

THE GLOBALIZATION OF THE ENFORCEMENT OF ANTITRUST LAWS

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What does a consumer or direct purchaser do when she identifies antitrust violations by a company? The costs for asserting a claim might be too small to warrant commencing a lawsuit. But when an individual claim is too small to justify such cost, rights can often be protected and loss recovered in private litigation by grouping the claims together in a class action. Private antitrust class actions expose and seek compensation for conduct made unlawful by the Sherman Act, such as price fixing, monopolization, market allocation, customer allocation, refusals to deal, exclusive dealing agreements, monopoly leveraging, vertical restraints, resale price maintenance and tying arrangements.

Private enforcement complements public enforcement by creating an incentive for private actors to scrutinize corporations' conduct for compliance with the law. Indeed Congress has created a bounty—treble damages—to induce those injured by unlawful anticompetitive conduct to seek redress in the courts for their financial injury. The class action device is an effective method for the private enforcement of the antitrust laws. It aggregates small individual claims, pooling resources and augmenting the chances of successfully bringing meritorious litigation. Without class actions, individual claims would be too small to enforce the laws via private suit.

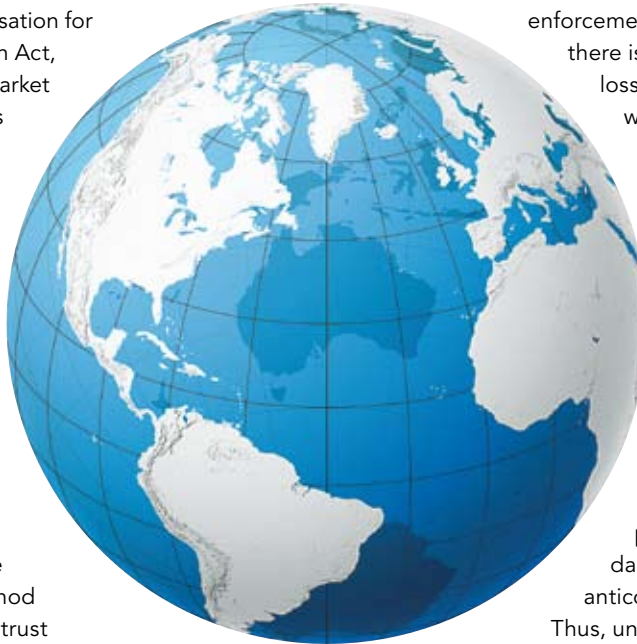
Different countries treat cases differently. Many U.S. class actions have successfully recovered money damages for violation


of antitrust laws. Though the European Commission ("EC") is actively pursuing antitrust violations, the class action device does not exist in Europe. Without the ability to pool resources, high litigation costs and low dollar values of individual claims result in very few cases seeking damages for breach of EC competition

laws, so that there is virtually no effective private enforcement in Europe. The EC recognizes that there is value in fostering the recovery of losses suffered by consumers, and thus is working to facilitate private damages actions to better compensate victims.

Ideas being considered include small claims procedures as a means of providing redress and the creation of collective consumer redress. Balancing its desires to encourage a competition culture without creating a litigation culture, the EC is presently drafting a proposal to improve its system of private enforcement. It is unlikely, however, that the EC will endorse private class actions seeking to recover damages suffered by those injured by anticompetitive conduct.

Thus, until change is made, European-based businesses continue to suffer a wrong without an effective remedy. In today's global economy, European-based businesses that fall victim to anticompetitive conduct have viable Sherman Act claims if they operate in the U.S. or conduct business from abroad with U.S.-based businesses, and the relevant conspiracy has adverse effects in the U.S. and involves U.S.





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trade or commerce. Numerous settlements and judgments have provided European businesses with substantial damages for such claims. Viable U.S. claims also exist where Europeans have been wronged through purchases of goods or services in "domestic" U.S. commerce or if their injury is directly tied to U.S. commerce. In the U.S. class action *In re Vitamins Antitrust Litigation*, for example, foreign plaintiffs who purchased price-fixed vitamins from the U.S. recovered substantial monetary damages.

However, Europeans injured by anticompetitive conduct from a European or other non-U.S.-based conspiracy lack a forum in which to bring the case in the U.S., even if the U.S. market and U.S. conspirators may be part of the overall conspiracy. The Foreign Trade Antitrust Improvements Act excludes certain foreign conduct from the reach of the U.S. antitrust laws, specifically, claims arising from anticompetitive foreign conduct (as well as conduct involving U.S. export commerce) unless such conduct (1) has a direct, substantial, and reasonably foreseeable effect on U.S. domestic commerce or U.S. import trade or commerce (or in some instances

U.S. export commerce), and (2) such effect gives rise to the plaintiff's Sherman Act claim. This second prong requires a showing that the U.S. domestic effects of the anticompetitive conduct were the "proximate" (or direct) cause of the foreign purchasers' claim of injury, i.e. the injury is directly tied to U.S. commerce. Unless both of these requirements are satisfied, a U.S. court does not have jurisdiction to hear such a case.

Failure to satisfy this second prong has prevented most foreign purchasers from bringing Sherman Act claims. U.S. courts have consistently rejected the argument that the second prong is satisfied where injuries abroad arise from the effects on U.S. commerce, and the fact that, in the global economy, the success of a worldwide conspiracy depends upon the success of a U.S. conspiracy, instead finding the effect too indirect. While presently this poses a significant obstacle to Europeans, there are a number of cases currently in U.S. courts where this standard will be re-evaluated.

In the meantime, where a U.S. nexus exists, antitrust wrongs should not and need not go without a remedy. 