies than traditional damage awards in the form of lump sum payments, e.g. contributing to the restoration of an efficient competitive process in the affected market and teaching consumers how to benefit from it.

If you base your approach on individual damage, the problem of passing on is fundamental. Rules should be introduced to clarify the ultimate consumer's right of action, but it is difficult to design a system where recovery is effectively guaranteed. A basic problem is the need to avoid

double jeopardy for the infringer, i.e. the risk of him having to compensate both the intermediary and the end-user. However, arguably the risk of double jeopardy is not very big, and one can also question whether the infringers' right to protection outweighs consumers' need for compensation. Arguably, if some kind of collective compensation is implemented, the middleman could be granted a stake in the process. Such solutions, where the direct and indirect purchasers join forces, could prove efficient. A more radical solution – in order to avoid double jeopardy – would be to give public enforcement some form of "right of first refusal" over the middleman's suit. Such a solution is discussed below in section 7.

5. Potential solutions – procedural issues

5.1 Introduction

In this section, we discuss solutions that may be implemented on the procedural level. The topics discussed fall into two categories: questions relating to the organisation of plaintiffs and questions relating to evidence and access to information.

The treatment of substantive issues introduced certain options related to "collective compensation". The discussion in this section departs from the traditional tort law regime, but incorporates specific needs brought about by the substantive adjustments discussed above.

The discussion proceeds on a rather general level. More detailed procedural options aimed at facilitating private enforcement of competition law, e.g. the possibility of cross examination of witnesses, the use of economic experts in courts, etc., are dealt with in the Commission Working paper.

5.2 Access to information and evidence

Competition law infringements are hard to detect. Consumers are not themselves capable of carrying out the investigations required except, perhaps, in cases of overcharges by dominant companies.[35] The competition authorities are vested with extensive investigative powers, and these are regarded as a necessary prerequisite for efficient antitrust enforcement. Private litigants, and in particular consumers, will necessarily need assistance with preparing their case. The existing possibilities relating to the mandatory production of documents in response to court orders are clearly insufficient to this end.[36]

Consumers are therefore dependent on the investigations carried out by public authorities. The question is how consumers could benefit from information and evidence gathered by the authorities.

There are two main ways: benefiting from the information as such, i.e. by bringing suit independently but on the basis of evidence gathered by the authorities, or benefiting directly from a legally binding judgement

[35] In Sweden there has been a proposal to allow investigations on behalf of private persons in competition law cases (conducted by "Kronofogden"), but the proposal has not received support so far (SOU 2004:10).

[36] See for a survey of the Member States Commission Working paper.

and/or decision by the competition authorities. These aspects are discussed in turn.

As the law stands, the legal possibility of sharing information varies between the jurisdictions. The same is arguably true for the competition authorities' willingness to contribute to private litigation. However, some competition authorities will regularly grant access to evidence for litigation purposes.

In the Nordic countries, it is only the Norwegian Competition Act which explicitly provides for a legal possibility that the competition authorities may "open their files" to prospective litigants.

In Norway, according to the Competition Act, Section 27(2)

> "Anyone with legal interest may demand access to documents with the competition authorities in cases that have been concluded regarding infringements of Section 10, Section 11, or orders pursuant to Section 12. For this right to access to include information subject to statutory required confidentiality, access must not appear unreasonable to those to whom the information pertains. Upon requests for access to information subject to confidentiality according to this provision, those for whom the confidential material pertains must be so notified and given a deadline for submitting their view on the matter. Rejections of requests for access may be appealed to the Ministry."[37]

It follows that the Norwegian Competition Act provides for formal access to information and evidence. The condition "legal interest" would normally be satisfied if a person wishing to sue for damages applies for access. This possibility has been used on several occasions, but we are not aware of cases where access to information has been granted to consumers or consumer organisations.

In order to create realistic opportunities for private litigants, some form of legal instrument assuring access to information is required. On the other hand, the alleged infringer would also have a legitimate expectation of confidentiality, in particular regarding trade secrets. In this regard, the Norwegian solution seems to balance these diverging interest in an appropriate way.

One obstacle to the sharing of information is the existence of leniency programs. An unconditional right to obtain access to information submitted by the infringers with a view to using it for litigious purposes would clearly jeopardise the proper functioning of the program. However, this would not exclude the possibility of acquiring the same material by way of a court order at a later stage.

The "protection" offered by the leniency program is only granted to the "whistle-blower". Thus, the fact that material has been collected under a leniency program should not block the authorities from passing it on for the purpose of making claims against other parties to the infringement. In order not to deprive the private plaintiff of this opportunity, ar-

[37] Unofficial translation from www.kt.no. (Website of the Norwegian Competition Authority).

guably one should introduce a rule preventing material from being used in litigation against the whistle-blower.

The *findings* of the competition authority, as well as evidence gathered by independent investigations, should in any case not be protected from being passed on to prospective plaintiffs.

A more radical solution would be to make favourable treatment under the leniency program conditional upon some form of compensation being paid to customers and/or consumers. However, such a solution might interfere with the incentives to "turn oneself in" created by the leniency option, and is therefore probably not viable.

5.3 Evidential value of judgements and administrative decisions

As indicated above, the other way consumers may benefit from information in the authorities' possession is to rely directly on a judgement and/or binding administrative decision by the competition authorities. If such decisions were binding upon the courts, this would clearly make it easier to establish the existence of liability.

There are at least two ways in which this issue could be dealt with: the first is to make decisions under the administrative/ penal procedure legally binding in private follow-on litigation. Such a rule would avoid the need to re-litigate on the question of whether an infringement has taken place, and the private plaintiff could focus on establishing causation and loss. The second way is to regulate the *evidential value* of such decisions in future proceedings. This option would only create a rebuttable presumption that an infringement had taken place, but would also ease the task of the private plaintiff.

In the US, judgements and consent decrees under public enforcement have value as *prima facie* evidence of infringements in subsequent private actions.[38] This means that they create a presumption, although any presumption would be rebuttable.

In the UK, Section 58A of the Competition Act says that in cases regarding claims for damages under either national or EU competition law: "In such proceedings, the court is bound by a decision mentioned in subsection (3) once any period specified in subsection (4) which relates to the decision has elapsed."[39] Such decisions are decisions either by the

[38] 15 USC 16a reads: "A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto."

[39] See consolidated version of the Act on http://www.dti.gov.uk/ccp/topics2/pdf2/compact1998consv31.pdf.

Office of Fair Trading or the Competition Tribunal finding infringements of the national or EU competition legislation.

Under EC law, the decisions of the Commission are not legally binding in subsequent private litigation; however, the general duty of sincere and loyal cooperation would prevent a national court from making a ruling contrary to a prior decision rendered by the Commission. (See also Article 16(1) of Regulation 1/2003). In practice, a finding of infringement at the Community level must be presumed to have strong evidential value before a national court.

With regard to the Nordic countries, as the law currently stands, it is clear that judgements rendered in penal proceedings cannot be ignored in later damages actions in the same case. In Norway, penal judgements are not said to be of a *binding* nature, but the evidential value is high, although it would not be correct to speak about a presumption. In practice, though, the reality seems close to US law. One might expect that a court routinely would find in favour of the plaintiff on the basis of a preceding penal judgement, unless new and convincing evidence to the contrary had been adduced by the defendant. A similar approach is found in the other countries in the study.

It may well be a good idea to introduce a rule modelled on the UK solution. A rule based on the UK solution would clearly facilitate consumers' claims, in particular by avoiding re-litigation of the question of infringement, allowing the scarce resources available to be focused on the question of causation. Furthermore, the rule would arguably facilitate settlements, something which generally will prove favourable to consumer plaintiffs.

One might argue that the scope of such a rule should be limited to cover penal *judgements* or *judicial confirmations* of decisions rendered by the competition authorities, as the very idea of making administrative decisions formally binding on ordinary courts would raise difficult constitutional issues relating to the separation of powers.

The validity of the counter-arguments also depends on the mode of implementation of competition law sanctions. In Sweden for example, sanctions are not imposed by the competition authority (Konkurrensverket), but by a special competition tribunal (Marknadsdomstolen). Decisions by this court could clearly be made binding in subsequent private litigation without constitutional problems arising. Furthermore, as long as the decisions have not been challenged and in any case would only be binding as to the finding of infringement, constitutional issues should not as a matter of law prevent such a rule from being adopted.

As regards a legal presumption, it is doubtful whether it would bring about much change in terms of the importance already attached by Nordic courts to final judgements and the findings of specially competent public bodies. However, it could not be ruled out that a legal presumption would

have a considerable pedagogical effect. A rule modelled on the UK solution does, however, seem to constitute the better solution.

5.4 Shifting the burden of proof and evidential standards

The above has demonstrated that difficulties relating to proof do indeed constitute one of the more fundamental obstacles to the effective compensation of consumers. These findings raise the question of whether a reversal of the burden of proof, applicable at least to parts of the procedure, could improve the chances of successful consumer suits being brought.

One question of principle relating to such a solution, is whether it should apply to all plaintiffs or only to consumers. This might seem a question of minor importance, but it may nevertheless be invoked as an argument against specific rules. Limiting the rule to consumers could be seen as discrimination between groups of plaintiffs, while universal application could be seen as equipping potential "sham-litigants" with too great an armoury.

However, we do not see strong objections to a more favourable treatment of consumers on this point. In order to avoid the potential for vexatious litigation, the laxer standard could be reserved to cases where a representative action, i.e. an action by a consumer organisation and/or a public authority, is brought. In this regard, it should be noted that a form of collective compensation based on the infringers' gain to a lesser extent involves problems related to proof and evidence.

Shifting the burden of proof or applying a laxer standard of evidence is first and foremost relevant in the field of the *calculation of damages and causation*. In the US, there is a clear distinction between "fact of injury" on the one hand and "amount of damages" on the other. Shifting the burden of proof seems less attractive as regards the existence of infringements; in this regard various options reinforcing the possibility of relying on binding judgement rendered under public enforcement should be considered instead.

As touched upon several times, some form of presumption of damages could be feasible. The effect of such a rule would be that the defendant would have to adduce evidence that the infringement did not produce adverse effects on the market. Such presumptions are currently used for the purpose of establishing infringements in cartel cases, for instance where information capable of having an anticompetitive effect has been exchanged between competitors.

A presumption would primarily be suitable with reference to the existence of damages. It is harder to justify a presumption of the *amount* of damages, in that the likely anticompetitive effect varies according to a number of factors, such as the market power of the infringers. However, a

presumption that an infringement has produced anticompetitive effects could easily be justified regardless of the market conditions.

As for the amount of damages, section 4.5 supra demonstrated that judge enjoy a large amount of discretion in assessing damages. Furthermore, it is submitted that when the uncertainty as to the amount is caused by the wrongful conduct on the part of the defendant, it is appropriate that doubt as to the amount must be the risk of the infringer. This is in line with US law, where the Supreme Court has held that

> "[A] defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible."[40]

Arguably, under the current state of the law, this reasoning can be applied by Nordic judges as well. The question of the amount of damages does not, however, seem suitable for a rule fixing a burden of proof. Rather, one could formulate a rule lowering the evidential standard, e.g. one stating that the amount of damages must be documented with a "reasonable" degree of certainty. In combination with a presumption that the infringement actually has produced anticompetitive effects, this could prove useful for consumer plaintiffs.

In addition, Nordic judges could make more active use of the "ex aequo et bono" rule of quantifying damages. Arguably, however, as proposed in section 5.3, a "standardisation light" in the form of a presumption of a minimum damages, would provide the most efficient solution to the problem.

Shifting the burden of proof may also be relevant in addressing the passing on problem. Probably one could shift the burden of proving that the customer in any case would have paid the same price over to the defendant.[41] This would mean that the defendant would have to prove that the retailer would have raised his prices for other reasons.

5.5 Organising consumers

It has been repeated several times that competition law infringements are likely to have widespread effects, in that the effects are distributed in small portions between a large number of victims. Such "collective damages" are difficult to handle within a traditional procedural framework, which rests on the idea of clearly identifiable plaintiffs and defendants.

It is clear that the traditional procedural approach reflects the traditional need for the protection of interests, which so far have been individ-

[40] Eastman Kodak, 373 US 359, 379.

[41] As a consequence of the rule of burden of proof for so-called "hypothetical causes".

ual in nature. New forms of harm necessitate new forms of protection. Collective harm should be remedied through collective actions.

As for consumer victims, it is no surprise that negligible harms do not create incentives to bring suit at the individual level. In my view, the relevant question is not how to create such incentives or how to protect the individual, but how it may be possible to protect the collective interest. In this context, some form of representative and/or collective action is required. There are three possibilities: either an individual member of the group having a stake in the collective interest, brings suit on behalf of other members, or a representative body brings suit (normally a representative organisation), or a public agency brings suit on behalf of the members. These aspects are discussed in turn.

We do not think that some form of "small claims procedure" would be a suitable remedy. Again, the burden would be concentrated on individual consumers, and the incentives to bring suit would not be strong. The Norwegian Civil Litigation Act of 2005 (not yet in force), Chapter 10, has introduced such a process, but it does not seem to bring about changes that will facilitate competition lawsuits. It should be mentioned that the EC has discussed a European small claims procedure in its Working Paper.[42]

5.6 Class-actions

The possibility of bringing a class-action suits varies considerably between the countries in the study. In Sweden and Norway, class-actions are expressly authorised in legislation; see below. In Finland, Denmark and Iceland there are no rules on class-actions. Proposals have, however, recently been put forward in Denmark and in Finland.

Norway has chosen a model with both an opt-in as well as an opt-out option. Class-actions are regulated by the Civil Litigation Act of 2005 (not yet in force) chapter 35. According to Section 35-3 of the Act, suit may be brought either by a member of the group, or by a representative organisation and/or a public agency.

In Sweden, the 2002 Group Proceedings Act, allows both collective actions, as well as representative actions brought either by an organisation on behalf of its members, or a public authority (Section 5 of the Act).

Thus, both in Norway and in Sweden, representative action is available. Arguably, the chance of individual consumers bringing suit on their own initiative is fairly low. The basic question is how to ensure that the potential for representative actions is realised.

Although one lacks experience of the functioning of the class-action institute in Nordic law, it seems fair to anticipate that financial risk cou-

[42] See para 189 et seq.

pled with lack of funding may serve as an obstacle to the efficient use of the remedy.

Ideally, class-actions should be funded in such a way as to remove any disincentives for private plaintiffs. In the US, there is a rule that each party to the litigation is responsible for his own costs. This brings down the risk associated with filing a class-action, and the risk is often entirely borne by law firms, who by contingency fees get a stake in the final outcome of the case. This is not the case in Europe, where, as a general rule, a losing party is responsible for the fees incurred by the winning party. This increases the risk associated with class-actions.

The options here are basically *public funding* or a form of *contingency fee*. In a European context, public funding seems the more attractive option, at least if the suit is brought by representative private or public bodies. It will most likely be more difficult to get the required support for rules providing for automatic funding of collective actions.

Another option would be to reserve parts of the fines imposed in an action of public enforcement for civil "follow-on" suits. By the same token, if an action is lost, the winning party's legal fees should be covered by the public purse. If the funding mechanism is combined with rules on the binding nature of preceding court judgements, as well as some form of presumption of damages, the risk associated with bringing suit seems fairly low.

In Canada, which operates a general rule of fee-shifting like European countries, they have tried to overcome the problem in several ways. When and to what extent the representative plaintiff is liable for the legal costs of a prevailing defendant varies amongst the three provinces, with different rules limiting the liability. For instance, British Columbia has adopted a solution rendering the representative plaintiff virtually immune from paying costs – he is only liable if the action is "frivolous or vexatious" (merely losing is not enough).[43]

Various funds have also been established in order to aid the emergence of class-actions. These include the Ontario Class Proceedings Fund, the main aim of which is to relieve the representative plaintiff from liability for the defendant's costs. It works in the following way: when a plaintiff applies to, and receives assistance from, the Fund, the Fund becomes liable to pay any costs awarded to the defendant, and in such circumstances, the representative plaintiff is relieved of any liability for the defendant's costs. The fund has, however, been a failure. Watson explains the reasons for this:

> "However, the Fund has been a failure in that, due to inadequate financing, it has given funding to very few class-actions (approximately six to date). It started out with an initial capital of $500,000, to be "topped up" by a levy of ten percent of

[43] For details, see Garry D. Watson: Class Actions: The Canadian Experience, 11 Duke Journal of Comparative and International Law 269 (2001). See also Ontario Law Reform Commission, Report on Class Actions, in 3 Summary of Recommendations § 56 (1982).

> any settlement or judgment in any action it has funded. The Fund has been extremely cautious in funding class-actions because one cost order could wipe it out. Presumably, the expectation of the drafters establishing the Fund was that all representative plaintiffs would apply to the fund. However, applications to the fund have been few (approximately thirty cases), and most importantly, the "big, successful" cases have not applied. The Fund received a levy in one case and it now has a balance of about $700,000, together with a liability for an as yet unpaid cost award of $240,000. Had the big cases applied for funding, the Fund would actually be in a position of extreme (and perhaps embarrassing) wealth because to date there have been a number of substantial settlements in Ontario class-actions (e.g., the heart pacemaker litigation settled for $23.1 million, the breast implant litigation for $29 million, and the vanishing life insurance premium cases for approximately $140 million). The total recovery for the class members in these actions alone was $206 million; a ten percent levy on these recoveries would have yielded the fund an additional $20.6 million. This is without even taking into account the $1.5 billion settlement in the Hepatitis C case."[44]

Watson proposes that the fund should be entitled to e.g. two percent of all successful actions, regardless of whether they were funded by it or not. This idea could prove workable in a European context as well.

Quebec has established a fund for the financing of class-actions. Its purpose is to fund the plaintiff's side of class-actions, but it does not relieve an unsuccessful representative plaintiff of liability for the defendants' costs. This means that it does not address the main element of the risk associated with class-actions. However, the fund apparently works better than the Ontario solution, which is due to the fact that Quebec rules on fee shifting provide better protection of the plaintiff.

Arguably, the better solution would be to make a limited contribution to a fund mandatory for successful class-action plaintiffs. Although the Canadian experience is limited, it indicates that financing through funds is a workable concept. Another solution would be to make public bodies responsible for bringing suit; see section 7 below.

Even if the problem of funding can be resolved, there are still challenges associated with making indirect consumer class-actions work. It is worth recalling that the experience with consumer class-actions under US state law has not been entirely positive, as explained above in section 6.2. The main problems specific to class-action suits relate to certification of the class and distribution of funds among the class members. As regards the first problem, the conditions for bringing a class-action should arguably be framed in such a way that the certification problem is avoided. In this respect, one could consider explicitly authorising class-actions brought by indirect customers for competition law infringements. Furthermore, guidance should be given to encourage a liberal interpretation of the condition that common features must prevail, e.g. in the sense that individual assessment of the passing on issue should not prevent the certification of the class (which has proved to constitute a problem under US

[44] Watson, cit., at 276-77, references omitted.

State Law; see above). Such a rule would probably not be controversial given the fact that "cy pres" distribution may be appropriate in any case.[45]

The problems which one has run into under US state law demonstrate that there are a wide array of potential problems that can arise in the context of class-actions, and in particular suits brought on behalf of indirect consumers. Some form of public coordination and involvement in the procedure would seem to be an appropriate way to avoid such difficulties, which is discussed in the following section.

[45] The term cy pres denotes a form of compensation that is not aimed at restoring the exact pre-damage situation, but aims at obtaining something similar. (See Black's Law Dictionary)

6. Consumer remedies implemented by governmental bodies?

In addition to representative actions, which constitute a form of "hybrid" between public and private enforcement, it is worth considering whether the task of ensuring the compensation of consumers could be entrusted to competition authorities, and thus be integrated as a mandatory part of public enforcement. Governmental bodies may facilitate the enforcement of consumers' rights in several respects: public recovery actions avoid problems of *organisation*, *multiple filings*, *funding* and to a certain extent *proof*. In addition, public action ensures *incentives* to bring suit.

Such solutions may be framed in various ways:

- Competition authorities may bring damages actions on behalf of classes of consumers as a mandatory part of their enforcement
- Parts of fines to cover consumer losses or to promote consumer interests
- In certain jurisdictions, private parties harmed by a crime may participate in penal procedures as "partie civile". Competition authorities to bring suit upon intervention of consumer agencies (or representative organisations)

Alternatively, such a task could be entrusted to consumer agencies. The main difference from the solutions put forward under Section 6, is that the remedy would be implemented by a public body, as opposed to a representative organisation or body.

Lopatka and Page make the following proposal to the indirect customer problem:

> "A major reform would be to place the primary responsibility to enforce the law against price fixing on the federal agencies, conferring residual authority on direct purchasers to sue only when the federal agencies choose not to act. The federal government would in effect have a right of first refusal. The United States would be allowed to recover damages in a civil action, even if it suffered no loss in its own property. The shaky statutory authority of the FTC in obtaining disgorgement of ill-gotten monopoly profits would be legislatively ratified. And the damage multiple for both agencies would be increased, say to 10, and expressed as a ceiling, with the multiple in any given case set by reference to the probability of detection ex ante under the circumstances.

> Although the political resistance to eliminating indirect purchasers' right to sue is strong, it may weaken if coupled with the prospect of more likely and larger recoveries by the federal government. Those agencies would be free to distribute the recoveries in any way they saw fit, including some kind of payment to purchasers if the costs of distribution were not prohibitive. Furthermore, any fear that the federal agencies would ignore violations should be assuaged by the conditional authority to sue retained by direct purchasers. Most important, this kind of enforcement scheme offers the potential of achieving optimal deterrence in a single action, rather than the current reality of haphazard enforcement in a multiplicity of actions."[46]

The rationale underlying this proposal would seem viable in a European context as well. Instead of placing the burden of organising a suit and proving damages on consumers, the responsibility would be taken by a public body, which would evidently have to be set up with sufficient resources to handle such tasks. Although the reason for private involvement in competition enforcement is different in the US and Europe (deterrence vs compensation), it seems clear that the solution put forward would be likely to improve compensation as well. Once it is accepted that antitrust injuries fluctuate and creates ripple effects in the economy, and that damage awards must mirror this fact, indirect compensation through a public action may seem to be an appropriate solution.

In the US, the 1976 Hart Scott Rodino Antitrust Improvement Act established the so-called *parens patriae* action, where State Attorneys General were given the power to sue in damages on behalf of the State's citizens. The act provides:

> "Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of sections 1 to 7 of this title. The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury, or (B) which is properly allocable to (i) natural persons who have excluded their claims pursuant to subsection (b)(2) of this section, and (ii) any business entity.
>
> The court shall award the State as monetary relief threefold the total damage sustained as described in paragraph (1) of this subsection, and the cost of suit, including a reasonable attorney's fee."[47]

Paradoxically, this legislation was passed only months before the US Supreme Court's ruling in Illinois Brick. As demonstrated above, the Illinois Brick decision effectively excludes most consumer claims under federal law, even in the form of parens patriae actions. Consequently, the

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[46] See Cavanagh, cit., at 44, arguing that State Attorneys General may be permitted to sue on behalf of indirect customers, and Harry First: Delivering Remedies: The Role of States in Antitrust Enforcement, 69 George Washington Law Review 1004 (2001) at 1039.

[47] 15 U.S.C.A. § 15c.

experiences with the remedy are limited. US commentators have argued that such actions should be excluded from the Illinois Brick rule. Some of the "Illinois Brick repealers" under state legislation are limited to such actions, e.g. in Iowa.

US experience, legislative initiatives and doctrine demonstrates that the best way of finding a solution to the passing on problem, the problem of organising suits and the need not to make antitrust litigation overly complicated, is arguably to depart from a pure private law solution and to involve some form of public agency.

It is submitted that the right body may not necessarily be national competition authorities, as they prioritise their cases upon public enforcement policy. However, it is noted that the possibility of the public prosecutor taking civil damages claims on board in penal actions has proved workable. There is no reason why such a system should not function under competition law as well. One could, for instance, imagine a solution where the competition authorities were obliged to claim damages on behalf of consumer upon the intervention of e.g. a public consumer agency. The problem of distribution of funds would create an unavoidable problem, but arguably such agencies are more suited to administering such a process than an ordinary court. Furthermore, once the necessity of some form of cy pres distribution is accepted, arguably the funds could be distributed more indirectly to consumers. Indeed, even under indirect class-actions under US state law, courts are often forced to adopt such solutions, e.g. because of low claim rates.

Arguably, a more direct involvement of the authorities would also provide solutions to the problems of proof. Although an action in damages raises new questions relating to causation and the existence and amount of harm, as compared to public enforcement, the involvement of public bodies would reduce the need for special discovery procedures and/or rules on access to evidence in the possession of the authorities. It would also be cost-beneficial, and reduce the risk of vexatious and/or speculative claims.

7. Pedagogical initiatives

The potential for bringing damage actions following the public prosecution of antitrust infringers is receiving increasing attention, but it is also true that both consumers and lawyers are largely unfamiliar with this kind of litigation.

One could think of several ways of making the potential for compensation claims better known, e.g. information campaigns. However, the best way of obtaining widespread knowledge, combined with willingness to bring suit, would arguably be *the existence of successful actions*. *Consumer agencies*, vested with powers to act as group representatives, should be frontrunners in this respect.

At a legal level, the most important pedagogical step, besides successful cases, is to have clear legal rules. In this context, there should be a statutory and unconditional right to damages. This is because the present right to obtain compensation rests on cumbersome reasoning established by complex case-law and general principles of law. A clear and unequivocal legal rule would make the right to recovery visible. Furthermore, a legislative initiative would underline the importance of such claims, something which would arguably influence judges' attitudes towards antitrust litigation and consumer recoveries.

Information campaigns accompanying competition law proceedings could be another option. Competition authorities could when making their decisions public specifically address the question of potential claims in damages. The recent initiatives from the Commission in this respect are welcome, but should be coupled with more guidance on specific cases. Such guidance should also be given by national competition authorities.

8. Conclusions

There is not much evidence of the need for wide-ranging reforms at the level of *substantive* legislation. The main obstacles to effective consumer compensation seem to be the *lack of suitable procedural devices*. This typically regards problems of organisation (class-actions) and problems of evidence.

A class-action institute as such would solve *some problems*, but not all. Experience with indirect customers' claims under US state law indicates problems relating to the certification of classes and distribution of funds. Furthermore, class-actions run into serious problems relating to proving passing on and the amount of the overcharge.

Arguably, no perfect solution can be achieved under private law, even if class-actions are introduced. One proposed model, which has also attracted support from US commentators, is to involve public bodies in the task of obtaining consumer relief. This would involve representative actions carried out by a public body, e.g. a consumer agency. Furthermore, the distribution of the amount obtained would be subject to the discretion of that body, typically under supervision of a court. However, this solution creates new problems, e.g. relating to consumers who want to pursue their claims on an individual basis, in addition to the need for coordination with other private plaintiffs.

On the other hand, it is important to note that these problems are not insuperable, and they seem easier to resolve than the problems posed by a traditional tort law. Finally, and most importantly, such mechanisms seem far better suited to obtaining consumer compensation than a traditional private law approach.