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The Rocky Path for Private Directors General: Procedure, Politics, and the Uncertain Future of EU Antitrust Damages Actions

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THE ROCKY PATH FOR PRIVATE DIRECTORS
GENERAL: PROCEDURE, POLITICS, AND THE
UNCERTAIN FUTURE OF EU ANTITRUST
DAMAGES ACTIONS

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For the better part of the past decade, the European Commission has engaged in a dialogue with European Union (EU) citizens and businesses in an attempt to strengthen an almost nonexistent private competition enforcement system. In the United States, where private antitrust lawsuits are most prevalent, litigation is justified on the grounds of both deterrence and compensation. While the Commission wants to make private damages actions the primary vehicle for the compensation of aggrieved parties, recent political pressure has made EU officials claim that government enforcement will remain the predominant means for the deterrence of EU antitrust violations. Furthermore, many EU policy makers have emphasized that they want to avoid what they perceive as shortcomings in the U.S. private enforcement system. In its 2008 White Paper on Damages Actions for Breach of the EC Antitrust Rules, the Commission proposed procedural reforms to incentivize antitrust litigation in member state courts, but it stopped short of offering the full range of rights granted to U.S. plaintiffs. Nonetheless, the Commission drafted a directive in late 2009 that effectively included U.S.-style antitrust class actions, but it quickly withdrew its proposal due to strong opposition in the member states.

This Note argues that the EU needs to implement greater procedural reforms than suggested in the White Paper to make antitrust litigation practical and desirable for most parties. It also contends that the need for private enforcement would be more credible if the Commission once again embraced deterrence as one of its central goals. Finally, this Note challenges the notion, perpetuated by many critics and EU policy makers,
that the U.S. system is wrought with unrestrained excesses and attorney mischief.

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INTRODUCTION

[A] pound of bacon, a peanut butter sandwich, some vitamins—anything that ADM has a hand in—it's all fixed . . . . Basically, everyone in this country is the victim of corporate crime by the time they finish breakfast.1

In the early 1990s, agricultural conglomerate Archer Daniels Midland Company (ADM) engaged in an international conspiracy to fix the price of lysine,2 an amino acid used in animal feed to promote growth.3 The global lysine market was cartelized well before ADM's entry;4 prior to 1991, three colluding Asian companies with American and European subsidiaries controlled the market.5 In 1989, ADM announced that it would begin producing lysine, and in 1992 the company set up its first meeting with Ajinomoto Co., Inc., historically the leading producer, to fix the price and set a sales volume allocation.6 While the companies were not able to agree upon a sales allocation, they successfully raised the price of lysine by fifty

2. United States v. Andreas, 216 F.3d 645, 651 (7th Cir. 2000).
4. Andreas, 216 F.3d at 651.
5. Id.
6. See id. at 651–52.
percent following the meeting. A full cartel including every major lysine producer met several times over the next three years with a similar agenda.

The U.S. Department of Justice (DOJ) Antitrust Division began investigating the cartel’s conduct in 1992, when Mark E. Whitacre, the president of ADM’s bioproducts division, informed the Federal Bureau of Investigation (FBI) of the conspiracy. In 1995, the FBI raided ADM’s corporate headquarters. In 1998, after a lengthy trial, a jury found Whitacre and executives Michael D. Andreas and Terrance S. Wilson guilty of conspiring to fix the price of lysine in violation of section 1 of the Sherman Act. ADM also pled guilty to price-fixing in the global lysine and citric acid markets and paid the government $100 million, by far the largest criminal antitrust fine ever imposed at the time.

While ADM paid a tremendous fine and its executives incurred jail sentences, the company also had to contend with parallel private civil lawsuits. This resulted in an additional $90 million in settlements. Altogether, ADM’s price-fixing scheme cost the company $190 million in the United States, in addition to its executives’ criminal charges.

In 2002, the European Commission (the Commission) fined ADM €47.3 million for its involvement in the global lysine cartel. Although the

7. See id. at 652.
8. See id. at 652–54.
9. Id. at 654–55. Mark Whitacre had embezzled over $9 million from ADM, which he failed to disclose to the FBI while serving as an informant. Id. Whitacre lied to the FBI throughout the investigation, believing that he would be hailed as a hero and become ADM’s new president after the government removed his superiors. Id. at 655. Whitacre’s corporate criminal escapades became the subject of a novel, KURT EICHENWALD, THE INFORMANT (2000), and a major motion picture, THE INFORMANT!, supra note 1.
13. See Greenwald, supra note 12 (stating that the criminal fine that ADM paid was “more than six times the amount of the previous record settlement”).
14. See id.
15. Id.
16. On June 7, 2000, when the decision was rendered, the euro was valued at $0.96. See Board of Governors of the Federal Reserve System, Spot Exchange Rate—Euro Area, http://www.federalreserve.gov/RELEASES/H10/Hist/dat00_eu.txt (last visited Mar. 20, 2010). Thus, €47.3 million at the time was roughly equivalent to $45.4 million.
European Court of First Instance\textsuperscript{18} reduced the fine to €43.875 million,\textsuperscript{19} this was one of the largest antitrust penalties that the Commission had ever imposed.\textsuperscript{20} Nonetheless, the fines that ADM incurred in the European Union (EU or the Union) were not supplemented by private lawsuits akin to those in the United States following the DOJ’s criminal enforcement.\textsuperscript{21}

Although antitrust law is extremely important in the EU,\textsuperscript{22} private antitrust litigation is rare in the member states.\textsuperscript{23} Public agencies, including the Commission and national competition authorities (NCAs), handle the vast majority of enforcement.\textsuperscript{24} However, the Commission is seeking to improve the enforcement network by strengthening private antitrust litigation in the member states.\textsuperscript{25} Moreover, the European Court of Justice (ECJ) has reaffirmed that European citizens harmed by a breach of the EU antitrust rules are entitled to sue for damages in the member state courts.\textsuperscript{26}

\begin{thebibliography}{99}
\ bibitem{1} The Court of First Instance (CFI) is now called the General Court. \textit{See} Treaty on the Functioning of the European Union art. 256, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU] (formerly the Treaty Establishing the European Community).
\ bibitem{2} \textit{See} Case T-224/00, Archer Daniels Midland Co. v. Comm’n, 2003 E.C.R. II-2597, ¶ 380. The CFI reduced ADM’s fine because of its cooperation with the Commission’s investigation. \textit{See id.} The decision was upheld on appeal to the European Court of Justice (ECJ) notwithstanding ADM’s request that the fine be reduced or cancelled. \textit{See} Case C-397/03 P, Archer Daniels Midland Co. v. Comm’n, 2006 E.C.R. I-4429, ¶¶ 12, 107.
\ bibitem{3} \textit{See} Court To Decide Fine for Price Fixing; on Food Classification, FOODPRODUCTIONDAILY.COM, June 8, 2005, http://www.foodproductiondaily.com/Supply-Chain/Court-to-decide-fine-for-price-fixing-on-food-classification. The Commission now routinely issues far larger fines in cartel cases. \textit{See} DIRECTORATE GEN. FOR COMPETITION, EUROPEAN COMM’N, CARTEL STATISTICS (2009), available at http://ec.europa.eu/competition/cartels/statistics/statistics.pdf (listing the top ten largest cartel fines that the Commission has imposed on a single undertaking since 1969, all of which were in excess of €200 million).
\ bibitem{4} \textit{Cf.} supra notes 13–15 and accompanying text.
\ bibitem{8} \textit{See} Press Release, European Union, \textit{supra} note 23.
\ bibitem{9} \textit{See} Case C-453/99, Courage Ltd. v. Crehan, 2001 E.C.R. I-6297, ¶ 26 ("The full effectiveness of Article [101] of the Treaty and, in particular, the practical effect of the prohibition laid down in Article [101](1) would be put at risk if it were not open to any

\bibitem{10} \textit{EU ANTITRUST DAMAGES ACTIONS}
However, there are still procedural roadblocks that have thus far quashed the Commission's efforts.  

Private litigation dominates the U.S. antitrust enforcement system, but EU policy makers are unwilling to embrace the U.S. model because they fear the excesses of a "litigation culture." In the United States, both competitors and consumers harmed by violations of the federal antitrust laws can sue for treble damages. Potential plaintiffs are further empowered by procedural mechanisms such as broad discovery rights, class actions, contingent fees, and one-sided attorney fee shifting. While EU authorities believe that a stronger private enforcement system would be beneficial, they are concerned that these pro-plaintiff mechanisms would cause attorneys to run wild, harming their clients and discouraging businesses from engaging in procompetitive practices.  

Nonetheless, the Commission has engaged in an active dialogue with EU citizens and businesses, and it has taken bold steps toward transforming the landscape for potential antitrust plaintiffs. The Commission's dialogue has been successful insofar as it has raised awareness of the availability of damages actions to plaintiffs that are financially equipped to litigate. However, the Commission has faced a tough battle toward implementing any degree of legislative reform. In 2008, it published the White Paper on Damages Actions for Breach of the EC Antitrust Rules (the White Paper),

individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.

27. See Johan Ysewyn, Private Enforcement of Competition Law in the EU: Trials and Tribulations, 19 INT'L L. PRACTICUM 14, 14 (2006). See infra notes 125–28 for a more detailed discussion of the procedural factors that have hindered private antitrust litigation in the EU.


29. See infra Part I.B.


31. See Ginsburg, supra note 28, at 436.

32. See, e.g., Green Paper, supra note 24, § 1.1.

33. See infra Part I.B; see also Ginsburg, supra note 28, at 435–36 (stating that the high cost of antitrust litigation has led some defendants to settle cases "by abandoning the challenged conduct regardless of whether it was procompetitive or anticompetitive").


35. See infra notes 129–31 and accompanying text.

36. See infra notes 164–72 and accompanying text.

37. The EC, or European Community, was until recently the first of three pillars of the European Union. See EU-Oplysningen, What Are the Three Pillars of the EU?, http://www.eu-oplysningen.dk/eu_en/spsv/all/12/ (last visited Mar. 20, 2010). The EC consisted of the institutional bodies, such as the Commission and the Council, that have the ability to create binding laws for the EU. See id. The Treaty of Lisbon merged the EC with the Union such that it no longer exists as its own legal entity. See Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European
in which it proposed the harmonization of private enforcement procedures among the member state courts. Among the factors that the White Paper addressed were aggregate litigation, discovery rights, and the measure of damages. However, because some EU policy makers have expressed aversion toward the U.S. litigation system, these proposals are distinctly less plaintiff friendly.

Private antitrust litigation can have substantially positive effects on the welfare of consumers and the functionality of an economy. The threat of a costly lawsuit or a large adverse judgment can deter businesses from engaging in anticompetitive conduct. Political factors in the EU have driven the Commission to assert that deterrence is principally the goal of public antitrust enforcement and that it is simply incidental to private enforcement. However, private litigation can still compensate consumers

Community art. 1, Dec. 13, 2007, 2007 O.J. (C 306) 1 ("The Union shall replace and succeed the European Community.").

38. See White Paper, supra note 34, § 1.2; infra Part II.A. For a general discussion of the meaning of green papers and white papers, see infra Part I.C.4, and for an in-depth discussion of the Commission’s legal and political reforms to strengthen private antitrust enforcement, including the 2008 White Paper on Damages Actions for Breach of the EC Antitrust Rules (the White Paper), see infra Part I.E.


41. For instance, the White Paper calls for the establishment of an opt-in collective action instead of a U.S.-style opt-out class action. See White Paper, supra note 34, § 2.1; infra Part II.A.1.a-b. Opt-in collective actions require that the “victims expressly decide to combine their individual claims for harm they suffered into one single action,” White Paper, supra note 34, § 2.1, which creates a much smaller group of plaintiffs and limits victims’ ability to seek redress, see infra Part II.A.1.d.i.

42. See Green Paper, supra note 24, § 1.1 ("[P]ublic and private enforcement . . . serve the same aims: to deter anti-competitive practices forbidden by antitrust law and to protect firms and consumers from these practices and any damages caused by them. Private as well as public enforcement of antitrust law is an important tool to create and sustain a competitive economy.").

43. See id.

and businesses for their economic injuries, and the Commission intends to make damages actions the primary means of compensation for EU antitrust victims.

This Note contends that the EU cannot devise a fully functional private antitrust enforcement system until it is willing to embrace many of the U.S.-style procedures that incentivize litigation. Unless and until the Commission finds a way truly to motivate potential litigants with small claims and to alleviate the inherent costs and risks, it will not meet its goals. This Note also illustrates that the political factors that have driven the Commission to drop deterrence as a goal of private enforcement undercut the need to reform the current system. Moreover, it asserts that the EU policy makers' resistance to reform is based on exaggerated fears. Admittedly, due to its attorney-driven nature, private litigation is subject to potential abuses. By implementing more robust checks and balances, however, the EU could adopt U.S.-style procedures without disastrous effects. Thus, EU policy makers' efforts are stalled not for legitimate concerns, but on purely political grounds.

Part I first introduces the U.S. private antitrust litigation system and describes the criticism it has received from some EU policy makers. Then, it explores the Commission's role and its desire to create a more robust system of private enforcement. Finally, it details the legislative steps that the Commission has taken, before and after the White Paper, to facilitate antitrust damages actions.

Part II.A discusses some of the procedural mechanisms that allow for a strong private antitrust enforcement system in the United States and their White Paper analogues. It focuses on three procedural elements—aggregate litigation, multiple damages, and contingent fees. For each element, it discusses the approach advocated in the 2008 White Paper, the corresponding U.S. model, and support and criticism on either side. Part II.B then examines EU fears of adopting U.S.-style litigation in light of the nature of antitrust litigation and checks on U.S. plaintiffs' lawyers.

Part III concludes that the Commission will not meet its goals unless it moves toward the U.S. model of antitrust enforcement. Part III.A suggests that the Commission's shifting concern from deterrence to compensation makes private antitrust litigation an improper means to fulfill its goals. Then, Part III.B explains why it would be difficult, if even possible, to create a workable private enforcement system using only the reforms included in the 2008 White Paper. Finally, Part III.C argues that the EU policy makers' criticisms of U.S.-style litigation are overstated given the

45. See White Paper, supra note 34, § 1.2.
46. See infra notes 137–39 and accompanying text.
47. See infra Part III.B.
48. See infra Part III.A.
49. See infra Part III.C.
50. See, e.g., infra notes 291–02 and accompanying text.
51. See, e.g., infra notes 304–09, 329–40 and accompanying text.
nature of antitrust law and the potential checks that the EU could place on plaintiffs’ attorneys.

I. BALANCING EU CITIZEN SUITS: THE COMMISSION’S ATTEMPT TO STRENGTHEN ENFORCEMENT WHILE AVOIDING THE PERCEIVED U.S. PITFALLS

In its 2005 Green Paper on Damages Actions for Breach of the EC Antitrust Rules (the Green Paper), the Commission described the state of private antitrust damages actions in the member states as “total underdevelopment.” The EU does not have a system of federal courts akin to that of the United States; EU courts may only exercise jurisdiction over a private antitrust matter through a preliminary ruling, where a member state court or tribunal can refer a question of EU law to the ECJ. Thus, the only place for a private litigant to initiate an antitrust lawsuit is a member state court. Furthermore, there are vast differences in procedural rules between the member state courts. The Commission is therefore trying to harmonize the procedural rules of the member states to put an end to the “astonishing diversity” that has stifled private litigation and that creates inconsistency and forum shopping.

This part details the Commission’s competing motives in its campaign to strengthen private antitrust enforcement. Part I.A presents the U.S. “private


55. See Green Paper, supra note 24, § 1.2; Georg Berrisch, Eve Jordan & Rocio Salvador Roldan, E.U. Competition and Private Actions for Damages, 24 NW. J. INT’L L. & BUS. 585, 587 (2004); see also TFEU art. 263 (limiting the ECJ’s direct jurisdiction over cases initiated by “[a]ny natural or legal person” to proceedings against EU institutions and member states where a regulation or decision is “of direct and individual concern to them”).

56. See Ysewyn, supra note 27, at 14.

57. WAEILBROECK ET AL., supra note 52, at 1.

58. See Janet L. McDavid & Howard Weber, E.U. Private Actions, NAT’L L.J., Apr. 25, 2005, at 13. Because private litigants must pursue their antitrust claims in national courts, the lack of a harmonizing directive makes it more difficult for plaintiffs to succeed in some courts than others. See supra notes 53–56 and accompanying text. This can lead to inconsistency of substantive and procedural antitrust doctrine, and it may encourage forum shopping, where litigants choose to sue in the court with the laws most favorable to their claims. See BLACK’S LAW DICTIONARY 726 (9th ed. 2009).
The United States has the most advanced system of private antitrust litigation in the world. Public enforcement is divided between the DOJ Antitrust Division, which engages in both civil and criminal proceedings, and the Federal Trade Commission’s Bureau of Competition, which shares civil enforcement authority with the DOJ. However, the “well established and indeed successful” system of private litigation in the United States accounts for approximately ninety percent of antitrust enforcement. According to one commentator, “the emphasis [of the U.S. system] has always been on private rather than public enforcement.”

Private plaintiffs (dubbed “private attorneys general”) are authorized by section 4 of the Clayton Act to sue for antitrust damages. The statute...
provides that “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”66 Thus, private litigants have the promise not only of recovery, but also of treble damages, costs, and attorney’s fees.67

In addition to the U.S. antitrust laws, the Federal Rules of Civil Procedure grant all civil plaintiffs rights that may facilitate litigation.68 Class action rights enable plaintiffs to aggregate claims where it would not be practical to sue individually.69 Very broad discovery rights allow plaintiffs to garner evidence in support of their cases where access to information may be limited.70 Furthermore, while the Federal Rules of Civil Procedure do not expressly provide for contingent fees,71 U.S. plaintiffs can often initiate a lawsuit without paying any up-front costs or attorney’s fees.72

Altogether, U.S. procedures combine to create a robust system of private antitrust litigation that compensates victims for their losses and deters future violations of federal antitrust laws.73 However, because industrious lawyers drive the U.S. system,74 some commentators criticize it for being overly litigious or pro-attorney.75 Nevertheless, the U.S. system produces

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66. Id.
67. See id.; Berrisch et al., supra note 55, at 591; Ginsburg, supra note 28, at 429.
68. See Ginsburg, supra note 28, at 436–37; see, e.g., FED. R. CIV. P. 23, 26–37.
69. See FED. R. CIV. P. 23(a)(1); infra Part II.A.1.b.
70. See FED. R. CIV. P. 26–37; In re Auto. Refinishing Paint Antitrust Litig., MDL No. 1426, 2004 U.S. Dist. LEXIS 29160, at *8 (E.D. Pa. Oct. 29, 2004) (“Broad discovery is permitted because direct evidence of an anticompetitive conspiracy is often difficult to obtain, and the existence of a conspiracy frequently can be established only through circumstantial evidence, such as business documents and other records.”).
71. See infra note 277.
72. See infra Part II.A.3.b.
73. See Olsen, supra note 59, at 75.
74. See Issacharoff & Miller, supra note 53, at 191; see also infra Part III.B.2 (suggesting that the pro-plaintiff procedures that are the hallmark of the U.S. system work so well because they attract industrious lawyers).
75. See, e.g., Ginsburg, supra note 28, at 435 (stating that some commentators believe that the U.S. system may in fact harm competition because some innovative and procompetitive practices have been abandoned due to the fear of litigation); Eric Helland & Alexander Tabarrok, Contingency Fees, Settlement Delay, and Low-Quality Litigation: Empirical Evidence from Two Datasets, 19 J.L. ECON. & ORG. 517, 517–18 (2003) (explaining that economists have created models supporting opposite conclusions as to whether contingent fees promote or discourage low-value litigation and whether they induce or restrict settlement agreements); Donncadh Woods, Private Enforcement of Antitrust Rules—Modernization of the EU Rules and the Road Ahead, 16 LOY. CONSUMER L. REV. 431, 436 (2004) (expressing the view that class actions may fall prey to abuse, where lawyers “negotiate large settlements in cases of dubious merit”). See infra Part II.B.2 for a discussion of antitrust standing and the recent developments in federal pleading standards, both of which make it difficult for plaintiffs to extort settlements out of defendants on
far more private antitrust litigants than that of the EU, where only a few cases are initiated, mostly by large companies that can finance an expensive lawsuit.

B. The Commission's View of the U.S. Model: Lawyers Gone Wild

In a 2005 speech at the Harvard Club in New York City, former Competition Commissioner Neelie Kroes told her audience that the EU needs to find a way to "foster a competition culture, not a litigation culture." In an unspoken allusion to U.S. litigation, Commissioner Kroes stressed that the Commission was looking for ways to boost private enforcement and strengthen competition while "avoiding unmeritorious and even vexatious claims" and "avoiding the situation where defendants settle simply because litigation costs are too high." The previous section of this Note examined the U.S. system of private antitrust enforcement; this section lays out the criticism and opposition that such a system faces from some EU policy makers and commentators.

Commissioner Kroes's comments are not out of the ordinary; commentary on the EU's adoption of U.S.-style litigation is wrought with resistance and hostility—even from some U.S. observers. One

tenuous claims. Additionally, some criticism of the U.S. system has focused heavily on potentially conflicting interests between plaintiff classes and their counsel where fees are contingent on the settlement amount; see infra Part II.A.3.d for a discussion of these concerns and the federal legislation that placed limits on fees and subjects class settlements to higher judicial scrutiny.

76. See infra notes 122–24 and accompanying text.
80. Id.
81. See, e.g., Ginsburg, supra note 28, at 437 (deeming the idea that the EU adopt U.S.-style procedural rules simply in the realm of antitrust a slippery slope); Nagareda, supra note 40, at 6 (stating that EU leaders want to “avoid a litigation bonanza”); Olsen, supra note 59, at 73 (describing the EU’s goal as extracting the positive aspects of U.S.-style litigation while avoiding the perceived pitfalls); Ysewyn, supra note 27, at 18 (opining that it would be “undesirable” for “U.S. antitrust procedural rules [to] be imported into the European Union wholesale”). The view of the Commission at large is best exemplified in the Commission Staff Working Paper Accompanying the White Paper on Damages Actions for
commentator mentions that U.S.-style class actions "can send chills down the spines of many EU attorneys, conjuring images of greedy rushes to the courthouse." Moreover, some view contingent fees as "contrary to the legal tradition of the E.U. Member States," in that they "encourage[e] frivolous or merit-less litigation." The Commission is particularly concerned about the combination of contingent fees, class actions, and the lack of a "loser-pays" rule, perhaps because it believes that this gives lawyers carte blanche to initiate many meritless lawsuits at the expense of competition and European industries.

Accordingly, the Commission "deliberately avoid[ed] certain key aspects of the U.S. model of antitrust litigation, such as treble damages and class actions" in its 2008 White Paper. Commentators are quick to dismiss the possibility that the EU will adopt the U.S. model any time soon, in part because European society is not as litigious. However, this may be an impediment to private antitrust enforcement, even with greater procedural incentives.

C. The European Commission: Legislative Drafter, Policy Maker, and Guardian of the Treaties

Often described as the EU's executive branch, the Commission is the main administrative body of the Union. It is charged with carrying out


82. Olsen, supra note 59, at 75.

83. Berrisch et al., supra note 55, at 598.

84. See White Paper Staff Working Paper, supra note 44, ¶ 43 n.24; Olsen, supra note 59, at 75; infra note 201 and accompanying text. The "loser-pays" rule is a common procedural rule in EU member states, where the losing litigant has to pay the costs and attorney's fees of its adversary. See Nagareda, supra note 40, at 29.

85. Pheasant & McDavid, supra note 77. The Commission did in fact consider doubling damages in horizontal cartel cases in the Green Paper on Damages Actions for Breach of the EC Antitrust Rules (the Green Paper), see Green Paper, supra note 24, § 2.3, but it dropped this option in the White Paper, which calls for "full compensation of the real value of the loss suffered"—i.e., single damages, White Paper, supra note 34, § 2.5; see Pheasant & McDavid, supra note 77; infra Part II.A.2.a.

86. See, e.g., Berrisch et al., supra note 55, at 598 (stating that "the European Union is far from becoming as plaintiff-friendly as the United States" because it is "not as litigation-oriented"); see also Michael Van Hoof, Note, Will the New European Union Competition Regulation Increase Private Litigation? An International Comparison, 19 CONN. J. INT'L L. 659, 669 (2004) (explaining that "Europe is generally considered to have a weaker competition culture and a less litigious society" than the United States).

87. Nonetheless, the Commission's dialogue has already started to break down some of the psychological barriers to litigation for many potential plaintiffs. See infra notes 129–31 and accompanying text.

88. See, e.g., BERMANN ET AL., supra note 22, at 42; European Union, The European Commission, http://europa.eu/institutions/inst/comm/index_en.htm (last visited Mar. 20, 2010) [hereinafter Commission Overview]. However, the EU does not have the same
the day-to-day tasks of the EU, including the implementation and enforcement of competition policy. While the previous sections of this Note described the U.S. private right of action and EU opposition to this model, this section explores the functions of the Commission relevant to both public and private antitrust enforcement. First, it provides an overview of the Commission’s authority in proposing legislation and enforcing EU law. Then, it describes the role that the Commission’s Directorate General for Competition (DG Competition) plays in both public antitrust enforcement and competition policy. Finally, it explains the concept and use of green papers and white papers in the EU legislative process.

1. The Legislative Role

The Commission is the sole Union-level institution with the authority to draft and propose legislation. It makes a recommendation only if it deems that legislative action at the Union level would be more effective than at the local, regional, or national level. The Commission’s proposals take the form of either a directive or a regulation, and the Council and European Parliament vote on their adoption. The Commission also retains an implicit veto power over the legislative process, as it may at any point withdraw its proposals.


89. See Commission Overview, supra note 88.
90. Id.
94. See TFEU art. 288. Directives are measures requiring states to pass certain legislation, whereas regulations are laws that are “directly applicable in all Member States.” Id. Directives specify a legal goal, but they “leave to the national authorities the choice of form and methods.” Id. In the United States, by contrast, Congress may pass laws that directly regulate individuals, but it may not force a state to implement legislation. See New York v. United States, 505 U.S. 144, 175–76 (1992).
95. See TFEU art. 294. The degree to which the Parliament must be involved in the legislative process varies depending upon the field of the legislation being passed. See BERMANN ET AL., supra note 22, at 82–100. Regulations and directives that “give effect to the principles set out in Articles 101 and 102” are passed through the consultation method, where the Council can implement legislation, upon recommendation by the Commission, after consulting with the European Parliament. TFEU art. 103(1).
2. The Enforcement Role

The Commission is coined the “guardian of the Treaties” because it enforces the Treaty on the Functioning of the European Union (TFEU) and the Treaty on European Union, as well as directives and regulations instituted under the TFEU’s authority. Together with the ECJ, the Commission is responsible for ensuring the proper application of EU law in the member states. This includes taking actions against both member states that fail to comply with their treaty obligations and private entities that violate EU law.

3. The Directorate General for Competition’s Role in Antitrust Enforcement and Policy

In the realm of antitrust, the Commission serves as both a law enforcement agency and a policy maker. DG Competition works to “protect[ ] competition on the market and foster[ ] a competition culture” by taking “direct enforcement action against companies or governments” engaging in anticompetitive behavior and “ensuring that regulation takes competition duly into account among other public policy interests.” Article 105 of the TFEU states that the Commission “shall ensure the application of the principles laid down in Articles 101 and 102.” Article 101 prohibits “all agreements . . . which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.” Article 102 bans the “abuse . . . of a dominant position within the internal market or in a substantial part of it . . . so far as it may affect trade between Member States.”

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98. Id.
99. See TFEU art. 258.
100. See, e.g., id. art. 105(1) (authorizing the Commission to investigate and punish antitrust violations under Articles 101 and 102).
102. TFEU art. 105(1).
103. Id. art. 101(1). Article 101 specifically denounces behavior that fixes prices, limits output, allocates markets or supply chains, disadvantages competitors, or “make[s] the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.” Id.
104. Id. art. 102. Such behavior may include “imposing unfair purchase or selling prices or other unfair trading conditions,” restricting output “to the prejudice of consumers,” disadvantaging competitors, or “making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.” Id.
DG Competition investigates potential antitrust violations “[o]n application by a Member State or on its own initiative.”\(^{105}\) If it finds an infringement, then it must “propose appropriate measures to bring it to an end.”\(^{106}\) If this is unsuccessful, then the Commission must “record such infringement . . . in a reasoned decision.”\(^{107}\) DG Competition has the power to impose economic sanctions on culpable parties—while the Commission lacks criminal prosecutorial authority,\(^{108}\) it is able to charge tremendous fines.\(^{109}\) Commission decisions may be appealed to the EU courts.\(^{110}\)

In its policy-making role, DG Competition “works in partnership with national competition authorities and national courts to ensure an effective and coherent application of EU competition law,” “promotes the private enforcement of EU competition law,” “provides guidance and transparency about the competition rules and their enforcement,” and strives to “strengthen[] international cooperation in enforcement activities and mak[e] steps towards increased convergence of competition policy instruments across different jurisdictions.”\(^{111}\) The Commission and DG Competition are thus responsible for making private antitrust enforcement a procedural reality in the member states, in addition to conducting public enforcement at the supranational level. Because of this role, the Commission and DG Competition are seeking to strengthen private enforcement in the member state courts.\(^{112}\)

4. Green Papers and White Papers

The concept of green papers and white papers originates from the United Kingdom, where the Parliament uses them to identify and plan policy goals that will ultimately become legislation.\(^{113}\) The United Kingdom acceded to

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\(^{105}\) Id. art. 105(1).

\(^{106}\) Id.

\(^{107}\) Id. art. 105(2).

\(^{108}\) See supra note 60; see also Laudati, supra note 60 (noting that several EU member states, as well as the United States and Canada, provide criminal antitrust enforcement).


\(^{110}\) See TFEU art. 263; Laudati, supra note 60 (“The [General Court] or the Court of Justice is empowered to review the legality of the Commission’s decisions.”); see also supra note 19 and accompanying text (discussing ADM’s appeals to the CFI and ECJ).

\(^{111}\) Directorate General for Competition, supra note 101.

\(^{112}\) See infra Part I.D; see also White Paper, supra note 34, § 1.1 (discussing the Commission’s efforts to identify and resolve the “various legal and procedural hurdles” to private antitrust enforcement).

the Union in 1973, and the EU has subsequently adopted these instruments for its own supranational policy-making agenda. In the EU, green papers are "documents published by the European Commission to stimulate discussion on given topics at European level. They invite the relevant parties . . . to participate in a consultation process and debate on the basis of the proposals they put forward." The proposals included in green papers and their subsequent discussion "may give rise to legislative developments that are then outlined in White Papers." Commission white papers are "documents containing proposals for [Union] action in a specific area. In some cases they follow a Green Paper published to launch a consultation process at European level." White papers that are "favourably received by the Council . . . can lead to an action programme for the Union in the area concerned."

D. Behind the Commission's Efforts

The previous section of this Note discussed the Commission's role in public antitrust enforcement and antitrust policy, including setting uniform procedures for private enforcement in the member states. This section explains the Commission's desire to strengthen private enforcement in the EU. It explores why antitrust damages actions are so uncommon in the EU, how the Commission's dialogue has improved the state of damages actions, and why the Commission is working hard, despite some reservations, to increase their prevalence.

As Judge Douglas H. Ginsburg of the U.S. Court of Appeals for the District of Columbia Circuit describes, "The prevailing view in Europe seems to be that competition policy would benefit from an increased level

114. See BERMANN ET AL., supra note 22, at 10.
115. The EU has a history of adopting mechanisms for its governance and institutions that are either borrowed from or bear a strong resemblance to those of its member states. See, e.g., BERMANN ET AL., supra note 22, at 61 (noting that the use of an "Advocate-General [in the ECJ] is highly reminiscent of the commissaire du gouvernement before the French Conseil d'Etat").
117. Id.
119. Id. For instance, the 1985 White Paper on Completing the Internal Market became "the blueprint for the tremendously successful program for achieving the 'Europe of 1992'" by creating 282 legislative measures to advance the "free movement of goods, persons, services and capital and accordingly to remove the frontier checks and other physical and technical barriers to trade." BERMANN ET AL., supra note 22, at 542-43. The process by which EU legislation funnels through green papers and white papers is similar to notice-and-comment rulemaking, a common procedure in the United States where "a proposed rule is published in the Federal Register and is open to comment by the general public" before it takes effect. OMB Watch, Notice-and-Comment Rulemaking (Aug. 12, 2005), http://www.ombwatch.org/node/2578.
120. See supra Part I.B.
of private enforcement." 121 Private damages actions are rare in the EU, and most antitrust enforcement is left to public authorities, including DG Competition and NCAs. 122 In August 2004, a report found that there were only sixty reported cases of private antitrust damages actions in the EU—twelve based on EU law, thirty-two based on member state laws, six based on both, and ten unidentified. 123 By contrast, private U.S. plaintiffs filed 693 antitrust lawsuits in federal courts in the twelve months preceding March 31, 2004. 124

The Commission and commentators agree that private antitrust enforcement is rare because of the procedural difficulties that plaintiffs face in bringing a lawsuit in the member state courts. 125 The lack of opt-out class actions, full discovery rights, contingent fees, and multiple damage awards, combined with the prevalence of a "loser-pays" rule, makes it financially risky for an antitrust victim to proceed with a lawsuit. 126 Moreover, many antitrust victims can only claim a very small amount of damages, which is a further disincentive to sue, particularly when the stakes of losing are high. 127 Thus, the Commission, through its 2005 Green Paper and 2008 White Paper on damages actions, began the process of

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122. Berrisch et al., supra note 55, at 585; see Green Paper, supra note 24, § 1.1.
123. See Waelbroeck et al., supra note 52, at 1; Ginsburg, supra note 28, at 435; Olsen, supra note 59, at 74. The number of damages actions has since increased due to the Commission's active and long-standing dialogue. See infra notes 129-31 and accompanying text.
125. See, e.g., White Paper Staff Working Paper, supra note 44, ¶ 5 ("[T]he exercise of [the] right [to damages actions] in Europe is still facing considerable hurdles. First, the traditional tort rules of the Member States, either of a legal or procedural nature, are often inadequate for actions for damages in the field of competition law, due to the specificities of actions in this field. In addition, the different approaches taken by the Member States can lead to differences in treatment and to less foreseeability for the victims as well as the defendants, i.e. to a high degree of legal uncertainty."); Commission Staff Working Paper Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules, ¶¶ 30–43, COM (2005) 672 final (Dec. 19, 2005) (stating that the "principal obstacles to private enforcement of [EU] antitrust law currently existing in the [EU] Member States" are that there are "restrictions on collective actions in the Member States"; "that the burden of proof of causation and damage is on the claimant ... in all Member States"; that "the powers of national courts to order production of documents are very limited"; "that disincentives [are] created by restrictions on the amounts that can be awarded"; and that "high costs and risks involved in competition actions, as well as the length of proceedings, operate as a disincentive to bringing private actions"); Ysewyn, supra note 27, at 14 ("The key reason why private enforcement in the European Union is so rare is because of the divergence between the procedural frameworks in the now [twenty-seven] member states, the majority of which are not at all equipped to deal with antitrust litigation.").
126. See infra Part II.A.
127. See infra notes 174–75, 236–39 and accompanying text.
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harmonizing member state procedures so that potential antitrust plaintiffs in every member state will be more inclined to litigate their claims.\(^\text{128}\)

The Commission’s long-standing dialogue has considerably raised awareness among EU citizens and businesses of the right to damages actions.\(^\text{129}\) For instance, all EU press releases announcing a successful enforcement proceeding at the Commission now inform potential plaintiffs of their right to sue for damages.\(^\text{130}\) This has led to an increase in private antitrust litigation even without a directive\(^\text{131}\)—but only for larger, more

\(^{128}\) See White Paper, supra note 34, § 1.1 ("The current ineffectiveness of antitrust damages actions is best addressed by a combination of measures at both [Union] and national levels, in order to achieve effective minimum protection of the victims’ right to damages under Articles [101] and [102] in every Member State and a more level playing field and greater legal certainty across the EU."); see also Green Paper, supra note 24, § 1.3 ("The purpose of this Green Paper . . . is to identify the main obstacles to a more efficient system of damages claims and to set out different options for further reflection and possible action to improve damages actions . . . ").

\(^{129}\) See Roundtable Discussion, Will the European Union Ever See US-Style Private Antitrust Litigation?, GLOBAL COMPETITION REV., Oct. 2008, at 7, 8 (remarks of Till Schreiber) ("[W]e expect private antitrust litigation to significantly increase in the EU in the forthcoming years. We have seen in our practice that victims of anti-competitive conduct in the EU are increasingly aware of their right to claim damages and are looking for ways to successfully pursue their claims. In particular, publicly quoted companies cannot justify to their shareholders not to enforce damage claims which are potentially of very high value."). The Commission’s damages actions dialogue has also made plaintiffs more comfortable with the idea of filing an antitrust lawsuit and thus has started to break down what some believe is a psychological barrier to litigation. See Michael Hausfeld & Vincent Smith, Competition Law Claims—A Developing Story, EUR. ANTITRUST REV., 2010, at 39, 39 (positing that reasons for the low levels of antitrust litigation in the EU “almost certainly include a sociological reluctance in most European countries to resort to the court”).

\(^{130}\) See, e.g., Press Release, European Union, Antitrust: Commission Fines Plastic Additives Producers €173 Million for Price Fixing and Market Sharing Cartels (Nov. 11, 2009), http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1695&format=HTML &aged=0&language=EN& guiLanguage=en (“Any person or firm affected by anti-competitive behaviour as described in this case may bring the matter before the courts of the Member States of the [European Economic Area] and seek damages. The case law of the European Courts and Council Regulation 1/2003 both confirm that in cases before national courts, a Commission decision is binding proof that the behaviour took place and was illegal. Even though the Commission has fined the companies concerned, damages may be awarded without these being reduced on account of the Commission fine. A White Paper on antitrust damages actions has been published . . . ”).

\(^{131}\) See Roundtable Discussion, supra note 129, at 8 (remarks of Till Schreiber); Global Competition Review, Forthcoming Events: GCR Antitrust Litigation 2009: Enforcing Competition Law in the UK, Europe and the US, http://www.globalcompetitionreview.com/events/569/gcr-antitrust-litigation/ (last visited Mar. 20, 2010) ("Damages actions for antitrust infringements in Europe are on the increase: national courts are regularly asked to rule on claims in follow-on actions once the European Commission or national competition authority has issued an infringement decision; claimants also sue for damages in stand-alone actions.”).
financially adept plaintiffs with substantial claims. However, the Commission appears to be more concerned with compensating consumers and small businesses with lesser claims that cannot finance a damages action or are unwilling to sue under the current procedural regime.

The motivation behind the Commission’s damages actions campaign has shifted over the course of the last decade. At the time of the Green Paper, the Commission wanted to create a “common enforcement system” where public authorities and private aggrieved parties work together to “deter anticompetitive practices” and “sustain a competitive economy.” As public authorities have inherently limited resources, they cannot account for every single case where there is a violation of EU or national antitrust laws. The Commission stated that a greater amount of private antitrust litigation would “strengthen the enforcement of antitrust law.”

Since the White Paper, the Commission has stressed that it is striving merely to compensate injured parties. The Commission does not have the authority to collect damages on behalf of EU citizens. Thus, EU policy makers hope to make private damages actions the primary vehicle for the compensation of parties harmed by a breach of the EU antitrust laws. With this goal in mind, the Commission is attempting to alleviate the procedural burdens on plaintiffs that serve as an impediment to private enforcement. While it is looking to the U.S. experience as a guide, it is still seeking a “genuinely European approach.”

132. The absence of procedural rules alleviating the financial burdens and risks for plaintiffs with smaller claims and lesser resources makes it still impracticable for them to litigate. See supra notes 125–28 and accompanying text; infra Part III.B.

133. See White Paper, supra note 34, § 2.1 (“Individual consumers, but also small businesses, especially those who have suffered scattered and relatively low-value damage, are often deterred from bringing an individual action for damages by the costs, delays, uncertainties, risks and burdens involved.”).

134. Green Paper, supra note 24, § 1.1.

135. Berrisch et al., supra note 55, at 586.


137. See supra note 44 and accompanying text; infra notes 157, 166 and accompanying text.


139. See White Paper, supra note 34, § 1.2 (explaining that the goal of the White Paper is to ensure that “all victims of infringements of [EU] competition law have access to effective redress mechanisms so that they can be fully compensated for the harm they suffered”).

140. See Green Paper, supra note 24, § 1.2 (“Significant obstacles exist in the different Member States to the effective operation of damages actions for the infringement of [EU] antitrust law.”); see also Olsen, supra note 59, at 76 (likening the situation in the EU to having “only state law claims in the United States, without the federal overlay”); Ysewyn, supra note 27, at 14 (asserting that differences in the procedural rules among member states makes private enforcement rare).

141. See Woods, supra note 75, at 460.

142. White Paper, supra note 34, § 1.2; Pheasant & McDavid, supra note 77; see also Issacharoff & Miller, supra note 53, at 180 (stating that European reformers, even while describing their desire to adopt more liberal procedural rules, use a “proverbial ‘but,’” as in, “But, of course, we shall not have American-style class actions”)).
E. The Green Paper and the White Paper: From Deterrence to Compensation

The Commission has been working toward an antitrust damages actions directive for the better part of a decade, and the White Paper is merely a step along the way to reform. The previous section of this Note addressed the Commission’s rationale behind its drive to strengthen private enforcement. This section takes a closer look at some of the legislative proposals in the 2005 Green Paper and the 2008 White Paper. It also highlights how the Commission’s policy goals have changed since the Green Paper. Finally, it addresses the Commission’s draft directive that it withdrew in October 2009.

In the 2005 Green Paper, the Commission squarely addressed the procedural hurdles to private litigation, stating that “significant obstacles exist in the different Member States to the effective operation of damages actions for infringement of [EU] antitrust law.”143 Thus, the goal of the Green Paper was to “identify the main obstacles to a more efficient system of damages claims and to set out different options for further reflection and possible action to improve damages actions.”144 The Commission invited comments from private parties “to consider whether it is necessary and appropriate to take action at [Union] level to improve the conditions for stand-alone and follow-on actions.”145

The Green Paper addressed issues such as access to evidence, damages, aggregate litigation, and costs.146 For each issue, the Commission posed policy questions and offered a variety of solutions.147 For damages, the Green Paper asked both how they should be defined and how they should be calculated. It offered the options of defining damages “with reference to the loss suffered by the claimant,” “with reference to the illegal gain made by the infringer,” and “[d]ouble damages for horizontal cartels.”148 To calculate damages, the Green Paper suggested using “complex economic models,” publishing Commission guidelines, and splitting court proceedings between liability and damages.149 Furthermore, the Green Paper asked by what means, if at all, there should be aggregate litigation.150

143. Green Paper, supra note 24, § 1.2.
144. Id. § 1.3.
145. Id. at 12. The Commission defines “follow-on actions” as “cases in which the civil action is brought after a competition authority has found an infringement” and “stand-alone actions” as cases that “do not follow on from a prior finding by a competition authority of an infringement of competition law.” Id. § 1.3.
146. See generally id. § 2.
147. See id.
148. Id. § 2.3; see also ORGANISATION FOR ECON. CO-OPERATION & DEV., POLICY ROUNDTABLES: PRIVATE REMEDIES 270 (2007), available at http://www.oecd.org/dataoecd/24/62/39892177.pdf (noting that the Commission does not see double damages as punitive, but “merely a required financial incentive to support the purpose of compensation”).
149. Green Paper, supra note 24, § 2.3.
150. Id. § 2.5.
It offered a "cause of action for consumer associations without depriving individual consumers of bringing an action" and a "special provision for collective action by groups of purchasers other than final consumers."

In the Green Paper, the Commission clearly expressed that more private enforcement would serve a dual goal—deterrence and compensation. It noted that, in addition to helping aggrieved parties, "[p]rivate as well as public enforcement of antitrust law is an important tool to create and sustain a competitive economy." One commentator even suggests that the Commission's goal of private antitrust litigation in the Green Paper was primarily deterrence and secondarily compensation. Furthermore, both Commissioner Kroes and her predecessor, Mario Monti, have stressed the important deterrent effect of private antitrust enforcement.

By the time it published the 2008 White Paper, the Commission abandoned the goal of deterrence in favor of compensation. The White Paper proposed reforms that would allow antitrust victims to collect damages in compensation for their loss but mandated that any reforms follow a "genuinely European approach." Accordingly, the White Paper calls for "representative actions" and "opt-in collective actions" instead of U.S.-style opt-out class actions and a single measure of damages instead of the U.S. Clayton Act's treble damages regime. Furthermore, the Commission did not include any provision in either the White Paper or the Green Paper related to contingent fees, which allow U.S. plaintiffs to

151. Id.
152. See id. § 1.1.
153. Id.
154. See Ysewyn, supra note 27, at 17 ("The idea is, first, to add another weapon to the European Union's anti-cartel enforcement artillery and, second, to compensate the victims of hard-core anti-competitive behavior.").
156. See Ysewyn, supra note 27, at 17.
157. Compare White Paper, supra note 34, § 1.2 ("The primary objective of this White Paper is to improve the legal conditions for victims to exercise their right under the Treaty to reparation of all damage suffered as a result of a breach of the EC antitrust rules. Full compensation is, therefore, the first and foremost guiding principle."), with Green Paper, supra note 24, at 3 ("Facilitating damages claims for breach of antitrust law will not only make it easier for consumers and firms who have suffered damages arising from an infringement of antitrust rules to recover their losses from the infringer but also strengthen the enforcement of antitrust law."). The White Paper acknowledged that deterrence is "inherently" an effect of private enforcement, but made it clear that it is incidental to the compensation of victims. See White Paper, supra note 34, § 1.2.
158. White Paper, supra note 34, § 1.2.
159. Id. § 2.1. For a discussion of the differing impact of opt-in and opt-out systems, see infra Part II.A.1.d.i.
litigate without any up-front costs. The White Paper also addressed other procedural hurdles that may need modification to allow for more private antitrust enforcement, such as indirect purchaser standing, access to evidence, and follow-on actions.

While the Commission intends to incorporate the White Paper’s recommendations into a directive requiring member states to adopt harmonized legislation, it has faced an uphill battle toward reform. In 2009, the Commission proposed a directive that included a de facto provision for opt-out class actions. The draft directive further emphasized that the main goal of damages actions is compensation and that deterrence is merely a side effect. However, the Commission withdrew its proposal in early October. There is speculation that this was the result of strong opposition from the member states and European businesses. Some believed that Commissioner Kroes would revisit this issue before the end of her five-year term, but the Commission changed hands in February 2010 without drafting another directive. With a new Commission and Spanish Commissioner Joaquin Almunia now in charge of competition policy, the pace at which the Commission’s work on antitrust damages will proceed is unclear.

162. See Berrisch et al., supra note 55, at 597–98.
163. See White Paper, supra note 34, § 2. While there are clearly many factors that affect the strength of the EU’s private antitrust enforcement system, this Note limits its discussion to aggregate litigation (and its relationship with the “loser-pays” rule), contingent fees, and multiple damages. See infra Part II; see also infra note 173 (discussing how it would be ineffective for the EU to adopt some mechanisms of the U.S. antitrust system while rejecting others).
164. See Alfaro & Reher, supra note 44, at 43; see also supra Part I.C.4 (explaining the general role of green papers and white papers in EU legislation and policy).
166. See Alfaro & Reher, supra note 44, at 43 (“[T]he Commission now clarifies: ‘The proposed Directive takes a compensatory approach: its aim is to allow those who have suffered damage caused by an infringement of the EC competition rules to recuperate that loss from the undertaking(s) which infringed the law.’”).
167. Donald, supra note 165; see also supra note 96 and accompanying text (explaining that the Commission can and does retain the power to revoke its own legislative proposals).
168. Donald, supra note 165.
169. See id.
170. See New EU Commission Approved, supra note 78 (announcing that European Parliament “voted overwhelmingly to approve the next European Commission” and that Commissioner Almunia is replacing Commissioner Kroes as Competition Commissioner); supra note 78.
171. See supra note 78.
172. See Jim Brunsden, MEPs Fail To Test Almunia, EUROPEANVOICE.COM, Jan. 13, 2010, http://www.europeanvoice.com/article/2010/01/meps-fail-to-test-almunia/66847.aspx (“Quizzed by several MEPs on what he would do with Kroes’ stalled proposal for harmonised rules on damages actions against cartels, he set out a clear but cautious position:
Part I introduced the U.S. model and the negative way in which some EU policy makers and commentators view U.S. litigation. Then, it detailed the Commission's role in EU antitrust law and its campaign toward private damages actions. Part II measures the potential effectiveness of some of the White Paper reforms against the corresponding U.S. procedures. It also explains peculiarities of U.S. antitrust litigation that may cast doubt on the EU policy makers' fears.

II. THE WHITE PAPER THROUGH ROSE-COLORED GLASSES: EXAMINING THE REFORMS AND THE RESERVATIONS

This part addresses both the specific reforms advocated in the Commission's White Paper and its reluctance to adopt the U.S. model. The White Paper made several proposals to strengthen the private antitrust enforcement system; for simplicity, this part limits its focus to the White Paper approaches to aggregate litigation and multiple damages. Additionally, it discusses the efficacy of contingent fees, which were noticeably absent from the White Paper's proposals. For each procedural element, Part II.A describes the White Paper approach, or lack thereof; the corresponding U.S. approach; criticism of the U.S. model; and any other factors necessary to assess the relative strength of the U.S. or EU approach. Part II.B then examines the EU's concerns in light of antitrust practice and the mechanisms that the United States has used to prevent misconduct by plaintiffs' attorneys.

A. The White Paper Reforms

1. Aggregate Litigation

Individuals and small businesses that have antitrust claims often choose not to pursue them because their claims are too small, or because they would not be cost effective to litigate. If these parties could band their consumers' lack of redress at present is a 'real problem and we have to tackle it'; and at the same time reform should not lead to US-style class actions. He is to consider the matter over the coming months.

173. Nonetheless, it is important to keep in mind that all the procedural elements of a competition system are intertwined and collectively serve to allow plaintiffs to pursue their claims. At an Organisation for Economic Co-operation and Development (OECD) roundtable discussion on private remedies, Professor Andrew I. Gavil stressed that "substantive competition rules, evidentiary rules, and procedural rules, including rules for the compensation of attorneys, would work together as parts of a broader mix to create deterrence and ensure compensation." ORGANISATION FOR ECON. CO-OPERATION & DEV., supra note 148, at 11. Professor Gavil "emphasized that these factors were interdependent; and changing one without taking account of the others would be difficult and could be ineffective." Id.; see also infra Part III.B.3 (analyzing the procedural mechanisms addressed in Part II.A of this Note and explaining how they are interdependent in driving a private competition enforcement system).

174. See Berrisch et al., supra note 55, at 595; Woods, supra note 75, at 436.
claims together, they would possibly have large enough damages to warrant a lawsuit. The aggregating of claims, including modern day U.S. class actions, dates back to medieval European “group litigation.” Ironically, aggregate litigation is not common in modern day Europe, and the Commission is struggling to import it back across the Atlantic. This section considers the White Paper’s proposals for what it calls “collective redress” in light of the U.S. class action model, criticism of class actions, and potential problems with the White Paper approach.

a. The White Paper Approach: Collective Redress

The White Paper advocates for two types of aggregate litigation for antitrust victims: “representative actions” and “opt-in collective actions.” The Commission acknowledged that aggregating claims is necessary to allow consumers and small businesses with “scattered and relatively low-value damages” to receive compensation. This is because of the “costs, delays, uncertainties, risks and burdens involved” in bringing a damages action. Thus, the White Paper seeks reform that will allow and encourage these parties to pursue their claims.

Representative actions would be claims brought by consumer groups on behalf of victims. The White Paper’s proposal limits these actions to charges brought on behalf of identified victims, except in “rather restricted cases.” The consumer organizations would need to be “officially designated in advance” or “certified on an ad hoc basis by a Member State for a particular antitrust infringement to bring an action on behalf of some or all of their members.”

Allowing opt-in collective actions would result in a system that more closely resembles the U.S. class action model, as it would allow victims to aggregate their claims and file an action directly against the breaching

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175. See Woods, supra note 75, at 436.
177. See Woods, supra note 75, at 444.
178. See supra text accompanying notes 165–69.
179. “Collective redress” is the Commission’s term for its proposals for aggregate litigation, including opt-in “collective actions” and consumer group litigation. See White Paper, supra note 34, § 2.1; infra Part II.A.1.a.
181. Id.
182. Id.
183. Id.
184. Id. In U.S. class actions, the class representative does not have to identify all the victims, but merely has to describe the class. See Rachael Mulheron, The Case for an Opt-Out Class Action for European Member States: A Legal and Empirical Analysis, 15 COLUM. J. EUR. L. 409, 412 (2009). Even U.S. state attorneys general, who can sue in parens patriae for their citizens’ antitrust damages, do not have to identify specific victims while seeking recovery. See Clayton Act § 4c(a), 15 U.S.C. § 15c(a) (2006).
185. White Paper, supra note 34, § 2.1.
However, unlike the U.S. model, it would require that each plaintiff “expressly decide” to join the action. The Commission stated that this would allow victims to recover for their losses while also “not depriv[ing] them] of their right to bring an individual action for damages if they so wish.” The *White Paper* proposal does not consider an opt-out model, nor does it even use the term “class action.”

b. The U.S. Approach: Class Actions

Rule 23 of the Federal Rules of Civil Procedure authorizes U.S. plaintiffs to sue “as representative parties on behalf of all members” of a class. U.S. federal courts thus allow individuals to file claims on behalf of others that are not specifically identified but “merely described.” If a victim meets the class description and does not opt out, he is by default a member of the class. A potential class member may opt out of the class to bring his claim individually, but after a certain cutoff date he is bound by the ruling.

The opt-out class action model produces much larger classes than the opt-in model at a relatively low cost to counsel. Lawyers do not have to go on expensive campaigns to recruit plaintiffs, and, as opt-out rates have historically been extremely low, many more parties are swept into the litigation. The resultanty large classes combine to plead substantial

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186. See id.; infra Part II.A.1.b.
188. Id. In an opt-out class action, a party that fails to opt out of the class by a judicially determined cutoff date will be unable to bring an individual claim, and the decision of the lawsuit will be binding. *Mulheron*, supra note 184, at 412; see *Fed. R. Civ. P.* 23(c)(3).
189. See *White Paper*, supra note 34, § 2.1. Presumably, the Commission chose the term “collective action” instead of “class action” because of political resistance to U.S.-style class actions. See *infra* Part II.A.1.c.
190. *Fed. R. Civ. P.* 23(a). Class actions are only allowed in federal courts where “the class is so numerous that joinder of all members is impracticable,” all members’ claims share common questions of law and fact, the representative parties have a claim typical of those of the class, and the representative can “fairly and adequately protect the interests of the class.” *Id.* The same rule conversely allows for an individual or group of plaintiffs to sue a class of defendants. See *id*.
192. See *Nagareda*, supra note 40, at 28–29.
193. See *Fed. R. Civ. P.* 23(c)(1)–(3); see also *Mulheron*, supra note 184, at 412 (describing the potential mechanics of a European “opt-out form of collective redress”).
194. See *Issacharoff & Miller*, supra note 53, at 203–04; *Nagareda*, supra note 40, at 29.
196. Id.; see *Issacharoff & Miller*, supra note 53, at 203–04 (listing “inertia” as the reason behind traditionally low opt-out rates and stating that members have nothing to lose by remaining in the class because they “usually do nothing”); see also *Mulheron*, supra note 184, at 430–31 (describing a “surprising array” of “reasons why class members will not opt in to a group action”). See *infra* Part II.A.1.d.i for an extended discussion of the factors motivating (or not motivating) parties in both opt-out and opt-in systems.
damages, producing a powerful deterrent effect and serving as a vehicle for the compensation of aggrieved parties.\(^{197}\)

c. Criticism of Class Actions

While EU policy makers are trying to create an aggregate litigation system common to the member states,\(^{198}\) they are quick to point out "the excesses that have been reported from other jurisdictions."\(^{199}\) Indeed, the Commission is trying to strike a delicate balance by "facilitat[ing]" aggregate claims without "enabl[ing] litigation."\(^{200}\) In the *Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules* (the *White Paper Staff Working Paper*), the Commission charged that a set of intertwined procedural conditions in the United States—including opt-out class actions, broad pretrial discovery, contingent fees, jury trials, and the absence of a "loser-pays" rule—lead to the so-called "excesses."\(^{201}\) It also noted that Portugal and the Netherlands, which both have some emanation of an opt-out mechanism, have not reported any of these "excesses."\(^{202}\) However, many EU policy makers, member states, businesses, and attorneys still fear that importing U.S.-style class actions into Europe would bring excessive and unnecessary litigation, vest unwarranted power in the hands of plaintiffs' lawyers, and generally harm their competition culture.\(^{203}\)
Critics of the U.S. opt-out class action model argue that it shifts the focus from the client to the lawyer, who generally drives the litigation forward. Some commentators claim that this allows industrious attorneys to profit by ignoring their clients' interests and inducing defendants to settle on shaky claims rather than incur the costs and risks of litigation. They fear the kind of litigation culture that they associate with the U.S. plaintiffs' bar—"greedy rushes to the courthouse" and lawyers that "seek[] [their] own interest[s]" in pursuing cases such that their clients "lose control of the proceedings."

Professors Samuel Issacharoff and Geoffrey P. Miller, on the other hand, argue that the attorney-driven model is what makes the U.S. system successful. They state that "lawyer initiative is the engine that fuels American aggregative practice." Professors Issacharoff and Miller contend that it is inevitable that lawyers have the largest stake in a U.S. class action because they most often involve contingent fees, which are far larger than each party's individual damages. They assert that without this system, no rational consumer would want to bring a lawsuit on a small claim.

d. Concerns for Collective Redress

The previous sections of this Note introduced the competing White Paper and U.S. approaches to aggregate litigation and described some of the negative treatment that class actions have received. This section continues by pointing to various procedural roadblocks that may hinder EU private enforcement, even with collective redress as detailed in the White Paper. First, it explains that opt-in collective actions will limit the ability of attorneys to build sufficiently large classes. Then, it suggests that consumer groups may not serve as the best advocates for the individuals they represent. Finally, it discusses the "loser-pays" rule common in Europe and lead to abuse where attorneys "negotiate large settlements in cases of dubious merit"); see also Issacharoff & Miller, supra note 53, at 187 (explaining that lawyers' monetary motives are a "constant source of disparagement of American class actions"). Professors Issacharoff and Miller offer another possible reason why many Europeans are averse to opt-out class actions: they feel that "litigation cannot be legitimate, as regards an innocent party, unless he has voluntarily agreed to join the action." Issacharoff & Miller, supra note 53, at 202.

204. See Bergen, supra note 60, at 218.
205. See Woods, supra note 75, at 436; Bergen, supra note 60, at 218.
206. Olsen, supra note 59, at 75.
208. See Issacharoff & Miller, supra note 53, at 191.
209. Id.
210. See id. at 186–87.
211. Id. Professors Issacharoff and Miller concede that the lack of contingent fees would be more palatable if there were no "loser-pays" rule. See id. at 201. See infra Part II.A.1.d.iii for an explanation of the "loser-pays" rule that is prevalent amongst EU member states, and see infra Part II.A.3 for further discussion of contingent fees.
posits that the risk of additional litigation costs will dissuade consumers with small claims from opting in to a collective action.

i. Opt-Out vs. Opt-In

Several authorities, including the Commission itself, assert that opt-out mechanisms produce much larger classes and better serve the goal of deterrence. Nonetheless, the Commission, in the White Paper, expressly rejected the opt-out model. The Commission claimed that it did so to avoid the “excesses” of the U.S. system. It also recognized a political reality in explaining that “[o]pt-in mechanisms are more similar to traditional litigation, and would therefore be more easily implemented at national level.”

However, some commentators have made clear that only an opt-out system will produce adequate results. In opt-out systems, the opt-out rate has historically been very low. Professors Issacharoff and Miller suggest that a “rational class member will not opt out” of a class because, with contingent fees and the absence of a “loser-pays” rule, he has nothing to lose—he either receives compensation for his injury or loses an “essentially worthless right to bring his own lawsuit.” They further liken plaintiffs’ resistance to opting out (as well as to opting in) to “inertia,” implying that overall, people are more likely to take the path of least resistance.

Professor Rachael Mulheron explains that in an opt-in system, there are personal, procedural, and economic reasons why plaintiffs tend not to opt in to collective actions. Personal reasons include that the plaintiff does not feel engaged in the process, is inhibited by linguistic or cultural barriers, or would prefer to pursue the claim alone. Procedural reasons include that the plaintiff simply does not know about the litigation, prefers not to bear the burden of litigation until others have already succeeded, or believes that

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212. See, e.g., White Paper Staff Working Paper, supra note 44, ¶ 58; Issacharoff & Miller, supra note 53, at 207; Nagareda, supra note 40, at 29.
213. See White Paper Staff Working Paper, supra note 44, ¶ 58 (“[T]he analysis in the field of competition suggests that an opt-in collective action should be preferred to an opt-out collective action . . . . Combined with other features, such opt-out actions have in other jurisdictions been perceived to lead to excesses.”); supra text accompanying note 159. However, the Commission has clearly considered such an option since the White Paper. See supra text accompanying note 165.
216. Issacharoff & Miller, supra note 53, at 203 (“[C]lass members] almost never opt out. In consumer cases, on average, less than .2 percent—two in a thousand—exercise the right to exclude themselves from the case.”); see Mulheron, supra note 184, at 432–33; Nagareda, supra note 40, at 29.
217. Issacharoff & Miller, supra note 53, at 204; see Nagareda, supra note 40, at 29.
220. Id. at 430.
he would need more evidence. Economic reasons include that the plaintiff is worried about the costs of litigation in light of the size of the claim or wants to pursue the claim individually to receive more money. In an opt-out system, the plaintiff would by default be a member of the class, and thus many of these problems would never arise.

Professors Issacharoff and Miller refer to the procedural costs of garnering a large class of plaintiffs in an opt-in system. They assert, in their idea of "inertia," that it is difficult to attract widespread membership in an opt-in collective action. Thus, attorneys must incur an extra cost in recruiting plaintiffs, which would be unnecessary in an opt-out class action system, where a single representative may sue on behalf of a large class without express consent.

Moreover, evidence from Canada suggests that an opt-out system is much more effective in practice. Antitrust class actions are a fairly recent phenomenon in Canada, and, as of 2006, only some provinces allowed for opt-out class actions. A consensus among commentators at an Organisation for Economic Co-operation and Development (OECD) roundtable discussion on private antitrust enforcement was that the "Canadian experience suggests that an opt-out system [is] more successful in creating an inclusive class than an opt-in system in which only those plaintiffs participate in a class that have actively decided to do so." The provinces that had opt-out class actions also had a more favorable settlement rate.

ii. Faithful Consumer Groups?

In addition to "opt-in collective actions," the White Paper calls for "representative actions," where consumer groups would sue for antitrust damages on behalf of (usually) identified plaintiffs. Professors Issacharoff and Miller argue that while these organizations can, in theory, provide for consumer redress, they might not have the same incentives and interests as the consumers they represent. These organizations might take into account political and ideological considerations that are actually

221. Id.
222. Id. at 431.
223. See supra text accompanying note 192.
225. See Nagareda, supra note 40, at 29.
226. See ORGANISATION FOR ECON. CO-OPERATION & DEV., supra note 148, at 18.
227. See id. at 373.
228. See id. at 374. Canadian antitrust lawyer Donald Houston mentioned, at an OECD roundtable discussion on private remedies, that the other provinces were moving toward the opt-out model. Id.
229. Id. at 18.
230. Id. at 374.
231. White Paper, supra note 34, § 2.1.
adverse to the consumers' legal and financial interests. Incidentally, Professors Issacharoff and Miller contend that lawyers, who focus purely on their contingent fees, serve as better advocates because their goals are aligned with those of their clients. Furthermore, they assert that there might be nothing stopping entrepreneurial lawyers from representing the consumer organizations, thus defeating the EU's purpose in instituting representative actions.

iii. The Problem of Costs and the “Loser-Pays” Rule

Another commonly cited hurdle to private antitrust enforcement is the presence in much of Europe of a “loser-pays” rule, where the losing party is responsible for its opponent’s attorney’s fees and costs. The United States, by contrast, has no default fee-shifting rule. In U.S. antitrust cases, there is only a one-sided fee-shifting rule—a defendant found to have breached the antitrust laws must compensate the plaintiff for his attorney’s fees and costs in addition to damages. The “loser-pays” rule imposes an additional risk that may deter a plaintiff from litigating his claim.

This effect of deterring litigation is a particular problem in the realm of class actions and aggregate litigation. If an unsuccessful class representative has to pay his opponent’s costs and attorney’s fees, then no rational individual will want to represent a class. One commentator goes as far as to say that opt-out class actions are not possible in the EU unless and until the “loser-pays” rule is removed.

In the White Paper, the Commission responded to concerns about fee shifting by urging member states to “reflect on their cost rules” as to “allow meritorious actions where costs would otherwise prevent claims [from] being brought.” The Commission asked member states to try to foster settlements to keep costs down; set court fees as not to “become a disproportionate disincentive to antitrust damages claims”; and allow plaintiffs to receive up-front “cost orders” guaranteeing that they would not be responsible for their opponent’s fees and costs, regardless of the

233. Id. at 194.
234. See id. While incentives for class and counsel are complementary during the litigation, they may diverge during the distribution stage. See infra Part II.A.3.c for a discussion of the checks that the United States imposes on class action attorneys to prevent settlements that are unfavorable to their clients.
236. See Nagareda, supra note 40, at 29.
237. See id.
239. See Nagareda, supra note 40, at 29.
240. See Issacharoff & Miller, supra note 53, at 203 (asserting that such a system would encourage free-ridership because no one would want to expose himself to the “loser-pays” rule).
241. See Olsen, supra note 59, at 75. But see infra text accompanying note 362.
outcome of the case. Thus, while the Commission recognizes problems with the “loser-pays” rule, it has not called for its elimination.

2. Multiple Damages

Another reason for the relative rarity of private antitrust damages actions in the EU is the “modest” amount of damages that member state courts typically offer. In the United States, the Clayton Act requires any court that finds an antitrust violation to award the plaintiff treble damages. Currently, no EU member state offers treble damages to a victorious antitrust plaintiff. However, some commentators observe that EU member states may make up for this by awarding prejudgment interest, which is usually not offered in the United States.

While Part I.A.1 focused on the White Paper’s call for “collective redress” and its functionality compared to U.S. class actions, this section addresses both the Commission’s wavering treatment of multiple damages and the utility of multiple damage awards in private antitrust enforcement. First, it discusses the Green Paper’s proposal to double damages in horizontal cartel cases, which the Commission did not include in the 2008 White Paper. Then, it considers both the benefits and criticisms of the U.S. treble damages system.

a. The Commission’s Approach

i. The Green Paper: Double Damages in Horizontal Cartel Cases

In the 2005 Green Paper, the Commission made several proposals to define “the actual scope of the damages claim.” Most notably, it offered the option of doubling damages in horizontal cartel cases. Under this option, damages would be doubled either “at the discretion of the court,

243. Id.
244. See id.
245. Woods, supra note 75, at 437.
247. Berrisch et al., supra note 55, at 592; Van Hoof, supra note 86, at 669; see also White Paper, supra note 34, § 2.5 (advocating for a full but single measure of damages for successful antitrust plaintiffs).
248. See, e.g., Woods, supra note 75, at 437; Ysewyn, supra note 27, at 15; Van Hoof, supra note 86, at 669.
249. Green Paper, supra note 24, § 2.3.
250. Id. Horizontal cartels, where competitors collude to determine price and output, have long elicited the harshest treatment under antitrust regimes. See William J. Baumol, Horizontal Collusion and Innovation, 102 ECON. J. 129, 129 (1992). The U.S. Supreme Court has described collusion as “the supreme evil of antitrust.” Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004). A prominent example is the global lysine cartel, which resulted in major prosecutions in both the United States and the EU. See supra Introduction.
automatic[ally] or conditional[ly]." 251 Other options included defining damages with respect to the loss suffered by the victim and with respect to the "illegal gain made by the infringer." 252 The Green Paper also considered whether the member states should uniformly offer prejudgment interest. 253

ii. The White Paper: Single Damages and Interest

Perhaps reflecting the political struggle that caused it suddenly to drop deterrence as a goal, 254 the Commission did not incorporate the Green Paper option of double damages in horizontal cartel cases into the White Paper. 255 Instead, the White Paper advocates for a definition of damages reflecting the loss that the plaintiff suffered. 256 While it does not preclude the possibility of a member state multiplying damages, the White Paper asserts that "victims must, as a minimum, receive full compensation of the real value of the loss suffered." 257 This includes "the actual loss due to an anti-competitive price increase," "the loss of profit as a result of any reduction of sales," and "a right to interest." 258

b. The U.S. Approach: Treble Damages

In the United States, treble damage awards are meant to punish infringing parties and deter future violations of federal antitrust laws. 259 One European commentator describes treble damages as "central to the private enforcement of U.S. antitrust law" because it encourages plaintiffs to litigate and subjects infringing businesses to the risk of a huge penalty. 260 Plaintiffs will not be motivated to sue for only a small amount of damages, especially if they are not financially equipped to cover their costs. 261 Furthermore, "optimal penalty theory" 262 and economic models suggest that treble damages provide for the perfect amount of deterrence. 263

251. Green Paper, supra note 24, § 2.3.
252. Id.
253. See id.
254. See supra Part I.E.
255. See White Paper, supra note 34, § 2.5.
256. See id.
257. Id.
258. Id.
259. See Woods, supra note 75, at 437; Bergen, supra note 60, at 220.
260. Ysewyn, supra note 27, at 15.
261. See Joel B. Eisen, Antitrust Reform for Joint Production Ventures, 30 Jurimetrics J. 253, 268 (1990) ("Antitrust suits are expensive to prosecute for all but the most well-heeled plaintiffs, making the availability of treble damages almost mandatory for a plaintiff to be able financially to proceed.").
262. See Ginsburg, supra note 28, at 437.
The Clayton Act's treble damages requirement has been criticized on various grounds. Some believe that it encourages settlement on dubious claims because of the fear of paying a tremendous damage award. It may also make judges less likely to find an antitrust violation, as they would then have to treble the damages. Furthermore, a common view is that treble damages, when combined with large class actions, produce unjustifiably large damage awards—thus leading to overdeterrence and a chilling of competition. Moreover, some commentators believe that multiplying damages is punitive in nature and thus against the culture of the EU member states, which are guided by the "principles of restitution and compensation."

3. Contingent Fees

Lawsuits require "money, time, and energy," and clients often do not have the resources to fund a complex case. In the United States, plaintiffs can rely on their attorneys to bankroll the litigation in anticipation of a percentage of a monetary judgment or settlement. In the EU, however, this is generally not possible. While the Commission has thus far refused to consider proposals for contingent fees in its reforms, their absence can be a substantial hurdle to private antitrust enforcement. The previous sections of this Note considered the White Paper and corresponding U.S. approaches to aggregate litigation and multiple damages; this section assesses the Commission's rejection of contingent fees, as contrasted with their role in U.S. litigation. First, it notes how
contingent fees received no mention in either the Green Paper or the White Paper. Next, it describes the importance of contingent fees in the United States. Then, this section addresses the alleged negative effects of contingent fees. Finally, it explains the potential divergence of class and counsel interests in class actions with contingent fees and the corresponding check that the U.S. system places on plaintiffs’ attorneys.

a. Conspicuous Absence in the White Paper

Neither the White Paper nor the Green Paper proposes a common contingent fee for the EU member states.273 In fact, the White Paper Staff Working Paper listed contingent fees as one of the factors that, when combined with class actions, leads to dreaded “excesses.”274 EU member states have a purportedly negative view of contingent fees because they believe that they attract superfluous litigation.275 Commentators in the EU and the United States have posited that contingent fees encourage attorneys to take on innumerable cases in search of a huge payoff and thus risk harm to businesses, consumers, and competition.276

b. Funding U.S. Plaintiffs

Contingent fees are common in the United States, and they fund essentially all U.S. class actions.277 Lawyers are far better equipped to finance a case than their clients—they can more accurately assess the risks, they can diversify their portfolios with several cases, and they generally have better liquidity and access to loans.278 With a contingent fee, a plaintiff can bring a lawsuit with essentially no risk,279 as his attorney bears the risk for him.280 While the client may not be willing or able to sue using only his own finances, an attorney who expects a large payoff from a settlement or judgment will most likely be willing to provide the up-front legal costs.

275. See Berrisch et al., supra note 55, at 598.
276. See Helland & Tabarrok, supra note 75, at 517–18; infra Part II.A.3.c.
277. See Issacharoff & Miller, supra note 53, at 199. While U.S. federal and state procedural rules do not explicitly permit or forbid contingent fees, ethical rules impliedly authorize their use. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.8(e)(1) (2002) (stating that “a lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation,” but providing an exception that “a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter”).
278. Issacharoff & Miller, supra note 53, at 198–99; see Helland & Tabarrok, supra note 75, at 518; Woods, supra note 75, at 436.
279. See Berrisch et al., supra note 55, at 597–98.
c. Criticism of Contingent Fees: Meritless Lawsuits and Client-Counsel Conflicts

Two persistent criticisms of contingent fees are that they encourage frivolous litigation and that they put a wedge between the attorney’s and the client’s interests. Some commentators have suggested that contingent fees cause attorneys to take on a high volume of largely speculative litigation in hopes of hitting the jackpot with a few good cases. Commentators have also criticized contingent fees for both speeding up and slowing down settlements. Presumably, these concerns are among the EU’s feared “excesses”—if the concerns are valid, then contingent fees would discourage procompetitive practices and harm European industries.

Professors Eric Helland and Alexander Tabarrok conducted an empirical study to determine whether contingent fees truly produce more low-value litigation than hourly fees and whether they encourage or discourage settlement. Overall, the results showed that attorneys working on contingent fees turned down more cases and provided a comparatively higher quality of legal services. The results also showed that contingent fees were more likely to encourage settlements and hourly fees were more likely to delay them. Professors Helland and Tabarrok assert that this makes intuitive sense, as a lawyer working on a contingent fee will engage in more case screening and will not take a case that he thinks will be unsuccessful. An attorney working on an hourly fee will get paid whether or not his client wins, so he will not necessarily have an incentive to turn down a weaker case. Moreover, a lawyer working on a contingent fee may want to settle to limit his risks and expenses, whereas a lawyer working on an hourly fee will have an incentive to extend the length of the case and collect as much in fees as possible.

d. Coupon Settlements and the Class Action Fairness Act of 2005

The Commission fears U.S.-style contingent fees partly because it believes that they will cause class action plaintiffs’ attorneys to wrest

281. See Helland & Tabarrok, supra note 75, at 517; Woods, supra note 75, at 437.
282. See Helland & Tabarrok, supra note 75, at 518.
283. See id. at 520. Professors Eric Helland and Alexander Tabarrok state that some commentators believe that lawyers working on contingent fees do not want to settle because they have the resources to wait for a large payoff. Id. On the other hand, some commentators believe that they encourage settlement because attorneys want to cut costs and guarantee that they receive a fee for their work. Id.
284. See supra note 75.
285. See Helland & Tabarrok, supra note 75.
286. See id. at 540.
287. See id.; see also Woods, supra note 75, at 437 (arguing that lawyers paid by a contingent fee try to settle cases quickly to cut costs and minimize risk).
288. See Helland & Tabarrok, supra note 75, at 519.
289. See id.
290. See id. at 519–20.
control of the litigation and reap more benefits than the class.\textsuperscript{291} While the counsel and class’s interests are aligned in pursuing a judgment or settlement, there are potentially conflicting incentives at the distribution stage.\textsuperscript{292} In Kamilewicz v. Bank of Boston Corp.,\textsuperscript{293} for example, the plaintiff challenged the settlement of a 1994 Alabama class action where the class members had to pay far more in legal fees than they received in damages.\textsuperscript{294}

A classic example of misaligned class and counsel incentives is the “coupon settlement”\textsuperscript{295}—instead of a monetary award, the class members receive coupons for discounts on products purchased from the defendant.\textsuperscript{296} Coupon settlements are attractive to defendants because of low coupon redemption rates and because the coupons may lead to additional sales.\textsuperscript{297} They are also attractive to class counsel because they can settle for a higher face value, which they can use to garner higher fees.\textsuperscript{298} However, the class members may not be meaningfully compensated for their economic injuries.\textsuperscript{299} For instance, the settlement of a class action against a company selling cribs that were allegedly unsafe for infants offered the class members only a crib repair kit or a discount coupon for the purchase of a new crib from the same company.\textsuperscript{300} Due to the timing of the case, the

\textsuperscript{291} See White Paper Staff Working Paper, supra note 44, ¶ 58; supra note 203. But see supra text accompanying notes 208–11.

\textsuperscript{292} See ORGANISATION FOR ECON. CO-OPERATION & DEV., supra note 148, at 374 (“[U]ntil recovery was obtained a contingent fee system actually ensured that the interests of counsel and the class were synchronized. Once the award was obtained, a conflict of interest might arise.”).

\textsuperscript{293} 92 F.3d 506 (7th Cir. 1996).

\textsuperscript{294} See id. at 508 (concerning the settlement of Hoffman v. BancBoston Mortgage Corp., No. CV-91-1880 (Ala. Cir. Ct. Jan. 29, 1994)).

\textsuperscript{295} See ORGANISATION FOR ECON. CO-OPERATION & DEV., supra note 148, at 18, 356 (“The use of coupon settlements . . . raises conflict-of-interest concerns.”).


\textsuperscript{297} ORGANISATION FOR ECON. CO-OPERATION & DEV., supra note 148, at 356. One particularly bizarre coupon settlement case involved a consumer lawsuit against a cruise line that had gone out of business. See S. REP. NO. 109-14, at 16 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 16. Recognizing a potential profit opportunity, a completely different cruise line that was not a party to the litigation offered the class members discount coupons as part of the settlement. See id.

\textsuperscript{298} See ORGANISATION FOR ECON. CO-OPERATION & DEV., supra note 148, at 356. But see infra note 306 and accompanying text.

\textsuperscript{299} See ORGANISATION FOR ECON. CO-OPERATION & DEV., supra note 148, at 356, 376 (“Concerns could arise if attorneys tried to get fees based on the face value of coupons, without regard to actual redemption rates.”). But see id. at 18 (“Speakers also suggested that there can be cases where coupon settlements can be a potentially valuable remedy, for example where the total damage award is rather low or when the defendant has a credible claim that it cannot afford cash payments.”).

class members could only use their awards if they planned to have another child and still trusted the company’s products. Countless other cases have similarly yielded little to no benefit for most class members while rewarding their attorneys handsomely.

The Class Action Fairness Act of 2005 (CAFA) places a significant check on the use of coupon settlements. While CAFA does not ban their use, it sets limits on attorneys’ fees and subjects coupon settlement agreements to higher judicial scrutiny. First, CAFA requires that the fees distributed to attorneys be “based on the value to class members of the coupons that are redeemed” and not simply on the face value of the coupons. Second, CAFA requires a judicial hearing and written statement that “the settlement is fair, reasonable, and adequate for class members” before a court can approve a coupon settlement. Furthermore, the statute aims to eradicate the issue faced in Kamilewicz by allowing class counsel to settle at a monetary net loss for class members only where there is a “written finding that nonmonetary benefits to the class member substantially outweigh the monetary loss.”

B. The Commission’s Fears in Context

The Commission is generally worried about the excesses that it believes U.S.-style litigation would bring to EU antitrust enforcement. However, the field of antitrust has special characteristics that tend to limit the practicability of litigation for parties without a strong claim. Moreover, U.S. antitrust litigation offers vigorous checks on the ability of plaintiffs to state a claim sufficient to survive a motion to dismiss. While the last section focused on three procedural factors—class actions, treble damages, and contingent fees—that have a bearing on the viability of a private antitrust enforcement system, this section shifts the discussion to the EU fears of U.S.-style antitrust litigation. Part II.B.1 discusses features of antitrust litigation that make it less susceptible to attorney mischief, and

301. Id.
304. See id. § 1712.
305. See id.; ORGANISATION FOR ECON. CO-OPERATION & DEV., supra note 148, at 358.
306. 28 U.S.C. § 1712(a). Courts “may, in [their] discretion upon the motion of a party, receive expert testimony from a witness qualified to provide information on the actual value to the class members of the coupons that are redeemed.” Id. § 1712(d). Fees that are not contingent on the settlement amount “shall be based upon the amount of time class counsel reasonably expended working on the action.” Id. § 1712(b)(1). Fees that are “calculated on a mixed basis” are subject to both rules for their respective components. Id. § 1712(c).
307. Id. § 1712(e).
308. See supra note 294 and accompanying text.
310. See supra Part I.B.
311. See infra Part II.B.1.
312. See infra Part II.B.2.
Part II.B.2 describes some of the procedural restraints that limit the amount of tenuous antitrust claims.

1. Features of Antitrust Litigation

The debate on the efficacy of U.S.-style private antitrust enforcement is not unique to the EU—some American commentators have also criticized the U.S. system for bringing about superfluous litigation.\(^313\) Like their European counterparts, they are concerned that the U.S. system allows plaintiffs' attorneys to "extort large settlements" and "deters efficient, procompetitive business behavior."\(^314\)

In conducting an empirical study, Professors Steven C. Salop and Lawrence J. White establish a conceptual framework to determine whether the U.S. private antitrust litigation system truly deserves its criticism. They explain that antitrust litigation is in essence an exchange between rational financial actors.\(^315\) Each party responds to economic incentives—potential plaintiffs are more likely to sue when their probability of success is higher, litigation costs are lower, and potential damages are higher; potential defendants will more likely abandon certain conduct if the probability that a lawsuit will be brought, the probability of losing that suit, the litigation costs, and the potential damages are higher.\(^317\)

Professors Salop and White contend that while the United States' pro-plaintiff procedural mechanisms change incentives, they do not necessarily increase litigation.\(^318\) For instance, while one might expect treble damages to lead to more lawsuits, it could actually reduce litigation due to the deterrent effect on potential defendants.\(^319\) Moreover, with one-sided fee shifting, higher legal fees for a potential plaintiff could simultaneously serve as a disincentive for plaintiffs to sue and a deterrent for potential defendants.\(^320\)

Professors Salop and White also attack the presumption that U.S.-style antitrust litigation can harm legitimate, procompetitive business behavior. First, they challenge the assertion that the expenses and risks of antitrust litigation force parties to settle on dubious claims by explaining that defendants will not choose to settle when they believe that the claims

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314. Id.; see supra note 75.
315. See Salop & White, supra note 313, at 1018, 1050 ("Antitrust litigation ultimately is a financial proposition involving stakes and costs.").
316. See id.
317. Id. at 1019.
318. See id. at 1020-21.
319. Cf. id. ("A low level of complaints may be the consequence of a high level of deterrence and few violations, or it may indicate a low level of deterrence because of insufficient incentives to initiate suits."). Professors Salop and White refer to this as the "Laffer Curve of Litigation." Id. at 1020, 1021 fig.1.
320. See id. at 1020-21.
against them have no genuine merit. Second, they contend that the threat of meritless litigation will not deter a defendant’s procompetitive conduct. They state that “a court can probably detect and penalize frivolous suits more easily than frivolous defenses.”

Furthermore, antitrust is somewhat unique in U.S. litigation in that there are very few cases and each one is both complex and lengthy. Antitrust plaintiffs’ attorneys, like all attorneys who work on contingent fees, have to diversify their risk with a portfolio of cases. However, it stands to reason that, with fewer, longer, and more complex cases, antitrust attorneys will be more careful in selecting the claims that are most likely to succeed.

2. Antitrust Injury and Plausibility

The U.S. system imposes strict requirements on both the amount of facts needed to state a claim and the necessary standing to initiate an antitrust lawsuit. While the previous section of this Note described reasons why antitrust litigation is less vulnerable to abuse than some EU authorities believe, this section addresses some of the hurdles that U.S. antitrust law has deliberately imposed so that plaintiffs do not run wild and harm competition.

321. See id. at 1026 (“In essence, the cases that the defendant is less likely to settle tend to be those for which he feels the plaintiff’s chances of winning are low enough that the risky consequences for other cases are tolerable.”). But see id. at 1029 (acknowledging that it would be easier for a plaintiff to use “extortion tactics” to extract a settlement where it is “relatively more expensive for the [defendant] and less expensive for the extortionist” to conduct the litigation). However, the U.S. Supreme Court has recently made it harder for plaintiffs with tenuous claims to survive motion to dismiss in federal courts. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007); infra Part II.B.2.

322. See Salop & White, supra note 313, at 1029 (“[U]nless the plaintiff has a reasonable chance of success, the threat of litigation will not be credible.”).

323. Id.; see also infra text accompanying notes 335–40 (discussing the pleading standard that the Supreme Court announced in 2008 to limit frivolous claims).


325. See Salop & White, supra note 313, at 1009 & tbl.7 (asserting that, in their empirical data, the average antitrust case lasted 24.9 months, the average Multidistrict Litigation antitrust case lasted 5.7 years, and the average docket for an antitrust case was 8.2 inches thick); see also White Paper, supra note 34, § 2.8 (“[Antitrust damages] actions may be particularly costly and are generally more complex and time-consuming than other kinds of civil action.”).

326. See supra note 278 and accompanying text.

327. See supra text accompanying notes 278–80.
In its landmark 1977 decision *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, the U.S. Supreme Court held that to establish standing to allege a claim under the federal antitrust laws, a plaintiff needs to show "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." In *Brunswick*, the respondents, three bowling centers, challenged the petitioner, one of the two largest manufacturers of bowling equipment, under section 7 of the Clayton Act for the acquisition of their rivals in three distinct markets. Because the rivals were going out of business, the respondents sought treble damages for the additional profits they would have gained had they left the respective markets. The Court stated that "[e]very merger . . . has the potential for producing economic readjustments that adversely affect some persons. But Congress . . . has condemned them only when they may produce anticompetitive effects." The Court has subsequently broadened the concept of "antitrust injury" to "demand[] that every private plaintiff provide a clear articulation of both a theory of anticompetitive effects and allegations of personal injury directly tied to those effects."

Furthermore, the Supreme Court has recently made it far more difficult for a plaintiff to state any claim in the federal courts. In *Bell Atlantic Corp. v. Twombly*, the respondent class alleged that the petitioners engaged in a conspiracy to restrict new entry and allocate markets in the telephone service industry in violation of section 1 of the Sherman Act. The Court held that to plead a conspiracy successfully under section 1, a plaintiff must present "plausible grounds to infer an agreement." It explained that a complaint will not survive a motion to dismiss without "enough factual matter (taken as true) to suggest that an agreement was made." The Court reasoned that without this rule, a plaintiff with "a largely groundless claim" would be allowed to conduct protracted and expensive discovery to scare a defendant into a high settlement value. Thus, the plausibility requirement allows U.S. federal courts to weed out meritless claims fairly

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329. Id. at 489.
330. Clayton Act § 7, 15 U.S.C. § 18 (2006) (forbidding mergers and acquisitions where "the effect . . . may be substantially to lessen competition, or to tend to create a monopoly").
331. See *Brunswick*, 429 U.S. at 479–80.
332. See id. at 480–81.
333. Id. at 487.
338. Id.
339. Id. at 558 (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).
easily so that plaintiffs do not extort settlements due to the threat of high litigation costs.\textsuperscript{340}

Part II considered the efficacy of both the \textit{White Paper} reforms and EU resistance to adopting U.S.-style antitrust litigation. First, it assessed the benefits and drawbacks of some of the \textit{White Paper}'s proposals aimed to bolster private antitrust enforcement and the corresponding U.S. approaches. Then, it discussed the nature of antitrust practice and the restraints on U.S. plaintiffs that contrast with some EU policy makers' views of the U.S. system. Part III argues that the EU must edge toward the U.S. model to establish a fully functional private enforcement system. Furthermore, it asserts that the concerns of "excess" that have caused the Commission to restate its goals and have stalled its damages actions campaign are exaggerated and merely political.

III. "EXCESSES" AND SHORTAGES: DUBIOUS FEARS ARE THE ROADBLOCKS TO REFORM

The \textit{White Paper}'s proposed reforms, if implemented in their present form, would not likely produce a private antitrust enforcement system sufficient to meet the Commission's goals.\textsuperscript{341} In its desire to avoid the alleged shortcomings of the U.S. system, the Commission is ignoring the key procedural mechanisms that work together to make antitrust litigation a reality for most parties.\textsuperscript{342} Furthermore, the EU policy makers' fears of U.S.-style litigation are misguided—importing some of the U.S. procedures that enable private enforcement will not result in the "excesses" that the Commission so gravely predicts.\textsuperscript{343}

This Note draws three conclusions about the EU antitrust damages actions campaign. First, the Commission's shift in focus from deterrence and compensation to purely compensation negatively impacts upon the practicability (and desirability) of reform. Second, the \textit{White Paper}'s proposals, if enacted, would not have a noticeable impact on the level of private antitrust enforcement beyond what has already occurred. Third, EU criticism of the U.S. system is far overstated—with sufficient checks on plaintiffs' attorneys, private litigation will not become excessive or harm competition.

\textsuperscript{340} See id. at 559.
\textsuperscript{341} See supra Part I.D. Although the Commission has raised awareness for antitrust damages actions, which has increased private enforcement somewhat, see supra notes 129–31 and accompanying text, it cannot create a sufficient vehicle for the compensation of parties with smaller injuries and less resources without implementing greater procedural reforms.
\textsuperscript{342} See supra Part II.A.
\textsuperscript{343} See supra Parts I.B, II.A.1.c.
The Commission’s recent paradigm shift away from deterrence and toward compensation casts a substantial veil over the efficacy of many of its proposed reforms. For instance, the White Paper calls for opt-in collective actions where claims are too small to be brought individually. U.S.-style class actions are justified on the grounds of both deterrence and compensation—each plaintiff collects damages, infringing parties are punished, and companies refrain from future anticompetitive behavior. Thus, in U.S.-style class actions, the combined damage award that the defendant has to pay is equally as important as each plaintiff’s share. If the Commission only worries about parties receiving compensation for their losses, and deterrence is a mere side effect, then it should focus on what each plaintiff receives individually. The Commission’s campaign, including its call for collective redress, has focused largely on claims that are too low to litigate under the current procedural regime. Because these claims are small, there is little benefit to the stakeholders. Without the goal of deterrence, one would think that these are a rather low priority.

In a similar fashion, other procedural mechanisms that bolster private enforcement do not make sense within the Commission’s new framework. For example, trebling damages, by its very nature, affords plaintiffs more in damages than the loss they suffered. If the goal of instituting procedural reforms is both deterrence and compensation, then it makes sense to multiply damages. If compensation is the only goal, however, then doing so is somewhat counterintuitive. Nonetheless, without the lure of treble damages, many potential plaintiffs will choose not to litigate, and injured parties will not receive the compensation that the Commission is working hard for them to receive.

Therefore, the Commission’s policy shift, even if meant to ease the passage of legislation, countermands the need for and the ability to instigate more private antitrust enforcement. If a party has a sufficiently large claim, it may choose to litigate even without a new directive. Collective redress
is important where damages are small and thus probably fairly insignificant to the individual plaintiffs involved. Furthermore, other mechanisms that persuade plaintiffs to sue are only appropriate if deterrence is at least a coequal goal. Thus, the Commission can only truly justify its efforts if it acknowledges the importance of deterrence in private as well as public enforcement.

B. Devising a Workable System

EU private antitrust enforcement will not increase beyond current levels without greater reform than the White Paper proposes. Problems will forestall litigation for plaintiffs with smaller claims and more limited resources even if the EU enacts a directive mirroring the entire White Paper. Thus, the Commission will only achieve its goals if it offers potential plaintiffs greater incentives to litigate; this includes liberalizing its views on the attorney-driven nature of private enforcement. Furthermore, EU policy makers cannot wholly reject individual aspects of the U.S. system if they expect to create an instantly functional private enforcement system.

1. Facilitating Litigation

Private antitrust enforcement in the EU is deficient under the current system because litigation is simply not possible for many plaintiffs. If the EU implements the White Paper reforms, this will probably not change. In the absence of contingent fees, potential plaintiffs have to fund their own lawsuits, which is a risk that most private individuals and smaller companies cannot take. With the "loser-pays" rule in most member states, this risk only increases—plaintiffs face the possibility of paying their adversaries' fees and costs in addition to their own. If the EU reforms included contingent fees, then the risk would shift to plaintiffs' attorneys, who are generally far more able to bear the up-front costs of litigation. Introducing contingent fees into EU antitrust litigation would even make the "loser-pays" rule more palatable for plaintiffs—if their attorneys assumed this additional risk, they would simply be more careful in selecting their cases.

Moreover, both opt-out class actions and multiple damages have a tremendous impact on the cost-effectiveness (and thus the feasibility) of an antitrust damages action. Antitrust lawsuits are complex and

355. See supra text accompanying note 181.
356. See supra text accompanying notes 350–53.
357. See supra note 44 and accompanying text.
358. See supra notes 125–27 and accompanying text.
360. See supra text accompanying notes 236, 239.
361. See supra text accompanying notes 278–80.
362. See supra text accompanying notes 288, 326–27.
expensive—without treble damages, it may cost a party more to litigate a claim than it stands to gain from the action. Furthermore, without opt-out class actions, litigation would likely be too expensive for most parties to pursue. Aggregate litigation, whether opt-in or opt-out, is fundamentally a way for plaintiffs to pursue their claims when each one cannot reasonably pursue his claim alone. In an opt-in system, however, a plaintiff may face substantial hurdles to joining the litigation. In the most basic scenario, the injured party simply does not know about the lawsuit. To resolve this problem, attorneys have to engage in expensive campaigns to recruit potential plaintiffs. This raises the cost of litigation to the point where it might no longer be worthwhile. An opt-out system, on the other hand, includes all similarly situated parties by default, thus saving costs and making litigation a reality for many more plaintiffs.

2. Incentivizing Litigation

To establish a private enforcement system where parties with smaller injuries and less resources receive compensation, the Commission has to do more than make litigation possible—it has to make it attractive to potential plaintiffs. Currently, in most member states, parties with a small antitrust claim have little to no incentive to sue. The White Paper’s reforms do little to expand these incentives. Ultimately, EU policy makers may have to become more comfortable with a system where attorneys drive private enforcement forward.

The White Paper proposals for collective redress and single damages will not motivate litigants with small claims to sue. Human inertia will prevent most ligants from joining an opt-in collective action unless they stand to gain substantially. In an opt-out system, plaintiffs do not need to take any action to join a class, thus making participation far more probable. Representative actions might have a larger impact, but consumer groups may not adequately represent the consumers’ interests. Furthermore, without the availability of a multiple damage award, plaintiffs with small

363. See supra note 325 and accompanying text.
364. See supra Part II.A.1.
365. See supra text accompanying notes 174–75, 181, 190.
366. See supra text accompanying notes 219–22.
367. See supra text accompanying note 221.
368. See supra text accompanying note 225; cf supra text accompanying note 195.
369. See supra text accompanying notes 192, 223.
370. See supra notes 125–27 and accompanying text.
371. See infra notes 373–79 and accompanying text.
372. This is one of the main reasons why the United States has a more robust private antitrust enforcement system than the EU. See supra text accompanying notes 208–09. In Part III.C, infra, this Note discredits the Commission’s claim that an attorney-driven system will harm the economy with excessive and meritless litigation.
373. See supra text accompanying note 218.
374. See supra text accompanying notes 216–23.
375. See supra Part II.A.1.d.ii.
claims will not be lured into court.\textsuperscript{376} Multiplying damages, whether or not it deters antitrust violations, has the effect of encouraging litigation where it is otherwise undesirable.\textsuperscript{377}

Furthermore, the lack of contingent fees and the presence of the "loser-pays" rule make it extremely unattractive for potential plaintiffs to sue, even if they are able to handle the financial risks involved.\textsuperscript{378} To achieve its goals, the Commission should thus consider either disposing of the "loser-pays" rule or allowing for contingent fees. This would ease the burden on potential litigants and make them more comfortable bringing their claims to court.\textsuperscript{379}

Notwithstanding the Commission's overt criticism of the attorney-driven nature of the U.S. system,\textsuperscript{380} it will likely need to embrace the U.S. model to some degree to realize the extent of its goals. The combination of class actions, contingent fees, and the absence of a "loser-pays" rule allows litigation to proceed on behalf of more parties at risk only to their attorneys.\textsuperscript{381} This is by far the best way to ensure that litigation is prevalent and that injured parties are compensated: because lawyers are much more willing and able to take this risk than their clients, plaintiffs are much more likely under this system to pursue their claims.\textsuperscript{382} Naturally, this will give the attorney the largest stake in the litigation,\textsuperscript{383} but the attorney's interests are at least initially aligned with those of his clients.\textsuperscript{384} Under the system that the Commission is proposing, there is less risk of attorney abuse,\textsuperscript{385} but there is a far greater chance that injured parties will not receive damages.\textsuperscript{386}

3. Tying the System Together

The nature of competition enforcement systems is such that it would be very difficult for the EU to pick and choose what procedures to import from the United States.\textsuperscript{387} Effective private enforcement requires a large number of litigants; to achieve this, the whole procedural regime must work

\textsuperscript{376} See supra notes 148, 260–61 and accompanying text.
\textsuperscript{377} See supra notes 148, 260–61 and accompanying text.
\textsuperscript{378} See supra text accompanying notes 236, 239. The Commission's suggestion that member states let plaintiffs know early on in the litigation whether the "loser-pays" rule will apply would be an improvement on the status quo, but the plaintiffs would still be responsible for their own costs if they lose. See supra text accompanying note 243.
\textsuperscript{379} See supra text accompanying notes 236, 239.
\textsuperscript{380} See supra notes 201, 291 and accompanying text.
\textsuperscript{381} See supra Part II.A.1.d.i, 3.b.
\textsuperscript{382} See supra Part II.A.3.b.
\textsuperscript{383} See supra text accompanying note 210.
\textsuperscript{384} See supra note 292 and accompanying text. To the extent that the client and counsel interests are at odds, the procedural rules should impose limits on the attorneys' actions and subject their decisions to judicial scrutiny. See infra Part III.C.2.
\textsuperscript{385} See supra Part II.A.3.d, infra Part III.C.2.
\textsuperscript{386} See supra notes 373–79 and accompanying text.
\textsuperscript{387} See supra note 173.
together to incentivize lawsuits and limit risks. At an OECD roundtable discussion, Professor Andrew I. Gavil further emphasized that each procedural element is interdependent and that reforming one without the others would likely be difficult or ineffective. It is thus hard to believe that the EU will be able to revitalize private antitrust enforcement simply by implementing a directive guaranteeing class action or collective action rights; the Commission would still likely fall vastly short of its policy goals.

For example, it is impracticable to create a system of opt-out class actions where contingent fees (or equivalent mechanisms) are not available. At the very least, the class representative would be responsible for the costs and attorney’s fees of the class as a whole. This would make it difficult if not impossible to find representatives willing to litigate on behalf of the class. With the addition of a “loser-pays” rule, plaintiffs’ attorneys would have even more trouble finding representatives willing to litigate. If, however, the attorneys could cover the up-front costs for the class, then introducing class actions would be effective.

Conversely, a system of contingent fees would only be viable if damages are large enough for attorneys to want to litigate—that is, if they expect a monetary judgment or settlement large enough to cover their expenses. Absent class actions, which allow for a large grouping of individual claims, and treble damages, which may allow even one party with a moderate claim to seek sufficient damages, a plaintiff may not have a large enough claim to warrant a lawsuit. Private attorneys will likely not accept a fee contingent upon the relatively “modest” amount of damages currently available in most member states.

Furthermore, the EU must also find a way to incorporate (or at least find a suitable alternative to) the factors not covered in this Note, such as indirect purchaser standing and discovery rights. To strengthen private antitrust enforcement, the Commission will have to overcome opposition in

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388. See generally supra Part II.A (measuring the White Paper and U.S. procedural approaches by how well they served to encourage parties to litigate).
389. See supra note 173.
390. See supra text accompanying note 165.
391. See supra Part II.A.3.b.
392. Because a class representative would have to cover the risk of his fellow class members, there would be a strong incentive for potential class representatives to wait for someone else to sue for their damages. See Mulheron, supra note 184, at 430 (“[C]lass members . . . may prefer that others ‘bore the grief of the litigation, but are willing to ‘piggy back’ in any subsequent litigation . . .’”).
393. See supra notes 240–41 and accompanying text.
394. See supra Part II.A.3.b.
395. See supra Part II.A.3.b.
396. See supra notes 174–75, 260–61 and accompanying text.
397. See supra note 245 and accompanying text.
398. See supra notes 163, 173 and accompanying text.
the member states and find a way truly to liberalize procedures. Unless and until that happens, the Commission will not meet its goals, and antitrust damages actions in the EU will remain scarce.

C. A Closer Look at the EU’s Concerns

While political concerns may not currently allow for the implementation of U.S.-style procedures for EU antitrust plaintiffs, the Commission’s perceptions of the U.S. system are misguided. It is true that any system driven by private profit incentives is vulnerable to mischief. However, critics of the U.S. system fail to acknowledge that the EU may prevent this by placing robust checks and balances on plaintiffs’ attorneys. Some EU policy makers think that the U.S. system creates “excesses” where lawyers run afoul, harming their clients and businesses in the pursuit of profits. However, this is not the case that one observes with U.S. antitrust plaintiffs’ attorneys. Antitrust is somewhat less susceptible to abuse than other fields of litigation—cases are few and costly, and it is more difficult to proceed with a meritless claim. Moreover, the U.S. private enforcement system places strict limits on standing, and it prevents plaintiffs from initiating a costly lawsuit where there is only tenuous evidence. Furthermore, U.S. federal civil procedure corrects the problem of diverging counsel and client interests by imposing judicial scrutiny on class action settlement agreements.

Adopting U.S.-style procedures simply would not create a “litigation culture” where plaintiffs’ attorneys work against the interest of their clients, courts are flooded with lawsuits, and businesses are deterred from engaging in procompetitive conduct. With sufficient checks and balances like those imposed in the United States, antitrust plaintiffs’ attorneys will not be the destructive force that the Commission suggests.

1. Antitrust Lawyers Gone Wild?

Whereas excessive litigation might very well be harmful to a competition enforcement system, adopting U.S.-style procedures for antitrust will not produce the “litigation bonanza” that the EU expects. In antitrust litigation, parties are motivated by costs, risks, and expected payoffs.

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399. See supra text accompanying notes 165–68; see also supra Part I.B (describing some EU policy makers’ resistance to adopting more pro-plaintiff procedures).
400. See supra Part I.B; supra text accompanying notes 165–68.
401. See supra Introduction; see, e.g., supra Part II.A.3.d.
403. See supra Parts I.B, II.A.1.c.
404. See infra Part III.C.1.
405. See supra Part II.B.1.
406. See supra Part II.B.2.
407. See supra Part II.A.3.d.
408. See supra note 81.
409. See supra notes 315–17 and accompanying text.
antitrust attorney is unlikely to take a case of limited merit on a contingent fee—particularly because there are relatively few antitrust lawsuits and because there is such a heavy expense in litigating each one.411

Furthermore, after Twombly, the notion that U.S. defendants settle tenuous claims to avoid high litigation costs is completely erroneous.412 Now, even to reach discovery, plaintiffs in federal court need to possess enough evidence to present a "plausible" theory of harm.413 The Supreme Court made clear that its ruling was necessary to prevent expensive fishing expeditions that extort settlements.414 Therefore, in prospectively assessing their conduct, firms will only consider the risk of credible claims, as courts will swiftly dismiss everything else.415 Thus, instead of dismissing the idea of U.S.-style litigation entirely,416 the Commission should consider this sort of procedural safeguard that would prevent the very scenarios it fears.417

Additionally, importing U.S. procedural mechanisms will likely not yield an increase in litigation beyond what is desirable. First, procedures that enable litigation may deter violations of the EU antitrust laws so that there are less potential claims available.418 Second, U.S. federal courts have for over three decades limited antitrust standing—the Commission should consider this as a potential means to limit the amount of antitrust litigation and the types of parties that can sue for damages.419 Third, European culture is generally less litigious than American culture, so EU antitrust litigation would likely not reach U.S. levels, even under the same procedural rules.420

2. Fully Aligning Class and Counsel Interests

The judicial check that CAFA places on plaintiffs’ class action attorneys further illustrates that the EU fears forestalling reform are inflated.421 While the Commission believes that class actions and contingent fees lead to agency problems,422 contingent fees clearly align the class and counsel interests toward reaching a judgment or settlement.423 While the attorney’s interests may diverge from those of his clients in the distribution of damages and awarding of fees,424 the United States now ensures that the

410. See supra text accompanying notes 286, 288–89.
411. See supra notes 324–27 and accompanying text.
412. See supra text accompanying notes 335–40.
413. See supra notes 337–38 and accompanying text.
415. See supra note 40 and accompanying text; supra Part I.B.
416. See supra text accompanying notes 205–07.
417. See supra notes 318–20 and accompanying text.
418. See supra text accompanying notes 329–34.
419. See supra note 86 and accompanying text.
420. See supra Part II.A.3.d.
421. See supra text accompanying note 291.
422. See supra Part II.A.3.c; supra note 292 and accompanying text.
423. See supra note 292 and accompanying text.
class members' interests are still protected. CAFA serves to prevent obtuse outcomes where the defendants and the plaintiffs' attorneys can reach a mutually beneficial agreement that either does not benefit or harms the financial interests of the class members.

To the extent that the Commission fears that antitrust class actions would favor attorneys at the expense of the class, it should offer in its directive a CAFA-like check on EU plaintiffs' attorneys. This would be a far more direct way to implement a functional private antitrust enforcement system than flatly rejecting the U.S. model. By crafting a system with sufficient checks and balances, the EU can perhaps fulfill its goal of compensating plaintiffs with smaller claims and also prevent potential attorney abuses.

CONCLUSION

The Commission's dialogue on damages actions has succeeded in motivating larger parties to litigate their EU antitrust claims. However, the reforms in the 2008 White Paper did not go far enough to assist plaintiffs with less resources and smaller claims who face procedural and not just psychological hurdles to litigation. If the EU enacted the White Paper proposals as drafted, potential plaintiffs would not be much more likely to litigate than they are under the current system. Thus, without greater action, the EU will not meet its goals and will not reap the potential benefits that a stronger private enforcement system would bring to the European internal market.

Moreover, while the Commission appropriately recognizes that there is potential for attorney abuse in the U.S. system, it ignores the safeguards that the United States has set up to protect parties on either side. Despite clear political opposition, the Commission would best serve its policy goals by embracing both the U.S.-style procedures that facilitate litigation and the U.S.-style mechanisms designed to keep attorneys in check. Finally, EU policy makers should acknowledge that they may not meet their goals immediately or with a single directive—a viable private enforcement system will not emerge overnight, and they will likely need to hone it over time.

425. See supra notes 304–09 and accompanying text.
426. See supra notes 304–09 and accompanying text; see also supra notes 294, 299–02 and accompanying text (describing some of the instances of attorney abuse that motivated the U.S. Congress to pass the Class Action Fairness Act of 2005).
427. See supra text accompanying note 291.
428. See, e.g., supra notes 304–09 and accompanying text.
429. See supra notes 129–31 and accompanying text.
430. See supra Part III.B.
431. See supra Part III.B.
432. See supra notes 42–46 and accompanying text.
433. See supra text accompanying note 50.
434. See supra notes 412–17, 419, 421–28 and accompanying text.
435. See supra Part I.B; supra text accompanying note 168.
436. See supra Part III.B–C.