



**ON THE ROAD TO LITIGATION ABUSE:
THE CONTINUING EXPORT OF U.S. CLASS ACTION
AND ANTITRUST LAW**

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About a year ago, we published a paper entitled “Expanding Private Causes Of Action: Lessons From The U.S. Litigation Experience.” In that paper, we examined European policy-makers’ recent efforts to embrace what heretofore had been essentially American legal concepts on group litigation and antitrust law and analyzed the potential impact of these changes on European legal culture. Our purpose in writing that paper was a simple one – to urge European policy-makers to proceed cautiously in their adoption of American class action and antitrust principles and to heed the lessons of the American litigation experience before enacting further reforms. As a practical matter, Europe presently stands at the same policy crossroads where America stood forty years ago. Much like European policy-makers today, the American policy-makers of that era were motivated by the best of intentions – they wished to create a more efficient legal system that would make it easier for individuals with meritorious claims to have their day in court.² But in their zeal to expand opportunities for private individual and group litigation, these policy-makers failed to see how their procedural reforms were opening the door to widespread litigation abuse.³ Plaintiffs’ attorneys quickly realized that they could use newly-

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² Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem”*, 92 Harv. L. Rev. 664, 669 (1979) (“The Advisory Committee’s objectives in rewriting the [federal class action rule] were rather clear. It had few, if any, revolutionary notions about its work product. Although it was expected that the revision would operate to assist small claimants, the draftsmen conceived the procedure’s primary function to be providing a mechanism for securing private remedies, rather than deterring public wrongs or enforcing broad social policies.”).

³ *Id.* at 670 (“Thus, in the main, the rulemakers apparently believed that they simply were making rule 23 a more effective procedural tool. The class action onslaught caught everyone, including the draftsmen, by surprise.”).

enacted procedural devices, such as the modern American class action device, to exert substantial settlement pressure against defendants independent of the merits of their case. As a result, within a short time, America descended into a litigation morass from which it has only recently begun to extricate itself. Our concern was that European policy-makers not make the same mistake.

The events of the past year, however, do not inspire confidence. The zeal of European policy-makers for expanded group litigation procedures and increased private antitrust enforcement does not appear to have slackened. To the contrary, if anything, the pace of change has increased. Indeed, in the short period since we published our initial paper, Ireland, France, Italy, Norway, Denmark, Finland, England, and Germany have all considered or adopted new group litigation laws, and the European Commission released a Green Paper strongly proclaiming its commitment to enhancing and encouraging private antitrust enforcement in the member states.⁴ More significantly, the institutional barriers that have long protected Europe from American-style litigation abuse are beginning to erode. In our paper, we identified five characteristics generally found in European legal systems – none of which are present in American law – that have largely prevented the onset of American-style litigation abuse in European courts: (1) the presence of “loser pays” rules; (2) prohibitions on contingency fee relationships; (3) restrictions on the scope of permissible discovery; (4) prohibitions on exemplary damages, punitive damages, and “soft” compensatory damages, such as pain-and-suffering damages; and (5) the use of judges rather than juries to apportion damages awards. The effect of these structures has been to make it unprofitable for parties or attorneys to file frivolous or unsubstantiated claims, since taken together, they serve to increase the costs of

⁴ Green Paper (European Commission), *Damages Actions for Breach of the EC Antitrust Rules*, COM (2005) 672 (December 19, 2005).

bringing suit while reducing the amount of any potential recovery. However, because these aspects of European law serve to temper litigation impulses generally, they have become a target of the same European policy-makers who have pushed for expanded class actions and greater private antitrust enforcement. For example, the EC Green Paper contained a proposal to amend European competition law so that private antitrust plaintiffs could recover exemplary damages in certain circumstances.⁵ The overall effect is that Europe is much more structurally vulnerable to American-style litigation abuse today than it was a year ago.

Furthermore, as a result of changes in the international litigation climate, the need for caution on the part of European policy-makers is increasing. Although we mentioned in our paper that leading American plaintiffs' attorneys were beginning to take steps to establish a presence in the European legal market, those attorneys are far better positioned today than they were a year ago to take advantage of European opportunities. Indeed, the international plaintiffs' bar has been growing at a remarkable pace, and those attorneys are increasingly pursuing cross-border litigation strategies in large-scale litigation.⁶ At present, the most common form of such cross-border litigation is plaintiffs' attorneys coordinating class actions in both the United States and Canada, since most Canadian provinces have permitted some form of class action for several years.⁷ But leading American plaintiffs' attorneys have moved aggressively in recent months to increase their presence in the European legal market, forming alliances with European law firms

⁵ *Id.* at 7.

⁶ See Julius Melnitzer, *Globalization Aids Plaintiffs in Cross-Border Litigation*, Corporate Legal Times, November 2005; Sandra Rubin, *Northern Exposure*, American Lawyer, Vol. 27, No. 10, October 2005; Jon Robins, *Michael Hausfeld Brings Class Actions to the UK*, The Lawyer (Oct. 24, 2005); Adele Nicholas, *Class Action Litigation Makes Headway In Europe: New Rules Bring Europe Closer to American System*, Corporate Legal Times, Vol. 15, No. 169 (December 2005).

⁷ See Melnitzer, *supra* note 6; Rubin, *supra* note 6.

and opening offices in major European centers.⁸ Accordingly, if Europeans policy-makers open the door to litigation abuse even a crack, attorneys are already preparing to engage in similar tactics in European courts.

In sum, when we published our article last fall, we noted the irony of litigation abuse engulfing Europe, just as the United States was beginning to cure itself of that longstanding affliction. Yet the events of the past year have made that outcome more likely. Europeans have tended to view modern American legal culture with great disdain.⁹ But if European policy-makers continue along their present path and fail to heed the American experience, that culture may well be Europe's future.

I. RECENT DEVELOPMENTS IN EUROPEAN LAW HAVE INCREASED EUROPE'S VULNERABILITY TO LITIGATION ABUSE.

The prevalence of litigation abuse in the United States over the past forty years has not occurred by happenstance. Rather, as we explained in our prior paper, that outcome was largely preordained by the structure of the U.S. legal system. Simply put, American plaintiffs derive a substantial amount of power from the ability to bring a class action or to initiate private antitrust litigation. By their nature, both procedures give plaintiffs the power to expose defendants to massive potential liability merely by filing suit. And therefore both procedures confer on plaintiffs the ability to subject defendants to significant settlement pressure entirely independent of the merits of the plaintiffs' claims, since some defendants will occasionally settle claims

⁸ See Robins, *supra* note 6; *City Braced for Shareholder Actions with U.S. Launch*, *The Lawyer* (Oct. 16, 2006).

⁹ See, e.g., Edward F. Sherman, *American Class Actions: Significant Features and Developing Alternatives in Foreign Legal Systems*, 215 F.R.D. 130, 132 (2003) (“[M]ost other countries view American class actions as a Pandora’s box that they want to avoid opening.”); Christopher Hodges, *Multi-Party Actions: A European Approach*, 11 *Duke J. Comp. & Int’l L.* 321, 346-347 (2001) (“Europe neither needs nor wishes to import U.S.-style class action litigation, representing huge, avoidable, and unnecessary cost which distorts the economy . . .”).

wholly lacking in merit rather than risk the chance (even a miniscule chance) of a devastating verdict.

The American legal system, however, fails to incorporate any meaningful structural safeguards to prevent plaintiffs from misusing such powerful weapons. As such, it should be no surprise that plaintiffs' attorneys have exploited the leverage provided to them by class action and antitrust law to force defendants into large settlements of frivolous claims. It is this combination – plaintiffs possessing the procedural power to subject defendants to significant potential exposure independent of the nature of the case being brought, combined with a lack of mechanisms to prevent abuse – that has led to America's present litigation crisis.

Thus, when evaluating whether Europe has become more vulnerable to American-style litigation abuse in the year since we published our first paper, it is important to examine both parts of this troubling combination. And it is clear that, with respect to both metrics, the situation has gotten worse. As to the first metric, support for expanding the availability of class action devices and increasing the amount of private antitrust litigation has grown dramatically over the past year. The number of European nations where some form of class action has been adopted or actively considered is at a record high, and the European Commission has devoted substantial resources and political capital towards the goal of improving private antitrust enforcement. Practically speaking, the European landscape for class action plaintiffs and private antitrust action claimants has never been more favorable. As to the second metric, the structural safeguards that have long protected Europe against all forms of litigation abuse are now being viewed as obstacles to citizens' access to the courts and proposals to modify or amend such features are becoming increasingly common among European policy-makers. Accordingly, it is clear that Europe is more vulnerable to litigation abuse today than it was a year ago.

A. The Trend Towards Expanding The Availability And Use Of Class Actions And Private Antitrust Enforcement Has Continued At An Accelerated Pace.

As we noted in our prior paper, class actions and private antitrust actions were virtually unheard of in Europe a decade ago.¹⁰ Although England and Portugal permitted group litigation actions in certain circumstances, group litigation proceedings in either country were exceedingly rare.¹¹ Similarly, while private antitrust enforcement was not prohibited by European Union law at that time, as a practical matter, antitrust enforcement was left to the competition authorities.¹² But in recent years, starting with the European Union's 1998 directive requiring member nations to adopt laws for group litigation,¹³ the landscape has shifted in favor of expanding the availability of group proceeding devices similar to American-style class actions and increasing the ability of private parties to initiate and pursue antitrust claims. And that shift has accelerated over the past year.

1. Class Actions

Support for class actions or group litigation procedures has grown considerably since last September. At the time our paper was published, only a handful of nations were even considering the establishment of a group litigation procedure. However, in the intervening

¹⁰ Sherman, *supra* note 9, at 131 (“Most European countries eschewed American class action practice until quite recently, although some had distinctive procedures permitting expanded standing and aggregation through ‘group litigation.’”); *see also* Hodges, *supra* note 9, at 327 (“The first factual observation is that it is only recently that some European jurisdictions have introduced a rule of court procedure on the recognition or management of multi-party actions.”).

¹¹ Sherman, *supra* note 9, at 147-48 (England); Marjorie Holmes & Lesley Davey, *Competition Enforcement in the European Union: A Three-Way Partnership*, 72 Def. Couns. J. 31, 34 (2005) (Portugal).

¹² Denis Waelbroeck, Donald Slater, and Gil Even-Shoshan, *Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules*, Executive Summary, at 1 (Ashurst, Aug. 31, 2004).

¹³ Directive 98/27/EC on Injunctions for the Protection of Consumers' Interests (May 19, 1998), available online at http://europa.eu.int/comm/consumers/policy/developments/acce_just/acce_just09_en.pdf.

period, seven European nations have either enacted or indicated support for a group litigation procedure. In addition, England, which already has in place multiple procedures for group litigation and representative actions, is considering adding further mechanisms. And the European Commission has strongly endorsed the use of collective litigation procedures in the context of private antitrust actions and indicated support for collective actions more generally.

The most significant European class action development of the past year was Germany's adoption of a "model case proceeding." The Kapitalanlegermusterverfahrensgesetz, or KapMuG, went into effect on November 1, 2005, and permits German courts to determine issues common to multiple cases through the use of a single test case proceeding.¹⁴ It appears that the KapMuG will essentially operate as a form of an opt-in class action.¹⁵ Under the KapMuG, a party submits an application to a trial court for a model case proceeding, asserting that there are key issues in the litigation that are amenable to common determination and can be established through the use of common proof.¹⁶ The trial court then determines whether the case is one in which a model case proceeding is appropriate, basing that decision in large part on whether the court believes the issues raised by the party are actually capable of common determination.¹⁷ If the trial court concludes that the case is appropriate for a model case proceeding, then it will publish the application in an electronic registry.¹⁸ And if within four months of publication, at least nine additional applications seeking a model case determination of the published issues

¹⁴ Laurel J. Harbour & Marc E. Shelley, *The Emerging European Class Action: Expanding Multi-Party Litigation To A Shrinking World* (2006 ABA Annual Meeting, Section of Litigation, August 3-6, 2006), at 7-8.

¹⁵ *Id.*; Stefano M. Grace, *Strengthening Investor Confidence in Europe: U.S.-Style Securities Class Actions and the Acquis Communautaire*, 15 J. Transnat'l L. & Pol'y 281, 299 (2006).

¹⁶ Act on the Initiation of Model Case Proceedings in respect of Investors in Capital Markets, at 2, available at <http://www.bmj.bund.de/media/archive/1110.pdf>.

¹⁷ *Id.*

¹⁸ *Id.* at 2-3.

have been filed, then a model case proceeding is initiated.¹⁹ The original case is transferred to an appellate court for determination of the common questions, and all other cases involving the common questions are stayed pending the model case outcome.²⁰

The KapMuG is limited in scope – it does not apply to civil litigation generally, but instead is limited to securities cases.²¹ Furthermore, the decision of the model case proceeding is only binding on those parties who have already initiated a related case prior to the appellate court’s ruling. Notice is published when a model case proceeding is initiated, inviting individuals to file related cases. But only individuals who actually bring such lawsuits can take advantage of the appellate court’s ruling.²²

Beyond Germany, no other European nation has enacted a class action or group litigation statute during the past year, although Norway’s Mediation and Civil Procedure Act, which establishes an opt-in class action procedure similar to Sweden’s class action rule, takes effect in 2007.²³ But numerous other European nations have actively considered class action proposals in recent months, and in several countries, class action proposals are currently under active consideration. For example, in September 2005, the Irish Law Reform Commission issued a Report on Multi-Party Litigation, in which the Commission proposed the creation of a “Multi-Party Action” (MPA) procedure.²⁴ The proposed MPA procedure would essentially operate an

¹⁹ *Id.* at 3.

²⁰ *Id.* at 3-4.

²¹ *Id.* at 1. In addition, the KapMuG is an experimental measure – it will cease to have effect on November 1, 2010 if not reauthorized. *Id.* at 8.

²² *Id.* at 7.

²³ Harbour & Shelley, *supra* note 14, at 6.

²⁴ *Id.* at 10.; *see also* Report on Multi-Party Litigation, LRC 76-2005 (Law Reform Commission September 2005), available at <http://www.lawreform.ie/MPL%20Report.pdf>.

opt-in class action, with the trial court required to determine whether the proposed multi-party proceeding would be an “appropriate, fair, and efficient procedure in the circumstances.”²⁵ The proposal is currently under consideration by various Committees of the Irish Courts Service.²⁶

Similarly, in December 2005, the Danish Administration of Justice Committee submitted a report to Denmark’s Ministry of Justice recommending that Denmark adopt an opt-in class action procedure resembling the Norwegian model.²⁷ Under the Committee’s proposal, the conditions for class certification would include “uniformity of the facts and law, the superiority of the procedure, the ability to identify class members, and [the ability] to provide adequate notice and the adequacy of the group representative.”²⁸ The Danish Justice Minister submitted legislation to implement this proposal to the Danish Parliament on October 10, 2006.²⁹ Finally, the Government of Finland – which has been considering whether to institute class actions for years – recently submitted a proposal to the Finnish Parliament which would create opt-in class actions for consumer protection and product liability cases.³⁰ Under this proposal, only the Consumer Ombudsman would have the authority to initiate and prosecute class actions.³¹

²⁵ *Id.*

²⁶ *Class Actions Bulletin* (Lovells September 2006), at 9, available at http://www.lovells.com/NR/rdonlyres/4439EEA2-104B-432D-A7D1-911C291558B7/4364/3281_D1_ClassActionsBulletinSeptember2006.pdf.

²⁷ Harbour & Shelley, *supra* note 14, at 9; Press Release, *Report Paves the Way for Class Action Lawsuits on Behalf of Danish Consumers*, Office of the Danish Consumer Ombudsman (Dec. 21, 2005), available at <http://www.forbrug.dk/english/dco/dcopressreleases/skjultpm/news/classaction>.

²⁸ *Id.*

²⁹ *Minister Moves for Class Action Lawsuits*, *The Copenhagen Post* (Oct. 11, 2006).

³⁰ Press Release, *Class Action Proposed for Consumer Protection Cases*, Ministry of Justice, Finland (Sept. 28, 2006), available at <http://www.government.fi/ajankohtaista/tiedotteet/tiedote/en.jsp?toid=1946&c=0&moid=3125&oid=169629>.

³¹ *Id.*

In addition, although neither France nor Italy presently has class action legislation under active consideration, such legislation was proposed in both countries during the past year. In France, President Chirac has repeatedly indicated over the past two years a desire to implement a class action procedure. His initial proposal foundered in late 2005, in part due to the opposition of French business groups and in part due to the inability of the Government task force on class actions to arrive at a consensus recommendation on legislative language.³² However, the French Government has drafted a new class action bill and is expected to introduce the new legislation in late 2006.³³ In Italy, after taking office in June, the Prodi Government introduced a bill proposing opt-in class actions in July 2006.³⁴ Under the draft legislation, a class action could only be initiated and prosecuted by a registered consumer and could only be employed for causes arising in contract.³⁵ Although no action has been taken on the legislation at this time, it is likely that the Prodi Government will soon again raise the class action issue.

Furthermore, although the United Kingdom already has several mechanisms in place that permit group litigation proceedings or representative actions, the British Department of Trade and Industry issued a proposal in July 2006 which would permit certain approved consumer groups to bring damages actions on behalf of groups of allegedly injured consumers.³⁶ The DTI's rationale for issuing this proposal was the belief that "many consumers feel unable to bring a court case on their own, while those who do may consider the size of their losses are

³² Harbour & Shelley, *supra* note 14, at 8-9; Peggy Hollinger, *Europe: French Class Actions Plan Hits Snag*, Financial Times USA (Dec. 21, 2005); Liam Moloney, *Head of the Class*, Daily Deal (Aug. 18, 2006).

³³ Moloney, *supra* note 32.

³⁴ *Id.*

³⁵ *Class Action Bulletin*, *supra* note 26, at 5-6.

³⁶ Consultation, *Representative Actions in Consumer Protection Legislation*, Department of Trade and Industry (July 12, 2006), available at <http://www.dti.gov.uk/files/file31886.pdf>.

outweighed by the potentially high legal costs.”³⁷ Under the proposal, a consumer group could only bring suit on behalf of consumers who affirmatively indicated a desire to be represented in such a procedure and could only initiate such a representative proceeding after first receiving judicial permission to do so.³⁸

Finally, the European Commission, as part of its effort to encourage greater private antitrust enforcement, has also come out in favor of expanding the availability of “collective action.” In its Green Paper of December 19, 2005, entitled “Damages Actions for Breach of the EC Antitrust Rules,” the Commission suggested that the enactment of some sort of collective action procedure would be necessary to ensure that consumers with small antitrust claims brought suit because “[i]t will be very unlikely for practical reasons, if not impossible, that consumers and purchasers with small claims will bring an action for damages for breach of antitrust law.”³⁹ In addition, the Commission endorsed the concept of collective actions more generally, observing that “collective actions can serve to consolidate a large number of smaller claims into one action, thereby saving time and money.”⁴⁰

2. Private Antitrust Enforcement

In addition to the generalized concept of class actions, support for expanded private antitrust enforcement in Europe also appears to have grown significantly over the past year. Much of this growth is attributable to the European Commission, which has invested substantial time and effort in this issue since the release of the December 19 Green Paper. In that Green Paper, the Commission observed that “[p]rivate as well as public enforcement of antitrust law is

³⁷ *Id.*

³⁸ *Id.*

³⁹ Green Paper, *supra* note 4, at 8.

⁴⁰ *Id.*

an important tool to create and sustain a competitive economy” and that “[d]amages actions for infringement of antitrust law serve several purposes, namely to compensate those who have suffered loss as a consequence of anti-competitive behaviour and to ensure the full effectiveness of the antitrust rules of the Treaty by discouraging anti-competitive behaviour[.]”⁴¹ The Commission recognized that at present, private antitrust enforcement was largely non-existent in EU member states, but it asserted that, as a matter of EU law, member states were required to provide their citizenry with an effective system for bringing antitrust damages actions.⁴² Accordingly, the Commission devoted the Green Paper, and its accompanying Staff Working Paper, to identifying the main obstacles in current European law to a “more efficient system of damages claims” and to proposing possible courses of action to ensure greater private antitrust enforcement.⁴³

Furthermore, since the publication of the Green Paper, Competition Commissioner Neelie Kroes and others have vigorously advocated for the Green Paper and have spoken out generally concerning the need for expanded private antitrust enforcement.⁴⁴ And the goal of expanding private antitrust enforcement appears to be fairly popular among policy-makers in the EU

⁴¹ *Id.* at 3-4.

⁴² *Id.* at 4.

⁴³ *Id.*; Commission Staff Working Paper, *Damages Actions for Breach of the EC Antitrust Rules*, SEC (2005) 1732 (Dec. 19, 2005).

⁴⁴ Speech by Neelie Kroes, Member of the European Commission in charge of Competition Policy, *The Green Paper on Antitrust Damages Actions: Empowering European Citizens To Enforce Their Rights*, European Parliament Workshop (June 6, 2006); Speech by Neelie Kroes, Member of the European Commission in charge of Competition Policy, *More Private Antitrust Enforcement Through Better Access To Damages: An Invitation For An Open Debate*, ERA Conference (Mar. 9, 2006); *OFT Looks To Lighten Load With Private Antitrust Enforcement*, *The Lawyer* (Apr. 10, 2006) (UK Office of Fair Trading expressing support for Commission’s approach to private enforcement).

member states – over 700 judges throughout the EU are currently being trained in antitrust law to help facilitate a viable private enforcement regime.⁴⁵

B. The Increasing Erosion Of Europe’s Safeguards Against Litigation Abuse

As indicated by the foregoing, policy-makers throughout Europe are demonstrating an unprecedented commitment to expanding the use and availability of group litigation procedures and private antitrust actions. And that increased commitment in turn has placed Europe’s traditional safeguards against litigation abuse under unprecedented pressure. As we noted in last year’s paper, those policy-makers who have strongly pushed for the expansion of class action and private antitrust procedures are unlikely to be satisfied with new procedures that no one uses; instead, they are likely to push for further changes in European law to ensure that individuals and entities take advantage of their reforms. But the features of European law that these policy-makers are targeting as obstacles to parties making use of the new class action and antitrust procedures – fee-shifting standards, prohibitions on contingency fees, restrictive discovery, bars to the recovery of punitive or exemplary damages – are the same characteristics of European legal systems that serve as bulwarks against litigation abuse. In short, the growing support for expanding the use of group litigation procedures and private antitrust lawsuits is beginning to cause policy-makers to question their commitment to these well-established features of European law.

Nowhere is that more true than with respect to the European Commission’s efforts to facilitate private antitrust suits. As the Commission noted, the objective of the Green Paper was to identify the aspects of European law that were creating obstacles to private antitrust

⁴⁵ Harbour & Shelley, *supra* note 14, at 4.

enforcement and to develop ways to eliminate or circumvent those obstacles.⁴⁶ Accordingly, the Green Paper proposed measures that would severely limit several of Europe's key protections against widespread litigation abuse.

First, noting that one of the principal barriers to private antitrust enforcement was the fact that "the relevant evidence is [often] not easily available [to plaintiffs] and is held by the party committing the anticompetitive behaviour," the Commission suggested that traditional European discovery rules should be relaxed so as to facilitate greater access to relevant evidence for plaintiffs.⁴⁷ In that vein, the Commission proposed several options that would significantly increase the discovery burden on defendants in private antitrust actions, including increased and more extensive mandatory disclosures; placing an obligation on defendants to produce all relevant documents to plaintiffs; and expanded preservation requirements.⁴⁸ In addition, other options offered by the Commission proposed linking discovery with the plaintiffs' burden of proof and reducing a plaintiff's burden of proof in establishing an antitrust violation if a court deemed that a defendant's production of evidence was insufficient.⁴⁹

Second, in addressing the issue of damages, the Commission indicated that it was also considering the relaxation of the traditional prohibition on exemplary and punitive damages.⁵⁰ The Commission noted that the Ashurst Study, which the Commission had ordered in preparation of the Green Paper, had found that the unavailability of punitive damages could

⁴⁶ Green Paper, *supra* note 4, at 4.

⁴⁷ *Id.* at 5.

⁴⁸ *Id.* at 5-6.

⁴⁹ *Id.* at 6.

⁵⁰ *Id.* at 7.

constitute a barrier to private antitrust actions.⁵¹ In light of that finding, the Commission asserted that “one has to consider whether it would be appropriate to allow the national court more than single damages in case of the most serious antitrust infringements” because “[i]n so doing, one would create a clear incentive for claimants to file a damages claim.”⁵² The Commission accordingly suggested that awarding double damages might be appropriate in cases involving horizontal cartel infringements, either on an automatic, discretionary, or conditional basis.⁵³

Finally, although the Green Paper did not deal with the “loser pays” rule or contingency fees directly, it stated that consideration should be given to how cost rules could be changed to facilitate greater access to the courts for plaintiffs.⁵⁴ Specifically, the Commission proposed an option that would make unsuccessful plaintiffs liable for costs only if they acted in a manifestly unreasonable manner in bringing the lawsuit.⁵⁵ Moreover, in the Staff Working Paper, the Commission clearly indicated that this option was proposed “[i]n order to prevent the disincentive effect of the “loser pays” principle in those cases in which the outcome can not be clearly assessed at the outset of the action.”⁵⁶ The Commission contended that the application of the “loser pays” rule in that particular context was problematic because the rule would overly deter plaintiffs who were uncertain about their chances of prevailing from filing suit.⁵⁷

⁵¹ Commission Staff Working Paper, *supra* note 43, at 14.

⁵² *Id.* at 36.

⁵³ Green Paper, *supra* note 4, at 7.

⁵⁴ *Id.* at 9.

⁵⁵ *Id.*

⁵⁶ Commission Staff Working Paper, *supra* note 43, at 62.

⁵⁷ *Id.* at 61-62.

The Commission has vigorously defended these proposed changes in the months since the Green Paper's release, despite receiving substantial opposition to some of these proposals during the Green Paper comment period. Indeed, in a speech in March 2006, Competition Commissioner Neelie Kroes defended the Green Paper's proposals, stating that "if we want to motivate victims of antitrust infringements to bring damages claims, the potential benefits of such an action must clearly outweigh the possible costs."⁵⁸ Furthermore, Commissioner Kroes indicated in the same speech that she fully understood that the Green Paper's proposals were pushing European law in an American direction that could create some degree of risk.⁵⁹ However, although acknowledging the need to avoid American-style litigation abuses, she nonetheless concluded that "these potential risks" should not stop the Commission from "taking any action to make things better for Europe."⁶⁰

Furthermore, it is not only the Commission that has begun to question the value of those traditional features of European law that have historically protected Europe against litigation abuse. Policy-makers at the national level have expressed similar sentiments during the past year as well. In Italy, the Prodi Government's legislative package for class actions included a Law Decree which abolished Italy's prohibition on contingency fees.⁶¹ However, because the decree was not ratified by Parliament within 60 days, it became null and void. Similarly, in England, the Civil Justice Council released a Report in September 2005 entitled "Improved Access to Justice – Funding Options and Proportionate Costs," in which it proposed introducing a system

⁵⁸ Kroes, *More Private Antitrust Enforcement Through Better Access to Damages*, *supra* note 44, at 4.

⁵⁹ *Id.* ("I am not naïve about the bear-traps that we need to avoid. We must avoid excessive levels of litigation. We must avoid speculative lawsuits prompted by ambulance-chasing lawyers. We must avoid an avalanche of unmeritorious claims.").

⁶⁰ *Id.*

⁶¹ Harbour & Shelley, *supra* note 14, at 12.

of contingency fees, particularly in the context of group actions and “other complex cases where no other method of funding is available.”⁶² The Council further noted that “[i]f contingency fees of the American type were introduced, it is inevitable that the fee shifting rule would have to be abolished.”⁶³

Finally, in addition to their loss of political support, Europe’s traditional protections against litigation abuse are beginning to be circumvented as a matter of practice. In England, the efficacy of the “loser pays” rule and the ban on contingency fees as barriers to litigation abuse has been undermined over the past year as plaintiffs are increasingly making use of a funding mechanism first pioneered in Australia – professional litigation funders.⁶⁴ These professional litigation funders contract with plaintiffs to sponsor their lawsuit, agreeing to front the costs of the litigation in exchange for a share of the recovery if the plaintiffs prevail.⁶⁵ Thus, as a practical matter, this relationship is analogous to an American contingency fee relationship, except that the plaintiff contracts with a third party rather than his or her attorney.⁶⁶

In sum, those features of European law that have largely prevented the onset of American-style litigation abuse are losing their potency and being called into question at the very time when they are most needed. By contrast, the power of European plaintiffs’ counsel to initiate large-scale, high-exposure litigation has likely never been greater. As such, from a structural perspective, Europe’s vulnerability to litigation abuse has significantly increased since the publication of our prior paper.

⁶² Civil Justice Council, *Improved Access to Justice – Funding Options and Proportionate Costs*, at 39, available at http://www.civiljusticecouncil.gov.uk/files/Improved_Access_to_Justice.pdf.

⁶³ *Id.* at 37.

⁶⁴ Heather Smith, *Critical Mass*, *The American Lawyer* (Jan. 1, 2006).

⁶⁵ *Id.*

⁶⁶ *Id.*

II. THE RISE OF THE INTERNATIONAL PLAINTIFFS' BAR

The foregoing initiatives to Americanize European legal systems should not be the exclusive source of concern. The broader issue is Europe's overall vulnerability to litigation abuse, and that issue is dependent not only on the growing existence of structural vulnerabilities described above, but also on whether there are parties capable of exploiting such vulnerabilities. By that metric, Europe's vulnerability has increased significantly over the past year. At the time we published our original paper, top American plaintiffs' lawyers had just begun to explore opportunities in the European legal market. Since that time, however, many of those American plaintiffs' lawyers have taken concrete steps to establish a European presence. Most have done so by entering into strategic alliances with European firms. However, the law firm of Cohen Milstein Hausfeld & Toll, whose partner Michael Hausfeld has been the leading proponent of expanding the American plaintiffs' bar into the European legal market, has gone so far as to open a branch office in London.⁶⁷ In addition, the European plaintiffs' bar has also become increasingly aggressive and sophisticated over the past year. For example, French plaintiffs' lawyers, anticipating that the Chirac government will eventually succeed in enacting a class action law, have already set up a website – www.classaction.fr – to recruit potential plaintiffs for various types of legal actions.⁶⁸

More significant, however, is the fact that the international plaintiffs' bar is becoming increasingly adept at the practice of cross-border litigation. More and more frequently in recent years, American plaintiffs' lawyers, working with Canadian allies, have asserted simultaneous

⁶⁷ See *German and U.S. Law Firm Announce Alliance to Provide Class Action Services for Institutional Investors*, PRNewswire (Oct. 3, 2006), available at <http://biz.yahoo.com/prnews/061003/nytu258.html?.v=1>; Press Release, *Labaton Sucharow & Rudoff LLP Launches Alliance With Top German Firm, Creating World's First International Securities Class Action Practice* (May 31, 2006), available at <http://www.labaton.com/index.cfm/hurl/SectionID=96/getGlobalID=23915>. See also *City Braced for Shareholder Actions with U.S. Launch*, *supra* note 8.

⁶⁸ See Laurence Frost, *Online Lawsuits Fire Up French Class Action Debate*, USA Today (Oct. 4, 2005).

class actions in both American and Canadian courts.⁶⁹ The plaintiffs’ lawyers have recognized that, by utilizing such a cross-border approach, they can take advantage of individual attributes of each legal system to improve their chances of success in all cases.⁷⁰ For example, in an antitrust litigation that arose out of allegations of price-fixing in the international market for vitamins, the plaintiffs’ attorneys in the Canadian action were able to obtain documents which they otherwise could not have obtained under Canadian procedural rules because their American counterparts – taking advantage of America’s more liberal discovery rules – had sought and received such discovery in the parallel United States action.⁷¹ Moreover, even when opportunities for cross-border leveraging are not available, plaintiffs’ attorneys have come to recognize that such cross-border cooperation allows them to pursue a particular defendant in multiple arenas while still obtaining substantial efficiencies of scale.⁷² Accordingly, “copycat class actions,” based on analogous U.S. proceedings, are increasingly being filed in Canadian courts.⁷³

In sum, over the past year, the leading American plaintiffs’ attorneys have developed and refined effective cross-border litigation strategies and techniques, while simultaneously making the necessary investments and connections to be active players in the European legal market. As a result, they are now well-positioned to exploit Europe’s increasing vulnerability to abusive litigation tactics.

⁶⁹ See Melnitzer, *supra* note 6; Rubin, *supra* note 6; S. Gordon McKee & Martha Cook, *Class Actions in Canada: 2005 State of the Union: Growing, Expanding, and Developing*, Defense Counsel Journal (Jan. 1, 2006).

⁷⁰ See Rubin, *supra* note 6 (“The first battleground in the new era of cross-border cooperation will almost certainly be discovery.”); McKee & Cook, *supra* note 69 (“Given the potential for alleged wrongs to occur across international boundaries, plaintiffs can be expected to rely more and more on cross-border discovery to gather the evidence necessary to support their motions for certification in Canada.”).

⁷¹ *Id.*

⁷² See Melnitzer, *supra* note 6; See Rubin, *supra* note 6; McKee & Cook, *supra* note 69.

⁷³ See Melnitzer, *supra* note 6; McKee & Cook, *supra* note 69.

III. CONCLUSION

As noted in the introduction, our purpose – both in this paper and in our earlier one – is to urge that European policy-makers take full account of the American legal experience before traveling down the road towards increased class actions and greater private antitrust enforcement, lest Europe find itself in the same litigation abuse crisis that has plagued the United States for the past four decades. However, far from mitigating that danger, Europe has become even more vulnerable to American-style litigation abuse over the past year. Although European policy-makers seem somewhat aware of the risk posed by Europe's continued adoption of American class action and antitrust principles, there is no evidence that they have drawn any lessons from the American experience. Instead, like the American policy-makers of the 1960s, they continue to plunge ahead with their plans to increase the filing of claims through collective action procedures and other litigation-increasing mechanisms. And, like those American policy-makers of the past, they seem to assume that because they do not intend to open the door to litigation abuse, the door will not open.

To be sure, Europe is not likely to experience widespread litigation abuse in the immediate future. The traditional aspects of European law that have safeguarded Europe from American-style litigation abuse in the past largely remain in place and continue to be fairly effective. However, given an increasingly sophisticated and organized international plaintiffs' bar, Europe simply cannot afford to maintain its current course. Europe still has time to heed the American experience with class actions and private antitrust litigation and to alter its track. But if Europe continues as it has for the past year, that opportunity will soon slip away.



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