

CARTELS AND DETERRENCE – CREEPING CRIMINALISATION AND THE CLASS ACTION BOOM

By Ken Daly*

The most effective deterrents in competition law are the risk of criminal sanctions and the risk of major damages awards. These are theoretically available in many EU Member States, but are rarely used to great effect. However, steps towards mass private litigation are well underway and the prospect of EU-wide criminal sanctions is closer than many realise.

At present, the EU's system of antitrust enforcement does not deter infractions. It still seems possible to profit from a cartel, even when it is detected and fully prosecuted. This is because the main risk to companies participating in a cartel in the EU continues to be the imposition of administrative fines by the European Commission (the Commission), which are capped at a maximum of ten percent of the global revenues of the company responsible (and often the maximum fines are not imposed).

Arguably, only a system which includes real and personal risk to executives, such as the risk of criminal sanctions, and which can force companies to pay out at least as much as they have gained, as might be the case with an effective damages system, will ever act as a real deterrent. Both of these are theoretically available in the EU in different ways and to different degrees, depending on the Member State. In practice, though, they are rarely, if ever, used to great effect. Herein lies the problem. It is the EU's avowed policy to rid the European economy of cartels, and it does what it can to pursue cartels using its existing fining powers. However, it is the Member States that have traditionally held the necessary powers to establish the most effective deterrents: the criminalisation of cartels and an efficient damages system.

Nonetheless, there have been major developments in relation to criminalisation, which indicate a 'creep' towards harmonised criminal sanctions for cartel offences in the EU. It is not entirely clear whether these developments are part of a "grand design," a natural (though some-

* Ken Daly is a counsel in Sidley Austin's Brussels office, where he focuses on EU competition and regulatory law. Mr. Daly has practiced competition law in Brussels since 1996. He has significant experience in merger control proceedings, cartel investigations and litigation, distribution practices, and abuse of dominance cases. He has advised clients in a variety of high profile cases before the European Commission and national competition authorities and has represented clients in litigation before the European Courts. In addition to having worked in a variety of industries and business sectors such as air transport, automotive parts, cement, food and beverages, glass, haberdashery products, luxury goods, military products, pharmaceuticals, precious metals, professional and financial services, and tobacco, Mr. Daly has particular experience in film, music, media and broadcasting, and sports law. He has written extensively on distribution, cartel and sports law and is a regular contributor to conferences on competition law, including those organised by the American Bar Association, the Antitrust and Trade Committee of the International Bar Association and the IBA's Global Forum for Competition Policy. Telephone: 32.2.504.6439, E-mail: kdaly@sidley.com. The author would like to thank Dominique Costesec for her help in preparing this article.

what unplanned) evolution, or mere luck for those sharing the cartel enforcers' objectives. Whatever their origin, effective and EU-wide criminal law sanctions for cartel offences are closer than many appear to realise.

In addition, the Commission has been both purposeful and public about its efforts to encourage greater use of damages actions in the EU Member States and to persuade national Courts to embrace such actions. There is much work to do, but the Commission and Member States at least appear to be moving towards creating a viable means for harmed parties to seek compensation from cartelists in the EU. This has led many to wonder (and fear) that the Commission's actions may lead to a boom in US-style class actions in the EU.

CRIME (STILL) PAYS

Former EU Competition Commissioner Monti described cartels as a "cancer" on the European economy.¹ Current Commissioner Kroes agrees, and argues that "cartels are the most damaging restrictions of competition" and emphasizes that the Commission "will pursue such practices relentlessly and with zero tolerance."² In recent years, the European Commission has indeed intensified its prosecution of cartels and has been very active in taking up new cartel cases.

However, its enthusiasm for taking on cartel cases is not matched by its ability to produce decisions. Between February 2002 and December 2005, the Commission received 167 applications from companies coming forward to confess their participation in cartels³ and to ask for either immunity from fines or lenient treatment. However, in 2006 the Commission reached just seven cartel decisions. This relatively low output is due in part to the exacting requirements of the European Courts (which overturn cases when certain minimum evidential standards have not been met), but also to resource constraints and, some would argue, a degree of inefficiency and lack of continuity at the Commission (for example due to staff rotation). At the present rate, even without taking on any new cases, it would take several years for the Commission to clear its backlog of cartel cases.

The vast majority of cases are uncovered as a result of a 'whistleblower' coming forward. However, the log-jam at the Commission

1. Foreword by Mario Monti to the XXXI Report on Competition Policy 2001, European Commission, 2002, p. 4.

2. Speech by Commissioner Kroes to the Hellenic Competition Commission in Athens, Commission Press Release SPEECH/06/566 of 5 October 2006.

3. Under the Commission's notice on immunity from fines and reduction of fines in cartel cases, OJ C 298, 8.12.2006, p. 17. This policy encourages companies to denounce their fellow cartel participants in exchange for immunity or a reduction of the fine they might otherwise expect. Statistics from the Joint answer by Mrs Kroes on behalf of the Commission to Written questions E-2233/06, E-2234/06 by MEP Sharon Bowles, submitted to the Commission on 19 May 2006. Note that more than one application may be made in relation to the same case so 167 applications do not equal 167 cases.

now effectively precludes it from actively tracking down new cartels, and it has little ability to focus its resources on detecting and up-rooting the most determined and embedded cartels.

When it does reach decisions, the Commission imposes some robust penalties. In 2006 it imposed fines totalling more than 1.8 billion Euro, and in the early days of 2007 it has already imposed a record cartel fine of 992 million Euro on a number of elevator manufacturers. The Commission has also introduced a new method of calculating fines⁴ which is expected to further increase the level of financial penalties, and which will, amongst other things, be harsher on recidivists and take account of illegal gains made by cartelists in its calculations (though always subject to a maximum of ten percent of global turnover).

In short, even though high fines are (and will likely continue to be) imposed upon those cartels that are investigated, the decision-making process is extremely slow and little time is devoted to active detection. Moreover, generous discounts are available for co-operation and many fines are subsequently reduced by the European Courts on appeal (about eighty-five percent of EU cartel cases are appealed). Therefore, it is hard to argue that, under the current system, the threat of fines alone has a particularly strong deterrent effect.

The gains achieved by cartels are difficult to quantify, but some evidence is available. According to the Organisation for Economic Co-operation and Development (OECD),⁵ the global citric acid cartel raised prices by as much as thirty percent and collected overcharges estimated at almost \$1.5 billion, and the graphite electrodes cartel raised the price by fifty percent in various markets during five years, and apparently extracted excess profits on an estimated seven billion dollars in world-wide sales. One survey found that average overcharges on customers in the EU probably amount to about forty-four percent, that the known overcharges exceeded \$262 billion and that the typical cartel caused more than \$2 billion in economic harm.⁶

The OECD has stated⁷ that effective deterrence requires a financial sanction of approximately three times the gain realized by the cartel. Other surveys have concluded that for fines to act as a real deterrent, it would be necessary to increase the level of fines by up to eighteen times (in the case of the EU's recent fining practice, from three billion Euro to

4. Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, *OJ C 210, 1.9.2006, p. 2*.

5. *Report on Hard Core Cartels*, Organisation for Economic Co-operation and Development, 2002.

6. *Statistics on Modern Private International Cartels, 1990-2005*, by John M. Connor and C. Gustav Helmers, Working Paper #06, 11 November 2006, Dept. of Agricultural Economics Purdue University, available at http://www.agecon.purdue.edu/working_papers/workingpaper.connor.11.10.06.pdf.

7. In the report mentioned at footnote 4.

over fifty billion Euro).⁸ However, there is evidence that fines were below the illegal gains in the vast majority of cartel cases (sometimes by up to sixty percent),⁹ and certainly were below the OECD's estimate of the level of fines that would in fact deter. While the Commission's new Guidelines on the calculation of fines¹⁰ might increase the fines imposed, the new fines will still significantly fall short of presenting a real deterrent. Therefore, while fines are climbing and the Commission is talking tough, there is an argument that it will never have the resources or ability to deter cartels using only the tools currently available to it.

If the European Community (the Community) wishes to achieve its goal of deterrence, it will have to find other means to put pressure on those that might otherwise profit from participation in a cartel.

CRIMINALISATION OF CARTELS

With the Commission's open political encouragement, many Member States have already started down the path of creating criminal sanctions to punish cartel behaviour. Varying degrees of personal exposure (whether criminal or administrative) for directors and other senior executives (including, in some cases, possible prison sentences) are already available in some Member States including Austria, Denmark, Estonia, France, Germany, Greece, Hungary, Ireland, Italy, the Slovak Republic and the UK.

In March 2006, Ireland became the first European country to order a jail sentence for cartel behaviour. An Irish Court ordered a custodial sentence of six months in prison (albeit suspended for twelve months) and a fine of fifteen thousand Euro for an executive who acted as the chief coordinator of a cartel in the Irish home heating oil market.

The traditional wisdom, political encouragement aside, is that the EU has no power when it comes to criminal law, this being a matter exclusively reserved to the Member States. In reality, this is untrue and also does not take account of the many other areas in which the Community already has real influence on how criminal law develops.

THE INTRODUCTION OF A EUROPEAN DIMENSION IN THE FIELD OF CRIMINAL LAW

The 1992 Maastricht Treaty first introduced competencies in criminal matters as an issue of 'common interest' for the Member States. However, many Member States considered that these areas were too sensitive to be managed by the mechanisms of the Community, and that the power of governments in these areas had to be stronger than the Union's powers. A 'three pillar' structure was developed to isolate the traditional

8. *Cartel Fines in Europe – Law, Practice and Deterrence*, by C. Veljanovski, July 2006, available at <http://ssrn.com/abstract=920786>.

9. Veljanovski, see footnote 7.

10. See footnote 3.

Community responsibilities in the area of the economy (the First Pillar), from the new competencies in the areas of foreign policy and military matters (the Second Pillar) and criminal matters (the Third Pillar, or Justice and Home Affairs Pillar). This structure ensured that while matters under the First Pillar were governed by a supranational system (in which the Member States agreed to give up some sovereignty in favour of the Union), criminal sanctions and penal matters (under the Third Pillar) remained under the management of an intergovernmental system.

In these early days, some initiatives were launched in order to improve judicial cooperation in criminal matters, such as the adoption of conventions on extradition, but many never entered into force because Member States failed to ratify them. To remedy this situation, the 1997 Amsterdam Treaty provided new legal instruments which are legally binding for Member States and do not require ratification (even though they may still require transposition into national law).

In October 1999, the European Council held a meeting in Tampere (Finland) which, for the first time, was exclusively devoted to issues of justice and home affairs. In Tampere, Member States set out the main principles for judicial cooperation in criminal matters and agreed that EU activities in this field would focus on four directions: (i) the approximation of legislation; (ii) the development of instruments based on the mutual recognition principle; (iii) the improvement of judicial cooperation mechanisms; and (iv) the development of relationships with foreign countries.

THE EU'S CURRENT POWERS IN THE FIELD OF CRIMINAL LAW

These developments have led the Commission to begin to initiate proposals with Member States in the area of criminal justice. It should nevertheless be noted that unlike for "regular" Community matters, the Commission cannot bring Member States before the European Court of Justice for failing to properly implement EU legislation in the area of criminal justice. The adoption of legislative proposals in this field is subject to the so-called "consultation procedure," in which the European Parliament has only very limited powers (it is consulted but its opinion is not binding). A unanimous vote in the Council is required.

Despite this somewhat limited mandate, the Commission has been the driving force behind a number of substantial initiatives and measures, which either do, or could soon, have relevance to the enforcement of EU competition law through criminal law. Some examples of these initiatives and measures are set out below.

Approximation of Criminal Laws - The Commission Already Regards Itself as Competent in Principle

Most competition lawyers will argue that, under the present structures, the Commission has no power to propose (let alone impose) crimi-

nal law sanctions for breaches of EU competition law. However, it seems that the Commission at least might not agree.

For some years the Community has been struggling to introduce a series of measures that would require the Member States to introduce criminal sanctions in their domestic laws for certain environmental offences. This led to a series of disputes between the European institutions concerning the legal basis on which this may be done.

In September 2005, the European Court of Justice confirmed that the Community has the competence to adopt criminal law measures for the protection of the environment if necessary to ensure the efficient implementation of its environmental policy.¹¹ The Court held that, although in general neither criminal law nor the rules of criminal procedure fall within the Community's competence, the EU can make use of criminal law when the application of "effective, proportionate and dissuasive criminal penalties by the competent national authorities is essential for combating serious environmental offences," and when the Commission considers that this is necessary "in order to ensure that the rules which it lays down on environmental protection are fully effective." The Commission is now using those reinforced powers to propose a directive that will oblige Member States to treat serious offences against the environment as criminal acts, and to ensure that they are effectively sanctioned. The proposed Directive even goes so far as to set minimum sanctions for environmental crimes across the Member States. Furthermore, the Commission made clear in a press release that in its view "the scope of this judgment exceeds by far the field of the environment, taking in the whole range of Community policies and the fundamental freedoms recognised by the Treaty."¹² According to the Commission's reading of the judgment,¹³ the Community legislature, "and it alone," has the power to adopt criminal law measures of any nature when needed to ensure the effectiveness of binding rules of Community law.

The environmental measures with a criminal character mentioned above are not the only examples of measures of this kind. There are already a number of other measures adopted in the sphere of fisheries, transport policy and finance law which either require the Member States to bring criminal proceedings or impose restrictions on the types of penalties which those States may impose.¹⁴

11. Judgment of the European Court of Justice of 13 September 2005 in Case C-176/03, *Commission v Council*.

12. Commission Press Release MEMO/05/437 of 23 November 2005.

13. Commission Communication to the European Parliament and the Council on the implications of the Court's judgment of 13 September 2005 (Case C 176/03 *Commission v Council*), COM(2005) 583 final (Not published in the OJ).

14. Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro (OJ L 140, 14.6.2000, p. 1) and Council Framework Decision of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in

The Commission has been taking the view that, as the EU grows and internal borders disappear, the approximation of legislation is a necessity in order to prevent criminals from taking advantage of the discrepancies between national legislation to operate across borders. For this reason, the Commission considers that all areas where international crime could develop on the back of reduced border controls might give rise to some need for harmonisation of national rules, including criminal rules.

The Commission has repeatedly identified 'white-collar crime,' including 'serious economic crime' as a priority area in which it wants to achieve more harmonisation. So far it has focused its efforts mainly on money laundering, counterfeiting of non-cash means of payment and fraud.¹⁵ To the author's knowledge it has not been actively proposed that competition law be considered for inclusion, but as the fight against cartels seems to be increasingly high on the agenda and is manifestly an 'economic crime,' one might wonder whether it is only a question of time before steps are taken towards approximation. Arguably, the Commission already has the power to do so.

Improvement of Judicial Cooperation: The European Arrest Warrant

The EU has also been active in the field of judicial cooperation in many ways, through the creation of a "European judicial network" and

connection with the introduction of the euro (OJ L 329, 14.12.2001, p 3); Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (OJ L 166, 28.6.1991 p. 77) and Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (OJ L 182, 5.7.2001, p. 1); Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment (OJ L 149, 2.6.2001, p. 1); Directive defining the facilitation of unauthorised entry, transit and residence and Council framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (OJ L 328, 5.12.2002, pp. 17 and 1); Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements and Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution (OJ L 255, 30.9.2005, pp. 11 and 164); Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (OJ L 192, 31.7.2003 p. 54); Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems (OJ L 69, 16.3.2005, p. 67).

15. See the Framework Decision on combating fraud and counterfeiting of non-cash means of payment, which was adopted on 28 May 2001, referred to in footnote 13 above. Under this proposal, fraud and counterfeiting involving any form of non-cash payment is recognized as a criminal offence and punishable by effective, proportionate and dissuasive penalties in all EU Member States. See also the Framework Decision on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, adopted on 26 June 2001 referred to at footnote 13. This limits Member States' discretion regarding confiscation of the proceeds of crime and laundering offences in respect of the 1990 Council of Europe convention on Laundering, and establishes a common threshold for penalties.

improved police cooperation, and generally by enhancing information sharing between national authorities. One of the most concrete achievements in this area is the European Arrest Warrant (EAW).¹⁶

The EAW entered into force in January 2004, and replaced a complex series of extradition procedures between the Member States. It provides for a faster and more efficient procedure involving reduced political involvement. An EAW may be issued by a national court if the person whose return is sought is accused of an offence for which, in both countries, the penalty can exceed one year's imprisonment or if he or she has actually been sentenced to a prison term of at least four months. Under the EAW system, Member States can no longer refuse on nationality grounds to surrender their citizens to the authorities of another Member State where that citizen has committed, or is suspected of having committed, a serious crime in the latter EU country.

Certain offences can give rise to a requirement to surrender citizens under an EAW without the need to demonstrate the severity of the offences in question. These offences are set out in a schedule to the Framework Decision. The schedule is peculiar in that it lists a number of offences, without offering any definitions at all. The list includes references to 'corruption', 'fraud', 'laundering of the proceeds of crime', 'swindling', 'racketeering' and 'extortion'. If these terms were interpreted broadly they could, perhaps, capture some elements of a typical hard-core competition law infringement.

Although it may not yet have been used in this way, there is a possibility that the EAW could already apply to competition law offences and, for example, an EAW could be issued in Ireland requiring an arrest to be made in Greece and a transfer of the prisoner to Ireland to face trial for operating an international cartel that breached Ireland's prohibition on cartels.

The European Evidence Warrant

The Commission has also introduced a proposal for a European Evidence Warrant (EEW).¹⁷ Although this has not yet come into force and is still under discussion, the idea is that the EEW would speed up the transfer of evidence needed for criminal investigations from one Member State to another. Evidence orders issued by a judicial authority in one Member State would be recognised in another and there would be only very limited grounds for refusing. It is anticipated that the EEW could drastically speed up the procedure for exchanging information between Member States.

16. Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision, OJ L 190, 18.7.2002, p. 1.

17. Proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters, 14.11.2003, COM(2003) 688.

It is proposed that the EEW could be used for evidence needed in connection with any criminal proceedings which are offences in both the requesting Member State and in the Member State receiving the request. In principle, if the evidence requested relates to an offence identified on the same list of offences referred to above (in relation to the EAW) then this ‘double criminality’ point would not need to be verified.

Development of Relations with Third Countries

While the EAW has already made extradition within the EU easier, extraditions to and from third countries are also being facilitated. Most importantly, in June 2003 the EU signed a Treaty on extradition with the United States.¹⁸

Some Member States such as the UK have gone even further than the provisions of the EU-US Treaty and have ratified their own bilateral Treaty with the US. The UK-US Treaty in particular has caused a lot of controversy, as it removes the requirement on the US to provide *prima facie* evidence when requesting the extradition of UK nationals to the US, but, due to delayed implementation in the US, the requirement on the UK to satisfy the “probable cause” requirement when seeking the extradition of US nationals to the UK is still in place.

This should be a cause for concern for European citizens who engage in international cartels, as the US has been very active in imposing personal criminal sanctions for restrictive antitrust behaviour. Several European executives have already been imprisoned in US jails in this context. In 2005, eighteen European individuals were prosecuted by the US Antitrust Division and sentenced to jail. Among them were nationals of Austria, Belgium, France, Germany, Italy, Norway, Netherlands, Sweden, Switzerland, and the UK. Some of these individuals were in the US already. At least six others “volunteered” to serve prison sentences in the US, after being threatened with the prospect of being placed on Interpol’s list for arrest with a view to extradition. Average jail sentences for antitrust offences in the US are about nineteen months.

The UK’s Courts have not yet dealt with many extradition applications from the US under the new Treaty. However, in 2006, the UK Home Secretary ordered the extradition of a former CEO of Morgan Crucible Plc, which was accused by antitrust authorities of being the ringleader of a cartel in the market for carbon products. The individual is appealing the decision, but came one step closer to extradition in January 2007 when the UK’s High Court rejected his appeal. If the US authorities are successful, he would be the first European citizen to be formally extradited to the US to face antitrust-related offences. There are currently some twenty individuals in the UK subject to US requests for extradition on antitrust-related charges.

18. Agreement on extradition between the European Union and the United States of America, OJ L 181, 19.7.2003, p. 27.

A most interesting question is whether (now or in the future) a participant in an international cartel could be arrested in one European country, transferred to the UK without an extradition procedure under the European Arrest Warrant, and then subsequently transferred for trial to the US under the UK-US Treaty (perhaps without even a *prima facie* case being shown). If this were possible one could argue that there is already a multinational criminal enforcement system in place, and only actual enforcement is lacking.

CREEPING CRIMINALISATION

Even if the EU is not at present openly proposing EU-wide legislation or measures in the field of criminalisation of competition law offences, the march towards criminal responsibility for cartel offences across the EU is well underway on a variety of different (and perhaps not coherently connected) fronts.

In the face of the realisation that current policy does not sufficiently deter cartels, the motivation may well exist to encourage “criminalisation” in general. As the EAW, and eventually the EEW, become more commonly used and accepted; as more Member States introduce (and actually use) criminal law sanctions in relation to cartels; as international extradition is used more frequently in relation to cartel offences; and as Member States become used to accepting harmonisation initiatives from the Commission in the field of criminal law to underpin areas of overall EU policy, it seems to be only a matter of time before a serious proposal is made to take the first steps towards harmonisation of criminal sanctions for cartels within the EU.

While such moves might meet with initial resistance, the Commission is likely to argue that international cartels are too difficult to combat on a national basis when their impact is EU-wide and, perhaps ironically, that there are a number of overlapping and misaligned measures already in existence which make prosecution difficult in practice and which should justify some degree of harmonisation.

REINFORCEMENT OF PRIVATE DAMAGE CLAIMS

The second major factor that tends to deter would-be cartelists is the availability of significant damages to those harmed. A major initiative is underway to facilitate damages actions in the EU’s Member States. Companies or consumers harmed by cartel behaviour are, in theory, currently able to bring actions for damages for breach of EC antitrust rules in most Member States. However, in practice, such actions for damages have been rare. The reasons vary from one Member State to another but national rules on jurisdiction, costs, evidential issues, and judicial reluctance and inexperience have all played a part in limiting the number of major actions.

The European Court of Justice eased the way in 2001 when it explicitly recognised a right to damages for breaches of EC competition law.¹⁹ A study conducted for the European Commission in 2004 confirmed that only around sixty cases for damages (based on EC and/or national law) had been decided in total for all Member States, of which only twenty-eight resulted in an award being made.²⁰

The Commission therefore decided to examine the conditions under which private parties can bring actions for damages before the national courts and to identify any obstacles. Its findings were published in December 2005 in a Green Paper and a Commission staff working paper for public consultation.²¹ The Commission is currently preparing a White Paper that will set out in concrete terms its suggestions for encouraging more damages actions. The White Paper is expected in 2007.

Based on its work to date, it is clear that the Commission believes that improved access to private damages claims not only have the potential to make it easier for consumers and firms who have suffered harm from an infringement of competition law to recover their losses, but will also reinforce deterrence and increase compliance with the law. This way, private parties would in essence complement the work of the antitrust regulators.

While the Commission's preparatory work stops short of proposing the introduction of US-style treble damages (where the amount of loss that can be shown based on an infringement of US federal antitrust law is automatically trebled and awarded to the plaintiff),²² one of the options being discussed is double damages for cartels. The award of such double damages could be automatic, or at the discretion of the court hearing the case. Other suggestions include lowering the evidential barriers, the alteration of the burden of proof and the facilitation of "group claims." Even in advance of co-ordinating action from the Commission, there have already been some developments in the EU demonstrating that more serious damages actions are on the way.

Recently, a Belgian company (named 'Cartel Damages Claims') purchased a number of damage claims from parties affected by a cartel in the cement sector, which had been uncovered by the European Commission.

19. Judgment of the European Court of Justice of 20 September 2001 in Case C-453/99, *Courage v Crehan*.

20. *Study on the conditions of claims for damages in case of infringement of EC competition rules*, by Ashurst, 31 August 2004, available at http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/study.html.

21. Green Paper *Damages actions for breach of the EC antitrust rules*, COM(2005) 672, and Commission Staff working paper, SEC(2005) 1732, both dated 19 December 2005. Comments on the Green Paper submitted to the Commission by third parties are available on the website of the European Commission's DG Competition.

22. The system of treble damages is based on the concept that only 1 in 3 cartels are successfully prosecuted, and therefore damages should be increased to take account of that fact. In reality, it is likely that the probability of a cartel being detected is lower than 33%.

It has bundled those claims and presented them to a German court and has won a favourable preliminary ruling relating to jurisdiction. The Belgian firm is preparing further suits against companies involved in European cartels in the bitumen and bleaching chemical sectors, as it is seeking to apply this method to pursue other lawsuits in Europe.

In the UK, the Competition Appeal Tribunal received its first private damages claim in October 2006 from the company Arla Foods which is seeking compensation from six Scottish dairies that had been found guilty of price fixing by the Office of Fair Trading (OFT). Moreover, the very first class action suit against a cartel participant was filed this month by the consumer group 'Which?' The consumer group is using new powers granted to it by the UK 2002 Enterprise Act to sue the sports retailer JJB Sports, which was found guilty by the OFT of fixing the price of England and Manchester United replica football shirts with competitors and overcharging fans. The Commission has even taken up the habit of routinely reminding consumers in the press releases which typically accompany its cartel decisions, that if they are affected by the cartel identified, they are entitled to seek damages from civil courts.²³

Finally, specifically in anticipation of the Commission's White Paper and in response to the growing wave of private antitrust litigation, specialist US class-action firms have begun to open offices in Europe.²⁴ Critics argue that the Commission is creating conditions which are pushing the EU headlong towards a US-style private enforcement system and claim that this system (and in particular the class action system) has not benefited US society and is unsuited for adoption in the EU. They argue that, for better or worse, the effect of the Commission's actions is likely to be a boom in private antitrust litigation.

CONCLUSION

Even though there might be no centralised and entirely coordinated policy, it seems that criminalisation at EU level and cartel damages have gained momentum and are seeping into European enforcement culture. It seems likely that these different elements of national and EU law will gradually link up, creating an ever more forceful deterrent to breaching the EU's antitrust laws.

23. See for example Commission Press Release IP/07/209 of 21 February 2007, *Commission fines members of lifts and escalators cartels over €990 million*.

24. *US law firm makes move on Europe*, Financial Times, 3 January 2007.