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LITIGATING ANTITRUST CLAIMS IN EUROPE: PROPOSALS AND IMPLICATIONS

DR. CHRISTOPHER J.S. HODGES

PREFACE

We are indebted to our Legal Advisory Council member, Linda A. Willett, for alerting us to this latest development in the EU, creating the prospect of greater litigation, and to the author, Christopher J.S. Hodges, for his careful analysis of the subject matter. Companies transacting business in EU member countries would be well advised to tract the progress of this proposal.

As with all other publications of the National Legal Center, this monograph is presented to encourage a greater understanding of an important public policy issue with a significant impact on the law and its processes. The views expressed in this monograph are those of the author and do not necessarily reflect the opinions of the advisers, officers, or directors of the Center.

Richard A. Hauser
President
National Legal Center

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LITIGATING ANTITRUST CLAIMS IN EUROPE: PROPOSALS AND IMPLICATIONS

DR. CHRISTOPHER J.S. HODGES

I. BACKGROUND TO THE EU COMMISSION'S *GREEN PAPER*: LITIGATION AS A REGULATORY WEAPON

The European Commission published a *Green Paper* and *Staff Paper* in December 2005[1] that signalled the intention to encourage civil litigation in the area of EU competition law. The Green Paper comes from the Competition Directorate-General ("DG COMP") of the Commission, and has not yet been considered by the other Directorates-General or other Commissioners, since no concrete proposals have yet been made. However, the matters raised in the *Green Paper* indicate that major changes are contemplated. The change in policy that is signalled here is likely to have a major impact on increasing litigation not just in the antitrust field but also in every other type of claim. Europe seems to be heading for a litigation explosion.

The background is that the Commission has been pursuing a policy of modernising competition policy, on both substantive

[1]Green Paper: *Damages actions for breach of the EC antitrust rules*, COM (2005) 672, 19 Dec. 2005; Commission Staff Working Paper: Annex to the Green Paper *Damages actions for breach of the EC antitrust rules*, SEC (2005) 1732, 19 Dec. 2005. In this discussion, a reference to the *Green Paper* includes the longer and more explanatory *Staff Paper*, unless expressly mentioned.

law[2] and enforcement.[3] The Commission has relinquished its role as primary enforcement authority, placing Member State agencies and courts at the centre of the process.

The *Green Paper* takes matters further. DG COMP now asserts that private enforcement and public enforcement are to be equal pillars within the new regime.[4] As its starting point is an assertion that there are insufficient damages claims for breach of antitrust law that are brought in EU national courts. This claim is based on a study made by the law firm Ashurst[5] that was carried out for the Commission and found only 60 cases decided by courts. The study concluded that the existing national laws constitute an area "of astonishing diversity and total under-development."[6] Indeed, a 1984 study by a different Directorate-General of the Commission, who was responsible for consumer affairs, concluded that it was not possible to propose binding harmonisation of national mechanisms on collective actions, since there was too much complexity and diversity amongst the national systems.[7]

Thus, DG COMP concluded that the different national procedures that govern litigation procedure need to be reformed

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[2]Council Regulation 139/2004, [2004] O.J. L 24.

[3]Council Regulation 1/2003; *see* D.J. Gerber, *The "Modernisation" of European Community Competition Law: Achieving Consistency in Enforcement: Part 1* E.C.L.R. 2006, 27(1), 10-18.

[4]D. Woods, Presentation at the International Bar Association's 2nd Antitrust Spring Conference, Sydney, Australia (29 Apr. 2006).

[5]D. Waelbroeck, D. Slater & G. Even-Shoshan, *Study on the conditions of claims for damages in case of infringement of EC competition rules* (Ashurst 2004).

[6]*Id.* at 1.

[7]Green Paper: *Access of consumers to Justice and the settlement of consumer disputes in the single market*, COM (93) 576, 16 Nov. 1993. *See also* Memorandum from the Commission: Consumer Redress COM (84) 692, 12 Dec. 1984.

in order to facilitate the bringing of more competition damages cases. This policy is, of course, based on the assumption that damages claims have some deterrent effect, and, therefore, can be encouraged as a regulatory mechanism. This will be examined further below.

Indeed, DG COMP privately believes that the regulatory resources, powers, and mechanisms of both it and of the national authorities are insufficient, and that further forces need to be brought to bear. Thus, it believes that there is a "regulatory deficit" and that existing regulatory mechanisms are insufficient to address this. Private litigation could, therefore, be brought into play as a regulatory mechanism. The real point here is that DG COMP has limited resources, and it does not see that its powers or resources are likely to be increased. It also believes that the competition authorities in many Member States, especially the smaller ones, are underequipped to provide effective regulation. The Commission would wish to avoid an argument with Member States that the latter were inadequate in this respect, and Member States would in any event resent what they would see as unauthorised Commission interference in their internal affairs.

DG COMP's thinking was based on the precedent of private enforcement of antitrust law in the United States of America, and its financial incentives for claims to be sought out by "private attorneys general". In contrast to the U.S. position, civil litigation in Europe is not based on a "private attorney general" basis, and, at least until recently, does not involve contingency fees. Regulation is policed by the authorities, with the European Commission and national regulators generally having power to impose fines as sanctions for infringements.

DG COMP believes that its approach toward these matters is soundly based on the primary policy of the Barroso Commission, which is to enhance the economic health of the EU market, promoting European competitiveness, growth, and jobs (the

"Lisbon agenda").[8] The thinking goes that a regime that is strongly competitive will be robust and innovative, and have high employment. The Community's "Lisbon agenda programme" has not delivered on these objectives, and there is some urgency to make economic progress, as seen in the recent revision of that programme. Making economic progress is also required in order to fund the cost of assisting the 10 States that acceded to the EU in 2004 to undertake significant modernisation of their economies and systems. In these circumstances, it is unsurprising that serious questions as to the political basis of the EU enterprise have been raised.

Further, a robust competition regime can be brought about not only through regulation by public authorities but also by engaging the power of consumers. The involvement of consumers in markets also has a political dimension. Given the rejection of the draft *European Constitution* in 2005 by voters in France and the Netherlands, the Commission has a politically motivated desire to engage consumers directly with what it is doing and with the European enterprise.[9]

The above points have been summed up by EU Competition Commissioner Neelie Kroes: "I am personally convinced that there is a lot of potential in advancing private enforcement of the European competition rules. . . . [I]t could really contribute to our number one priority in Europe: creating a more competitive environment for business and industry, and thus growth and economic and social welfare for our citizens. . . . [T]he threat of

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[8]The Commission's Strategic Objectives 2005-2009, COM (2005) 12.

[9]There has been a raft of consumer protection legislation in recent years, and it is noticeable that consumer organisations have been included in regulatory mechanisms as co-regulators, such as under Directive 2005/29/EC on unfair business-to-consumer commercial practices ("UCP"), Article 4.

having to pay damages for the harm caused by an infringement of the competition rules has a strong additional deterrent effect."[10]

There is a large information gap as far as most EU citizens are concerned about what the EU is actually there for. So it is natural that the Commission wants to try to show how the EU is actively enhancing the position of consumers. However, since the Commission uses the language of economics, it directs its action at "consumers" rather than at citizens. In so doing, it runs the risk of missing the point that individuals still fail to understand how the EU enterprise is relevant for them. The few people who work in consumer organisations might end up with an enhanced position, but the person in the street is none the wiser.

II. THE SPECIFIC PROPOSALS

In view of all the matters discussed in Section I of this *Briefly*, the Green Paper signals that the Commission wishes to make radical changes in the existing national rules of the Member States on civil procedure in order to enhance the ability of consumers and competitors to bring claims for damages for breach of competition law. The approach broadly has three aspects: to make it cheaper for claims to be brought, to make evidence more available, and to facilitate claims to be brought on a collective basis.

The *Green Paper* raises an extensive range of issues. The mechanisms mooted relate expressly to altering the financial incentives for bringing litigation. The discussion in the *Green Paper* relates exclusively to affecting the position of those who may suffer loss, especially consumers. However, it does not

[10]Neelie Kroes, EU Competition Commissioner, Address at the Harvard Club, New York, N.Y.: Advancing Private Enforcement of European Competition Rules (22 Sept. 2005).

mention or consider the other economic interests, which inevitably arise in litigation; namely, those of the intermediaries who are involved in litigation transactions, that is, lawyers. In broad terms, the issues all take inspiration from the strong incentives to litigate that are found in the U.S. system of antitrust (or other) litigation.[11] Thus, DG COMP identifies a sequence of barriers to litigation that exist in many European systems. It then asks what future harmonised rules should be adopted across Europe, on the assumption that some or all of these supposed barriers should be removed.

The main questions asked are:

- whether there should be special rules on *access to documentary evidence* (e.g., through the introduction of discovery rules, which would be foreign to civil law traditions, and through access to evidence held by authorities);

- whether there should be special rules on *burden and standard of proof*;

- whether there should be a requirement to *prove fault*;

- how *expert evidence* should be obtained;

- whether the rules on *causation* need to be clarified to facilitate damages actions;

- whether new rules should govern how *damages* should be defined and calculated;

[11] Staff Paper, para. 46.

- whether damages should include some *punitive* element, such as double damages;
- whether there should be a defence that loss has, or should have been, mitigated by the claimant (e.g., through the *"passing-on" defence* or a restriction on a claimant's standing to bring a claim);
- whether special procedures should exist for bringing *collective actions*;[12]
- whether claimants should be insulated from the *costs risk*, both of funding claims and of liability for opponents' costs if the claimants lose;
- how *private and public enforcement* systems could be integrated, so as to achieve consistency in approach;
- what *substantive law* should apply; and
- whether *limitation* periods should be suspended or altered.

Some of these issues will now be outlined in more detail. It is important to note that the *Green Paper* does *not* suggest the introduction of class actions or contingency fees in Europe. DG COMP has deliberately avoided these possible mechanisms, since it recognises that they have produced excessive litigation in the United States, which they believe to be undesirable and to involve a significant number of unmeritorious claims, with

[12]This question gives rise to difficult issues of standing (the classic debate is over opt-in versus opt-out mechanisms), quantification of damages, and distribution of damages.

disproportionate legal fees. The Brussels officials do not want to copy or encourage such a system in Europe.

However, as will be discussed next, many of the matters that they raise would tend to produce the effect that they seek to avoid. The *Green Paper* proceeds on the assumption only that there are valid claims that are not brought and should be encouraged. It does not consider that liberalisation of financial incentives to litigation may produce unmeritorious claims, and that it is the financial effect of *any* mechanism that needs to be evaluated, irrespective of whether it is called a class action, costs rule, burden of proof, or something else.

A. Making It Cheaper for Claims To Be Brought

A whole raft of different aspects are raised by the *Green Paper* with the aim of reducing the cost of antitrust claims, and, hence, encouraging more claims to be brought.

First, there are aspects that directly relate to a plaintiff's exposure to costs and expense in litigation. The standard rules in European jurisdictions are that a plaintiff pays his or her lawyer and the lawyer's disbursements, and the loser pays the other side's costs. The *Green Paper* asks whether all of these rules should be reversed, in accordance with standard American practice, as part of limiting the costs exposure of a claimant.[13] The basic reason for this proposed change is that "[t]he high costs and risks involved in competition actions, as well as the length of proceedings, operate as a disincentive to bringing private actions."[14]

The second issue that can affect the cost of a case, and the financial balance in risk-benefit that a claimant (and lawyer) will have to evaluate, relates to the amount of likely damages

[13]Staff Paper, paras. 202–20.
[14]Staff Paper, para. 43.

recovered. Quantifying and calculating damages can be notoriously difficult and complex in some antitrust cases, and the *Staff Paper* sets out various possible quantification methodologies.[15]

The *Green Paper* states that restrictions on the amounts that can be awarded, such as the unavailability of punitive damages, constitute disincentives and obstacles to private actions.[16] Punitive damages, or the power to award multiples of compensatory awards, are generally unavailable in European jurisdictions,[17] but the *Green Paper* asks whether punitive damages should be available, since they would have an obvious effect on the financial equation. This raises the policy question of whether the purpose of litigation is purely compensatory, which is the traditional European approach, or whether there should be a move toward using private litigation as a regulatory mechanism, involving aspects of punishment and deterrence.[18] As elsewhere, the *Green Paper* does not attempt to debate the issues; it merely raises them, albeit in a way that clearly indicates DG COMP's desire to change the approach.

A third issue that affects the complexity and costs of a case is the burden and standard of proof required. The normal rule in EU states is that the burden of proving all elements of a claim rests on the claimant. The *Green Paper* asks whether this approach should be alleviated for antitrust claims, in view of asymmetry of information between the parties.[19] A further consideration is the Commission's suspicion that some evidence of cartels can be

[15]Staff Paper, paras. 125–55.

[16]Staff Paper, para. 40.

[17]Thus, Europe does not have the U.S. triple-damages rule, although the effect of awards of interest on damages can sometimes have a similar effect.

[18]Staff Paper, para. 112.

[19]Staff Paper, paras. 81 *et seq*.

destroyed or hidden too easily. DG COMP moots that one possible approach might be to permit claimants to rely on findings of infringements by regulatory authorities, as applies in Germany and the UK. Another approach might be to permit courts to take refusal to disclose evidence as proof of the alleged facts relating to relevant documents. A further approach might be to reverse the burden of proof where one party makes it impossible for the other to prove a fact. DG COMP accepts that these matters raise issues of proportionality and fairness, but there is no discussion of the issues that might give rise to a balanced system.

The fourth issue arises from the fact that the nature of the legal liability can have a significant effect on the extent of evidence and cost in a case. Some EU Member States require proof of fault on the part of a defendant as a prerequisite for liability for damages, whereas others presume fault if illegality is shown.[20] In EC competition law, there is no requirement for fault in respect of violation of Article 81 or 82 EC. Hence, DG COMP argues that national fault requirements constitute an obstacle to damages actions. The policy options mooted are that liability should be based on the infringement itself, or that liability should be based on the infringement itself in relation to the most serious infringements, or that there should be a defence of excusable error where illegality is shown.[21]

The fifth issue that can affect litigation costs, or whether a claim is viable at all, relates to the "passing-on defence" and standing of indirect purchasers. A direct purchaser of goods or services who has paid a supracompetitive price may have suffered no, or reduced, loss, to the extent that it has been able to pass its loss on to the next purchaser in the chain. Hence, the issues arise whether the infringer should be allowed a passing-on

[20]Staff Paper, para. 101.
[21]Staff Paper, paras. 109–11.

defence, and whether an indirect purchaser may make claims. These areas have been much debated, and DG COMP asks whether there should be a harmonised EU position.[22]

B. Making Evidence More Available

A claimant in Europe and elsewhere can face a major obstacle in gaining access to evidence of alleged antitrust infringements.[23] This can be particularly so where the claim does not follow a prior decision by a regulatory authority finding an infringement (known as a "stand-alone" action, as opposed to a "follow-on" action).

DG COMP raises a sequence of issues here:[24]

- whether claimants should be permitted to have access to evidence held by regulatory authorities;
- whether the rules on access to defendants' documents are sufficiently powerful;
- whether there should be sanctions for parties who do not disclose evidence; and
- whether there should be procedures to secure evidence, whether it should be possible to compel witnesses to give evidence, particularly at an early stage (European jurisditions do not generally have U.S.-style deposition procedures), whether the rules on examining and cross-examining witnesses need revision.

[22] Staff Paper, paras. 156–87.
[23] D. Waelbroeck et al., *Study*, *supra* note 5.
[24] Staff Paper, paras. 54–77.

DG COMP accepts that these points raise an issue of public policy over the potential for abuse in gaining unjustified access to business secrets, and notes that some national courts have mechanisms designed to control and restrict public access.[25]

C. Facilitating Claims To Be Brought on a Collective Basis

Many of the matters raised in the *Green Paper* would affect claims by competitor companies. However, the Commission is always concerned to consider the position of individual consumers, whose ability to bring claims may be dramatically different from companies. A typical scenario that is discussed here is that of a company whose infringement causes small losses to a large number of consumers, thereby affording considerable illegal benefit to itself. DG COMP therefore raises the option of introducing a mechanism specifically to provide for the collective or representative redress of consumers.[26]

As mentioned previously in this monograph, the *Green Paper* does *not* suggest the introduction of class actions in Europe. Instead, it refers to preexisting models for representation of collective consumer claims by consumer organisations, which exist in many Member States and are increasingly appearing in European Union law. Consumer organisations have also increasingly been included in various EU consumer protection laws, where they have been given regulatory enforcement functions. These are the Directives for misleading advertising,[27] unfair contract terms,[28] cross-border injunctions for breach of

[25]Staff Paper, para. 57.
[26]Staff Paper, paras. 188–201.
[27]Directive 84/450/EEC, Art. 4.1.
[28]Directive 93/13/EEC, Art. 7.

specified consumer protection Directives,[29] the Regulation on consumer protection cooperation,[30] and the recent Directive on unfair business-to-consumer commercial practices ("UCP").[31] DG COMP now asks whether a cause of action should be introduced for consumer organisations to bring damages claims in competition law, or some provision should be made for collective action for groups of purchasers other than final consumers.[32]

D. Some Other Matters

The *Green Paper* raises fundamental issues about whether private litigation should formally be enlisted as part of the public regulatory system, as an extension of its traditional European function as compensation for loss between private citizens. From the Commission's perspective, given frustration caused by both insufficient resource and concern at the effectiveness of many national regulatory systems, private litigation looks attractive if one wants to maximise deterrence and compliance. However, the integration of a private mechanism into preexisting and sometimes sophisticated public regulatory systems may cause challenges.

A major issue that arises here is what to do about the public encouragement of voluntary disclosure of infringements to regulatory authorities, which is encouraged and rewarded by immunity from or reduction of fines ("leniency programmes"). The rule is that the operation of such a regulatory discretion

[29]Directive 98/27/EC, Arts. 1–3.
[30]Regulation 2006/2004, Arts. 4.2 and 8.3.
[31]Directive 2005/29/EC, Art. 4.
[32]Staff Paper, paras. 199–201.

cannot affect any civil liability.[33] DG COMP cannot propose to deconstruct leniency programmes, so it moots whether a leniency application should not be discoverable in private litigation, or whether there should be some rebate on damages, or whether the joint liability of tortfeasors should be removed for a leniency applicant.[34] Each of these approaches raises considerable problems, not least over fairness, and the area has given rise to particularly heated debate. However, the fundamental insight is the difficulty of integrating public enforcement with private compensation mechanisms.

The existence of 25 EU Member States gives rise to a major problem over jurisdiction, consolidation, and applicable law in relation to claims that can only be brought in national courts. DG COMP raises the following policy options: [35]

- the applicable law should be determined by the general rule as expressed in Article 5 of the proposed "Rome II" Regulation on applicable law;[36]

- some specific rule for damage claims based on an infringement of competition law, providing that the law of the State in which the damage occurs shall be any of the laws of the States on whose market the victim is affected;

[33]Commission notice on immunity from fines and reduction of fines in cartel cases ("Leniency notice"), O.J. 2002 C 45/3, para. 31.

[34]Staff Paper, paras. 221–36.

[35]Staff Paper, paras. 237–54.

[36]*Proposal for a Regulation on the law applicable to non-contractual obligations*, COM (2003) 427, as amended: this is known as "Rome II," following Rome I on contractual obligations, based on the 1980 Rome Convention on the law applicable to contractual obligations.

- a specific rule that the applicable law is always the law of the forum; and
- a specific rule that where the markets of more than one State are involved, the claimant should have the choice of law.

Other aspects raised relate to the use of expert evidence (for which the approach differs fundamentally between common law and civil law jurisdictions),[37] whether limitation rules should be relaxed,[38] and whether proof of causation requires a specific approach for antitrust cases.[39]

III. WHAT HAPPENS NEXT

The period for responses to be made to the *Green Paper* ended in April 2006. DG COMP is now considering its position. It is likely to announce its conclusions by the end of 2006. However, the European Parliament has scheduled hearings on the *Green Paper* for November 2006, and this may delay the Commission.

Although the Commission might proceed by issuing a *White Paper*, there is some speculation that the Commission will proceed directly to issue draft legislative proposals. Any legislative proposal must be accompanied by an Impact Assessment that examines the cost that proposed measures would involve, and judges whether the costs are justified.[40]

Business interests can be expected to lobby hard against significant change. The attitude of Members of the European

[37]Staff Paper, paras. 255–60.
[38]Staff Paper, paras. 261–72.
[39]Staff Paper, paras. 273–76.
[40]European Commission, *Impact Assessment Guidelines*, SEC (2005) 791, 15 June 2005.

Parliament will be important. But the attitude of Member State governments, acting as members of the European Council, will be crucial. There are signs that some governments are split on the issues, with some competition and consumer ministries being in favour (although Germany is against), but justice ministries voicing strong fears. The outcome is therefore impossible to predict, and much will turn on political lobbying, both in Brussels and national capitals.

IV. BUSINESS OBJECTIONS

Businesses operating in Europe have lodged strong objections to the *Green Paper*.[41] One fundamental point is that the U.S. approach of private enforcement litigation operates as a major regulatory mechanism, whereas the tradition in Europe in all areas regulated by public law is for enforcement to be undertaken by public authorities: private litigation is a foreign and unknown concept.

A fundamental policy issue is whether private litigation is effective as a regulatory tool because of its deterrent effect. Clearly, if the level of litigation, damages (e.g., if doubled, and with interest added), and costs were very high, private litigation would have a deterrent effect. But would this effect deter not only infringements but also legal and healthy economic activity, such as innovation and healthy competition?

The *Green Paper* approach is in fact inconsistent with modern scholarship on what constitutes effective regulatory and enforcement policy. The research findings establish that a policy of "responsive regulation" is the optimal approach. "Responsive

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[41] Some 140 Responses are available at <http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/gp_contributions.html>. The Response of the European Justice Forum is especially noteworthy: *see also* <www.europeanjusticeforum.org>.

regulation" is based on there being a strong regulator with a big stick that he rarely uses: the mere threat of power is enough to achieve compliance, and costly aggressive enforcement through prosecution is avoided by means of cheaper and more flexible discussions and education on compliance, unless there are obvious or severe breaches.[42] Enforcement can, therefore, be risk-based.[43] Professor Baldwin has concluded that a punitive approach "assumes a model of corporate behaviour that is unrealistic and, as a result, brings a number of dangers. It may fail to make best use of self-regulatory capacities, it may chill healthy risk-taking and it may make successful regulation more, rather than less, difficult to achieve."[44]

The UK government, for one, has recently strongly endorsed the "responsive regulation" approach.[45] Another Directorate-General in the Commission has also recently announced that it wishes to introduce a "responsive regulation" approach in the area of surveillance and enforcement for products.[46] Yet it seems

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[42]IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (Oxford 1992).

[43]Better Regulation Executive, *Regulatory Justice: Sanctioning in a post-Hampton World* (Cabinet Office 2006).

[44]Robert Baldwin, *The New Punitive Regulation* (2004) 67(3) MLR 351–83.

[45]There was an initial Report: Philip Hampton, *Reducing administrative burdens: effective inspection and enforcement* (H.M. Treasury 2005). The Report was accepted in full by the Chancellor of the Exchequer, Gordon Brown, in his budget speech in March 2005. Consultation on implementation of aspects of the Report was published in *Reducing Administrative Burdens—the Consumer and Trading Standards Agency: Consultation* (DTI 2005), and Better Regulation Executive, *A Bill for Better Regulation: Consultation Document* (Cabinet Office 2005).

[46]Elements for a horizontal legislative approach to technical harmonisation, Draft Certif. Doc. 2005-16, rev. 1, 2 Dec. 2005, at 25.

that DG COMP remains somewhat behind the times in this respect in its adherence to "old-fashioned deterrence" as an enforcement policy. Reliance on deterrence may be thought to be somewhat alarming if it is free to be operated by multiple actors in an uncoordinated fashion—if those actors capture it, the weapon could get out of control.

Interestingly, a respected member of the Commission's own Legal Services has publicly stated that public enforcement is inherently superior to private enforcement, and that there is not even a case for a supplementary role for private EC antitrust enforcement, beyond the current use as a legal shield.[47] He argues that there is a divergence between private and general interests, and that the cost of obtaining corrective justice through damages actions is very high.

The assumptions on which the new policy is based have been widely questioned.[48] The principal areas of debate are:

- Is it true that there is insufficient competition, and ineffective regulation?
- Are national civil justice systems inadequate to cope with competition damages claims?
- Would reform of Member States' differing national rules on civil justice risk encouraging a considerable increase in litigation, with little benefit?

[47]W.J.P. Wils, *Should Private Antitrust Enforcement Be Encouraged in Europe?* WORLD COMPETITION, 26(3): 473–88 (2003).

[48]For example, Christopher Hodges, *Competition enforcement, regulation and civil justice: what is the case?* 2006 C.M.L.R. 43: 1-27.

- If the essence of the problem is that the Commission has insufficient resources to act as an effective regulator, and national competition regulatory agencies are variable in effectiveness, should those issues not be addressed directly?

- Would the proposed reforms offend principles of fairness and equality of arms?

- What is the justification for treating antitrust claims differently, and more favourably for claimants, than other types of claims?

An extraordinary position about the current debate is how little empirical data exists. For example, DG COMP asserts that there is extensive breach of the regulatory rules, but it produces no data to substantiate this. Instead, DG COMP says it has tried to find data but cannot prove the negative that there is insufficient compliance. Thus, the entire policy of upsetting the balance of civil justice systems is based on *no* clear evidence that there is insufficient compliance. Rather, it is based on ideology and on the impression that DG COMP holds, because it receives more complaints than it can deal with. Before one makes judgments on such serious matters, might it be sensible to examine whether DG COMP has insufficient resources to deal with a sensible level of investigations (and it itself says that it does not have enough resources)? Might one also want to investigate the extent to which some complainants prefer to complain to the Commission rather than to national regulators, and some companies may wish to bring complaints so as to make life difficult for their competitors?

In any event, if further formal proposals are made, Commission rules require that a formal impact assessment must be published, which analyzes the likely economic and social

impacts, considers all alternative policy options, and compares the impacts of different options.[49]

Business can be expected to scrutinise the legal basis on which any legislative proposal may be made. If the Commission purports to act under Article 83(2) EC, which covers competition law, there are likely to be objections. The other main option would be Article 65(c), which covers judicial cooperation in civil matters having cross-border implications but that would also present some difficulties, and be less attractive for the Commission through increasing the role of the European Parliament.

V. THE LIKELY IMPACT

The *Green Paper* raises issues but does not give answers. The process for making decisions and announcing them was outlined above. It may be that some aspects that have been raised will not lead to any changes. However, it is clear that DG COMP wishes there to be considerable and fundamental change. In this situation, it is difficult to prioritise the individual matters raised in the *Green Paper*, or predict what might or might not be adopted. However, it can be said that if the general thrust of the proposals that are signalled in the *Green Paper* were to be implemented, it is predictable that there would be an increase in legal claims for damages for breach of EU antitrust law: after all, that is what is explicitly intended.

There is a curious situation here. One might have expected that business would be trying to persuade the European Commission that the U.S. litigation system is not ideal and that it produces effects that can be seriously detrimental to the economy, and that, accordingly, the U.S. model should not be followed in Europe. Instead, the Commission has explicitly accepted the

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[49]European Commission, *Guidelines*, *supra* note 40.

view that the U.S. approach to class actions and contingency fees produces excessive and expensive litigation, which is harmful for the economy. Thus, the Commission has clearly stated that it wishes to produce a competition culture but not a litigation culture.[50] The argument is over the Commission's view that its proposals to increase competition litigation, essentially by radically altering the financial balance of risk in litigation so as to encourage claimants to bring more claims, will not produce an explosion of harmful litigation. Yet it is perfectly obvious that that is exactly what they would do.

It is entirely predictable that if the *Green Paper* proposals were to be adopted in Europe, there would be an increase not just in antitrust litigation but also in all types of litigation. This is because the new approach would radically alter the culture of litigation in the EU, and any changes would be highly unlikely to stop within the antitrust field. Many aspects of national practice in EU Member States on civil procedure and litigation funding are, in fact, changing, and DG COMP has not recognised this. Thus, the claim that there would not be "a litigation culture" is simply naïve. The *Green Paper* has been written by civil servants who are experts in antitrust regulation but not in civil justice systems. The authors genuinely believe that their proposals will not encourage a litigation culture. There is a serious level of ignorance here about how civil justice systems work, especially the complex interrelation of financial incentives that operate within them, and about the changes that are actually happening in national litigation systems. The cumulative effect of a lot of change is clearly going down the slippery slope toward opening Europe up to more litigation. These proposals would add a lot of fuel to the fire.

[50] *See* Neelie Kroes, Address at the Harvard Club, *supra* note 10.

The *Green Paper* approach is also criticised on the basis that it would lead to legal uncertainty for business, through the potential for multiple and conflicting decisions being made by a large number of courts across Europe. Scholars have clearly established that regulatory compliance increases where there is certainty and not a diversification of decision-makers.[51] This is consistent with the finding that the proliferation of decision making by courts as well as regulators in the United States has led to unpredictability, delay, cost, loss of opportunities, divisiveness, and further litigation.[52]

VI. THE LITIGATION THREAT IN EUROPE

One needs to look at what is actually happening in European civil litigation systems, and compare this with the lessons that are available from several parts of the world about how excessive litigation can be produced if the financial incentives to bring claims are allowed to get out of balance. When one stands back and looks objectively at the evidence, one sees that major changes are taking place, and the trend is already moving toward an increase in litigation.[53]

Both class actions and contingency fees have in fact been introduced into some European jurisdictions. The fact that these mechanisms, which DG COMP tries hard to avoid proposing, are

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[51]Ian Macneil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340; Ian Macneil, *Power of Contract and Agreed Remedies*, 47 CORNELL L. Q. 495; A.I. OGUS, REGULATION: LEGAL FORM AND ECONOMIC THEORY 261(Oxford 1994).

[52]ROBERT A. KAGAN, ADVERSARIAL LEGALISM (Harvard University Press, 2001).

[53]*See* LINDA A WILLETT, U.S.-STYLE CLASS ACTIONS IN EUROPE: A GROWING THREAT? (National Legal Center for the Public Interest, June 2005).

emerging will inevitably fuel antitrust claims (and all other types), so that if antitrust claims are made easier by other means, it is not difficult to envisage an explosion of litigation in some Member States.

The European equivalents of class action rules exist in England and Wales,[54] and Sweden.[55] Related laws exist in the Netherlands[56] and Germany.[57] Draft laws have been proposed in Finland, Norway, Denmark, Ireland, France, and Italy. As will be discussed next in this study, mechanisms also exist in many Member States for consumer organisations to bring collective proceedings for enforcement of consumer protection statutes.

It is also relevant to bear in mind changes that are occurring in various areas of substantive law, which can be predicted to lead to an increase in claims. One example is in the modernisation of company law, in response to scandals such as Parmalat and following the Sarbanes-Oxley lead. Both at European and national levels, the trend is to provide shareholders the rights to sue, and to hold directors more accountable.[58] The EU is also engaged in a huge project to produce a "Common Frame of Reference" on contract law,[59] which would, when other areas of

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[54]The Group Litigation Order Procedure under Civil Procedure Rules, Part 19.III. *See* CHRISTOPHER HODGES, MULTI-PARTY ACTIONS (Oxford 2001).

[55]Act on Class Actions 2003; the law was broadly based on U.S. Federal Rule 23.

[56]The Act on Collective Settlement of Mass Damages came into force on 27 July 2005.

[57]KapitalanlegerMusterverfahrensGesetz (KapMuG): the Capital Investors' Model Proceeding Law.

[58]A UK example is the Company Law Reform Bill 2006.

[59]Communication from the Commission to the European Parliament and the Council, *A More Coherent European Contract Law: An Action Plan*, COM (2003) 68, 12 Feb. 2003.

law have similarly been condensed, form the basis of a harmonised European code of contract.[60] Various draft codes also exist on tort law.[61]

The introduction of class and collective action mechanisms can be seen partly as a manifestation of wider reform of national civil procedure rules, and partly as a response to the occurrence of a specific phenomenon of mass claims. It is curious that some countries did not experience multiple claims before now, but this is happening across Europe. The recent German Capital Investors' Model Proceeding Law[62] was introduced in order for the courts to be able to manage efficiently a mass of related claims, after claims by 15,000 individual claimants against Deutsche Telecom had become unmanageable.

Modernising reform of European rules on civil procedure has been long overdue, and many countries are now attending to this. Leading examples of new rules are England,[63] Germany,[64] Spain,[65] and the Netherlands. Concern over imperfect access to

[60]The Commission has denied that it is creating a code, but it is obvious that that will be the result, as members of the European Parliament have noted.

[61]For example, C. VON BAR, THE COMMON EUROPEAN LAW OF TORTS, (Clarendon, Oxford 1998), 2 vols.

[62]KapMuG, *supra* note 57.

[63] In England and Wales, the Civil Procedure Rules, 1999.

[64]Gesetz zur Reform des Zivilprocesses of 2001. *See* Peter Gottwald, *Civil Procedure in Germany after the Reform Act of 2001*, 23 C.J.Q. 338–53 (2004).

[65]Law 1/2000 of 7 January 2000 on civil procedure.

justice for consumers was raised in the EU context prior to 1984,[66] and led to a *Green Paper* in 1993.[67]

Major divergences currently exist between the civil procedure rules of the Member States and in the efficiency of their operation.[68] Procedures are recognised to be very slow in some States,[69] such as Italy and Greece, where there is considerable scope for reducing complexity, cost, and delay.[70] Notwithstanding these issues, the Commission (significantly, a different DG from DG COMP) has concluded that the very great divergences between national procedures "are the product of country-specific traditions: rules of procedure as a whole represent a delicate balance and can only be harmonised gradually and with the utmost caution".[71] Nevertheless, moves toward harmonisation of European civil procedure rules can be

[66]Memorandum from the Commission: *Consumer redress*, Commission of the European Communities, COM (84) 692, 12 Dec.1984; *see also Supplementary Communication from the Commission on Consumer Redress*, COM(87) 210, 7 May 1987; Council Resolution of 25 June 1987 on consumer redress, O.J. No. C 176/2, 4 July 1987.

[67]Green Paper: *Access of consumers to Justice and the settlement of consumer disputes in the single market*, COM (93) 576, 16 Nov. 1993.

[68]*Cost-effective measures taken by States to increase the Efficiency of Justice: Report prepared by the European Committee on Legal Co-operation (CDCJ) in consultation with the European Committee on Crime Problems (CDPC)*, 23rd Conference of European Ministers of Justice (8-9 June 2000).

[69]Green Paper: *Access of consumers*, *supra* note 67, at 5.

[70]Note comments on lengthy delays in the survey of companies reported in S. Vogenauer & S. Weatherill, *The European Community's competence for a comprehensive harmonisation of contract law—an empirical analysis*, 30 E. L. REV. 821–37 (2005).

[71]Green Paper: *Access of consumers*, *supra* note 67, at 56.

predicted.[72] The Commission is currently working on an Action Plan,[73] which includes a European Judicial Network in civil and commercial matters ("EJ-NET")[74] and a Community framework of activities to facilitate the implementation of judicial cooperation in civil matters.[75] A *Green Paper* on minimum standards for some aspects of procedural law is due in 2008.

A related development is the removal of traditional bans on advertising by lawyers in EU States. In addition to reforms in some individual countries, deregulation of advertising by any professional is contemplated under the proposed liberalisation of services within the EU.[76]

Contingency fees are appearing in some States, even though they have traditionally been illegal or contrary to professional ethical codes. Contingency fees are attractive in Central European States, since they provide consumers with access to justice where it otherwise would not exist, since court systems, small claims mechanisms, or legal aid were not developed under Communist regimes. In Germany or the Netherlands, the ban on contingency fees has been circumvented by having an intermediary who contracts with the lawyer on a permitted fee

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[72]This was expressly called for in the European Parliament resolution on the prospects for approximating civil procedural law in the European Union, COM (2002) 654 + COM (2002) 746—C5-0201/2003—2003/2087(INI), A5-0041/2004.

[73]<http://europa.eu.int/eur-lex-/lex/LexUriServ/site/en/oj/2005/c_19820050812en00010022.pdf>.

[74]Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters, O.J. L 174/25, 27 June 2001.

[75]Council Regulation (EC) No. 743/2002 of 25 April 2002 establishing a Community framework of activities to facilitate the implementation of judicial cooperation in civil matters, O.J. L 115/1, 1 May 2002.

[76]*See* the Green Paper on *Services of General Interest*, COM (2003) 270, 21 May 2003.

basis, but contracts with consumers on a contingency fee basis. "No foal, no fee" arrangements apply in Ireland, Scotland, and elsewhere. The Dutch Bar lifted the ban on "no cure, no pay" remuneration as from 1 January 2004, although a pilot study proposed by the bar in personal injury cases was vetoed by the government in 2005.

The problem is that governments wish to increase access to justice without spending more. Historically, some have made state funds available for poor litigants, but they do not wish to continue to spend public funds on litigation systems, and voters want taxes to come down. The Commission also wants to increase access to justice, so as to encourage greater confidence in use of cross-border trade and shopping in the internal market, but its attempts to get Member States to spend more on legal aid have not been successful.[77] The country that spent the most on legal aid, the UK has deconstructed its system and replaced it with seemingly the only viable alternative, which is the private finance of litigation. Therefore, it seems likely that contingency fees will spread across Europe, followed by increased litigation of all types of claims.

The question here is whether governments will realise that *whatever* litigation funding system they permit, it needs to be regulated effectively if transactional costs are not to become disproportionate. To a European, the levels of remuneration involved in U.S. class actions are hugely disproportionate, and attempts to limit fees are simply ineffective. In privatising litigation funding in England and Wales, the UK government has introduced strong regulatory controls designed to keep legal costs

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[77]Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes. This does not establish comprehensive requirements for legal aid, and has not yet been followed up.

low and proportionate.[78] Germany has a different mechanism but an even better result, involving a tariff system. The UK system has been criticised as too complex, and difficult for consumers to understand, and there is pressure for contingency fees to be introduced.[79]

There do, however, remain some important differences between U.S.A. and EU jurisdictions in their civil justice systems. It is true that EU jurisdictions generally retain a "loser pays" rule, that civil decisions are made by judges rather than juries, and that punitive damages are generally unavailable. However, there is pressure for reform on all these matters, and it is difficult to predict what the litigation landscape will look like in 5 or 10 years. The spread of both class action mechanisms and of contingency fees may produce an inflationary effect on levels of damages, and, as seen in this monograph, the suggestion of the introduction of double damages for antitrust cases by as important a body as the European Commission will not go unnoticed and uncopied in other contexts. There are, in any event, moves toward harmonising levels of damages across

[78]The system is based on Conditional Fee Agreements, in which lawyers work on the basis of (a) no win, no fee and (b) a success fee, which is a percentage of the basic fee (that is calculated on hourly rates). However, the percentage uplift on the basic fee must be proportionate to the risk, and may not be greater than 100%. The courts have shown huge determination in enforcing strict regulation of the success fee uplift, which is required to be proportionate to the level of risk in the case.

[79]The Better Regulation Task Force, *Better Routes to Redress* (Cabinet Office 2004). *See* Michael Zander, *Will the Revolution in the Funding of Civil Litigation in England eventually lead to Contingency Fees?*, 52 DE PAUL L. REV. 260–98. "Improved Access to Justice—Funding Options & Proportionate Costs", Report & Recommendations, (Civil Justice Council 2005), Recommendation 11.

Member States,[80] and a disability rating system,[81] and harmonisation usually has an inflationary effect.

The picture currently looks like a jigsaw puzzle, in which the pieces are slowly changing colour in a different sequence across different countries. If any country ends up with too many pieces in new colours, it will experience a litigation explosion. And some countries are getting close, usually without realising it.

The Commission does not seem to have given sufficient attention to the role that intermediaries (lawyers or other claims farmers) can have in encouraging litigation. Unlike the U.S. position, the EU documents do not refer to lawyers acting as private attorneys general, but instead refer only to consumers. Europe does not have a constitutional or cultural tradition of private people exerting individual rights as if they were State representatives. A significant clash of cultures is being opened up here.

What lessons can be learnt from experience of civil litigation systems that have produced problems? The United States, UK, and Australia provide ready examples. The class action history of the United States will be well familiar to readers and need not be rehearsed here. In England and Wales, the ineffectively-controlled availability of legal aid, and the removal of a ban on

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[80]Recommendation to the European Commission, the European Parliament and Council for a Directive on personal injury compensation, proposed by a conference at Trier on 8-9 June 2000. F.D. Busnelli, *Prospettive europee di razionalizzazione del risarcimento del danno non economico*, *in* DANNO E RESPONSIBILITÀ 5-11 (2001).

[81]Draft Report of the Committee on Legal Affairs and the Internal market with recommendations to the Commission on a European disability rating scale provisional 2003/2130 (INI), 23 August 2003. This was a proposal for a European disability rating scale, sponsored by Willi Rothley MEP, and drawn up by the Confédération Euro péene d'Experts en Evaluation et Réparation du Dommage Corporel.

advertising by lawyers, produced a rash of class actions (known as Group Actions) from roughly 1980 to 1995. This led to a sequence of cases in which many thousands of consumers gained nothing, their lawyers were well paid by the State for losing, and the defendants paid large sums to their lawyers.[82] The government criticised the legal aid system as being lawyer-led, and switched to a private funding system. However, under the privatised system, a market of claims intermediaries was created, and the absence of regulation led to extensive consumer detriment and cases of fraud. New legislation was required to introduce regulation of third-party litigation funders.[83]

In Australia, the major systemic tort crisis of around 2000 was principally brought about by deregulation of advertising by lawyers, and the introduction of contingency fees and of class actions.[84] A large insurance company collapsed, medical malpractice insurance became unavailable, and ongoing medical care threatened to collapse, and the government had to rush through a sequence of measures to underpin medicine and restrict litigation.

VII. COLLECTIVE CONSUMER CLAIMS

The Commission is particularly concerned with facilitating consumer claims—such as the situation where many people may individually suffer small detriment, and would otherwise not sue for damages, but where the infringing company might otherwise reap large illegal gain. This underpins the idea of involving consumer organisations in a regulatory capacity as consumer

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[82]Christopher Hodges, *Multi-Party Actions* (Oxford 2001).

[83]Compensation Act 2006.

[84]Commonwealth of Australia Treasury, *Review of the Law of Negligence: Final Report, 2002,* <http://revofneg.treasury.gov.au/content/reports.asp>.

representatives, enabling them to bring representative actions on behalf of named individuals of a class of consumers.

Most Member States already permit consumer organisations to bring collective action remedies on behalf of consumers, as discussed previously in this study. These mechanisms have so far generally been limited to injunctive relief, but there is a trend for them to be extended to include damages claims. A recent example is a UK consultation paper of July 2006,[85] which proposes that, in cases where a breach of consumer protection legislation affects a number of consumers, a consumer group or similar organisation might be entitled to take legal action on behalf of the affected individuals, including claim damages.

However, the evidence is that the involvement of consumer organisations as regulatory bodies is ineffective. They have very rarely brought actions under national legislation, even though some have been able to do so for many years. Only one cross-border case has been taken under the EU provisions—and that was instituted by a public body and not a consumer organisation.[86] Research by the UK government showed that if

[85]The consultation document is available at <http://www.dti.gov.uk/consultations/page30259.html> .

[86]The case was brought by the Office of Fair Trading, against a Belgian company that was sending unsolicited mail order catalogues to UK residents together with notification of a prize win, and the Belgian court issued an order banning the practice on the basis that consumers believed that they had to make a purchase in order to secure a prize, whereas winners were preselected and few recipients would receive a prize, usually £10,000. The company was reported to have received about 4,000 orders per day from its catalogues. Press release at <http://www.oft.gov.uk/News/Press+releases/2004/208-04.htm>, *and see* Report from the Commission: *First Annual Progress Report on European Contract Law and the Acquis Review*, COM (2005) 456, 23 Sept. 2005. *OFT v. D Duchesne SA* referred to in *TS Today* , Feb. 2006, at 4.

consumer organisations were given increased funding to take legal action, it would have only marginal effect.[87]

The involvement of consumer organisations in consumer protection law in fact seems to be based essentially on ideological and political motivations. As discussed earlier, the ideological point is that the Commission wants consumers to exert an effect in making the European economy work. The political point is that the Commission wants consumers to think that they are being involved in the EU enterprise, and that the EU is good for them.

However, some Member States, in fact, strongly distrust consumer organisations as regulators, and seek to limit their involvement in enforcement. For example, they may restrict the number of consumer organisations that may exercise enforcement powers, or they may restrict the use of such powers.[88] A striking example is the UK, where a consumer organisation must first be approved by the government, on the basis of satisfying published criteria, and then can only make complaints to the public regulatory agency about an infringement, rather than being able to exercise enforcement powers itself.

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[87] *Comparative Report on Consumer Policy Regimes* (Department of Trade and Industry, Oct. 2003).

[88] Such as under Directive 93/13 on unfair contract terms, action is restricted to a regulator who is responsible for upholding the public interest, such as the Office of Fair Trading in the UK, the Director of Consumer Affairs in Ireland, the consumer ombudsman in Nordic states, and the Verbraucherschutzvereine in Germany, and the relevant Ministry in Spain and in Portugal: *Report from the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts*, COM (2000) 248, 27 Apr. 2000. An interesting precedent is the UK system of permitting damages claims to be brought in a representative capacity by an approved body, but subsequent to a decision on infringement by a competition authority: Competition Act 1998, § 47A(5).

Some suggest that if a solution to collective claims needs to be found, a responsible public regulatory body should be empowered to bring them, rather than a consumer organisation. A precedent would be the Australian Competition and Consumer Commission. This type of approach would require the public body to exercise proportionality and responsibility in evaluating which claims were worth pursuing, and which not. The body's activities would also be more democratically accountable.

VIII. CONCLUSION

This situation is worrying. The Commission believes that there are too many infringements of antitrust law in Europe, but has not produced any evidence to substantiate this assertion. Nevertheless, the Commission proposes to introduce major incentives to increase the number of damages claims. The ways in which it would do this would be by removing what it sees as a number of barriers to bringing claims, which would have the effect of making fundamental changes in the financial incentives to bring litigation. However, the Commission accepts that it does not want to bring about a U.S.-style litigation environment, since that would be seriously detrimental to the economy. It expressly identifies class actions and contingency fees as undesirable. Yet it seems blind to the obvious fact that the changes that it proposes would inevitably have the same result, and encourage a culture of excessive litigation in Europe. Transactional costs (lawyers' fees) would rise, sums paid to settle unmeritorious claims would increase.

Business interests have unanimously voiced fears that the litigation culture in Europe might undergo irreversible adverse change, and that there would be an explosion of litigation of all types in Europe. One litmus test of the proposals may be the response of lawyers. Some lawyers have quietly agreed with

business voices. But others support the proposals—now, where would their interests lie?

It remains to be seen where the argument will end up. Will the Commission accept that it just got it wrong, or will it press ahead? Will Member State governments and European Parliamentarians understand the message and exert enough pressure to affect the outcome? Will the Commission need to have a face-saving solution? Will all parties devote enough resources to overcoming the lack of information, and to establishing the real position through empirical research?

ABOUT THE AUTHOR

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He has published books and many chapters and articles, on multiparty actions, European product liability, product regulation and safety. He carried out the European Commission's first study on the product liability Directive in 1993-95. From 2004 he has been a member of the Commission's Expert Working Group on that Directive. From 1999 to 2003 he was Chair of the Committee of the International Bar Association on Product Liability, Advertising, Unfair Competition and Consumer Affairs. He has been a member of the Academic Advisory Panel of the Department of Trade & Industry on consumer law since 2001, and was a member of the Consumer Affairs Panel of the Confederation of British Industry for many years. He has advised governments in the UK, Japan, Australia, and Canada, the Irish Law Reform Commission and the European Commission.

He also advises various enterprises, including as a consultant to the international City of London law firm CMS Cameron McKenna, where he was a partner from 1990 to 2004. He has extensive practical experience of law in business and of European legal systems: he began his career in 1977 working on major financial and commercial litigation, later specialising in European product liability and product regulation, handling major cases and class actions throughout Europe.

He has an interest in the law of medical device technology, medicines, and health care. Since 2004 he has been Co-Chair of two Working Groups of the Health Industries Task Force, reporting to a Minister of Health. He is Chair of the Legal

Issues Committees of both the European and UK trade associations of medical device manufacturers, EUCOMED/ EDMA and ABHI/BIVDA. Since 2005 he has been Vice-Chairman of the Association of British Healthcare Industries, and Chair of its Technical Policy Group. He was Vice-Chair of an NHS Research Ethics Committee during the 1990s. He has recently been part of a team at Cambridge University advising the Human Genetics Commission on future regulation of genetic testing.

His honours include the Freeman of the City of London (1982), Fellow of the Society of Advanced Legal Studies (2000), Yeoman of the Worshipful Society of Apothecaries (2005), and election to the Society of Legal Scholars (2006).