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Cartel Damage Recovery: A Roadmap for In-House Counsel

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GLOBAL CARTEL ACTIVITY DOES NOT necessarily get much attention from many in-house counsel unless, unfortunately, their company is the subject of an investigation or lands on the right-hand side of the "v." in private litigation. However, there are significant reasons that it should be a focal point for a corporation's in-house counsel. From a business perspective, alleged overcharges should be viewed by procurement personnel as possible theft of hard-earned margin. Overcharges resulting from price fixing, bid rigging, or other coordinated anticompetitive conduct—even at only a 10–12 percent overcharge—can add up to very real money and constitute actual business harm that affects a company's bottom line. Effective management of a company's risk-reward calculus in maximizing recovery without incurring undue time, expense, and business distraction starts with in-house counsel.

In considering whether and how to pursue damages, in-house counsel need to evaluate many issues, and likely assess strategically with businesspersons more than once, including:

- What is the best manner for us to identify and/or monitor potential cartel activity affecting our business?
- If a class action antitrust litigation concerns a product we purchase, when and how do we decide whether to participate as a class member?
- If we elect to opt out or otherwise proceed independently of a class litigation, should we consider negotiating individually or as part of a group?
- What should our expectations be in terms of recovery and how might they be affected by the path we choose?

And all the while, corporate counsel also must be mindful of the likely ongoing commercial relationships with members of the alleged cartel.

Of course, there is no "right" path for every (or even any) matter. Recovery can vary greatly depending upon the nature of the product involved, the number of purchasers, the number of suppliers, whether government investigations are underway or completed, the strength of the likely admissible evidence in the context of a civil trial, whether and how many plaintiff's lawyers are willing to prosecute a matter (and at what price), and, to a great degree, the personalities and experience of the business teams and lawyers involved on each side. Based on these considerations, corporate counsel need to determine the best path to potential recovery for their company.

This article will provide a basic roadmap to the issues in-house counsel may encounter on the road to recovery, which should be considered in consultation with experienced outside plaintiff-side litigation counsel.

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A Big (and Growing) Industry of Its Own: Cartel Damage Recovery

Cartels cause real monetary damages to companies worldwide, both large and small. It has been widely suggested that cartel activity increases in times of economic downturn, during which suppliers are more likely to feel margin pressures and seek to prevent price reductions and to pass on costs.[1] Participation in cartels may also be driven by an opportunity for large personal bonuses. And while price fixing can arise across various products and services, certain industries possess attributes conducive to collusion—such as undifferentiated products, concentration among relatively few players, opportunities to signal and/or share pricing information, and high entry barriers.[2] These factors have rendered some market sectors frequent subjects of price-fixing activity, including pharmaceuticals, transportation services, financial services, building materials, electronics, and food staples.

The Starting Point: Public Enforcement. Regulatory authorities—such as the Antitrust Division of the U.S. Department of Justice (DOJ) and the European Commission (EC)—sometimes undertake general competition studies, e.g., the EC's recently issued report summarizing its concerns arising from restrictive licensing and distribution policies in e-commerce.[3] Similarly, investigations into industry-wide activity involving multiple products, such as automotive parts,[4] financial products, or generic drugs, may lead to findings against more than one group or against webs of conspirators.

Enforcement activity can thus have broad implications—and can even provide a prima facie liability case in a private damages action. (Indeed, in Europe, a "prohibition decision" of the EC may serve as proof that the conduct took place and was unlawful.) However, enforcement action also can be limited in scope—including as to the impacted temporal period, geographic area, product(s), and victims—as a result of negotiations between the defendants and the authorities, and fines ordinarily go to government enforcers rather than alleged victims.[5] Accordingly, understanding private antitrust actions is essential for corporate counsel not only to see the full landscape of potential cartel activity (whether pursued by the government or not), but also the extent of potential harm—and to ensure that claim value is not left on the table.

Potential Locations of Private Damages Claims. Private antitrust recovery has become more complex in recent years, but there are opportunities throughout the litigation process for in-house counsel to discover and assess their company's potential damages. Diligent corporate counsel cannot be content with simply "minding the mail" and timely filling out claims forms when class action notices arrive. Rather, they must keep in mind key considerations in the most likely jurisdictions for civil litigation, which we outline below.

United States. In the United States, a decade after the Supreme Court's decisions in *Twombly*[6] and *Iqbal*[7] requiring a "plausible" claim at the pleading stage, commentators have noted an increase in successful motions to dismiss, as well as a decrease in antitrust cases being filed.[8] In light of the higher threshold, those cases that are filed are increasingly well documented at the initial pleading stage. Since *Twombly*, antitrust class action complaints can span more than 100 pages,[9] often with substantial reliance upon government investigations and/or findings. Thus, pleadings now offer corporate counsel far more information.

At the same time, consolidations of cases have become increasingly complex, as in *In re Automotive Parts Antitrust Litigation* in the Eastern District of Michigan,[10] which involves more than 40 auto parts and nearly 200 defendants. And class certification has become increasingly more difficult in the wake of the Supreme Court's decisions in *Dukes*[11] and *Comcast*,[12] due to the substantial overlap with merits issues and extensive economic analysis now required at the class certification stage. All of these factors combine for significant challenges and potentially substantial investments of time and expense earlier in the cartel recovery process.

Europe. In Europe, private antitrust enforcement continues to develop, particularly with the issuance of the Damages Directive[13] and the European Commission's Collective Redress Recommendation.[14] While implementation of the Damages Directive has been a slow process, with several EU Member States missing the December 2016 deadline for transposition,[15] certain Member States have moved to the forefront as potential fora for private antitrust actions on a collective and multinational scale, including, subject to the future impact of Brexit, the United Kingdom (which allows for an "opt-out" class for UK nationals and an "opt-in" class for non-UK nationals), the Netherlands (in particular for its potential global settlement vehicle), and Germany (which has been open to assignment-of-claims models for collective activity). Diligent corporate counsel must now realistically look beyond the United States when considering antitrust recovery options.

Managing Recovery Expectations. For both in-house counsel and their business clients, the $64,000 (or more) question is "How much can I expect to receive?" There is, unfortunately, no universal answer—impact factors are far too numerous. Some learning exists: one study of 71 cartels concluded that even when cartels are discovered and private settlements occur, the payments average only 37 percent of alleged single damages.[16] However, available information is limited principally to those class action settlements subject to notice requirements, since individual resolutions are ordinarily confidential. Even within the realm of class actions, results can vary greatly, and recovery is often measured as a percentage of total sales (or "turnover"), which is distinct from the applicable overcharge. Indeed, some cases settle before a detailed damages analysis has been completed and an overcharge percentage asserted.

However, based on available data, most recoveries fall in the single digits as a percentage of purchases. Even within a single litigation, settlement percentages may range from the low single digits to just over 10 percent against different defendants, depending both on total sales and time of settlement. Instances in which separate settlement classes are certified at different times for different defendants also may present different opt-out decisions for corporate counsel.[17] A company willing to bring an individual or opt-out action may be able to exercise more control over litigation strategy, timing, and settlement structure, which can be leveraged into greater value.[18]

With that background, we turn now to some of the key questions corporate counsel must consider when evaluating recovery opportunities.

Relationships with Suppliers: Yes, They're Sensitive, But . . .

Corporate counsel seeking to recover damages incurred through alleged cartel overpayments must both ensure effective monitoring for cartel activity and balance the preservation of ongoing supplier relationships with the assertion of damages claims.

Monitoring Potential Cartel Activity. Establishing effective protocols for monitoring potential cartel activity enables early engagement and can create greater opportunity to control recovery strategy. Effective monitoring requires a relatively modest commitment of internal resources, but gains the strategic advantage of information—*early* information—on potential claims:

Proactive Monitoring: Procurement Team Training. Training procurement personnel to watch for activity asso-

ciated with cartel behaviors (e.g., decreases in numbers of bids, suppliers uninterested in expanding capacity, contemporaneous price increases from multiple potential suppliers) may allow the company to identify potential anticompetitive conduct on its own. For large purchasers, this may be a worthwhile investment, and can often be part of affirmative antitrust compliance training. Among the issues to consider are:

- If we commit to such training, should we focus on particular products? Particular regions? Are certain subsidiaries or divisions more likely to be affected?
- Should we evaluate our document retention policies to ensure that we will have purchasing data and contractual records that would be central to supporting a damages claim?
- Should we evaluate contractual provisions that can impact our ability to pursue potential damages claims (for example, suppliers may attempt to add arbitration clauses or class action waivers, and, conversely, some purchasers may be able to include terms that establish minimum damages should cartel activity occur).

The authors' personal experience is that such training and deputizing of "cartel-watch rangers" may be welcomed by procurement departments. A few well-placed questions of supplier business teams (and their counsel) might save years of effort trying to recover damages.

Utilizing External Monitoring Resources. There are also numerous resources that in-house counsel can rely on to stay abreast of developing cartel activity early. For example, corporate counsel can subscribe to paid antitrust news alerts (e.g., *MLex* and *Law360*) or review daily ABA Section of Antitrust Law updates for contemporaneous reporting on government investigations and case filings. Corporate counsel also can engage outside lawyers, who will provide periodic updates in the form of client alerts concerning potentially relevant products or services and obtain greater detail and individualized recommendations as news of cartel activity and potential class action opportunities develop. Third-party claims processors can provide monitoring and claims submission support, although they generally seek a percentage fee for their services were the company to recover damages. It should be noted, however, that there are many potential recovery opportunities that, for a variety of reasons, do not receive government or media attention. Thus, having a solid network of counsel on whom you can rely is important to stay informed of opportunities.

Relationship Fundamentals: Reacting to News of a Cartel. Once you learn of possible cartel conduct involving one of your suppliers, first make an initial assessment of relevant supplier relationships—keeping in mind that the company may not do business with all or even most of the accused cartelists, to whom joint and several liability will apply. While every alleged cartel will be different, consider discussing the following with litigation counsel:

- Should we ask our supplier(s) for information? If so, should we do so through counsel-to-counsel communication?
- Should we sue our supplier? Should we seek to give notice first and arrange a potential confidential settlement ("Rule 408") discussion—and, if so, who should be involved? If there is no class action yet to toll the statute of limitations, or if we are concerned about the breadth of the proposed class coverage, should we seek a tolling agreement?
- Is there a potential commercial resolution, rather than litigation, and how should it be structured and documented?

Although these are delicate situations, all involved sides must take appropriate steps to protect the best interests of their company. The authors' experience is that most commercial teams are more than willing to leave recovery to the lawyers, and to continue dealing with their counterparts as in the ordinary course of business. After all, the plants and factories of both suppliers and buyers must keep humming.

The Litigation Process: Decisions, Decisions, Decisions . . .

Once counsel has determined that the client has a potentially viable damages claim, the process of initiating and pursuing litigation presents several high-stakes decisions, including (1) selecting outside counsel, and (2) electing to stay in a class or opt out.

Outside Counsel Selection. Corporate counsel likely will want to research outside counsel candidates' past recoveries and litigation experience, as well as industry-specific knowledge and established relationships with defense counsel. Cartel damage recovery has evolved as a specialized practice for more than a decade. In-house counsel can be guided further by the following considerations in selecting litigation counsel:

- At what point do we need to select outside counsel? Should we first contact class counsel (if a class action has been filed) or private counsel? Should we respond to inquiries from opt-out counsel? These decisions will likely depend on the client's prior experience with class and opt-out counsel, as well as the size of the potential claim.
- What representation terms are appropriate for this claim, and how will costs be managed? While in-house counsel likely will have ample experience negotiating terms with outside counsel in more traditional litigation, such as contract or employment cases, suitable terms for an antitrust damages claim will vary depending on the recovery strategy, level of client involvement, size of the claim, and anticipated time to recovery, among other factors. Although contingency arrangements are common for such claims, hourly arrangements may be a suitable alternative for an out-of-court commercial negotiation approach, with a separate agreement if litigation becomes necessary. Recovery cases often include fees for necessary economic work (which can be hourly or contingency), which can be substantial. Representation terms are highly dependent upon the strength of the case, likelihood of recovery, and timetable for recovery.

Class Versus Opt-Out Actions. Whether to stay in a class action or opt out can be decided early, but corporate counsel may want to monitor the class case developments while analyzing individual claim value to determine if a separate action would be more successful. Opting out, either alone or with other similarly situated firms, requires greater investment (at least of time, even assuming a full contingency arrangement with opt-out counsel), greater visibility and adversity, and increased exposure to discovery, potential counterclaims, or business retribution. However, class actions generally cannot provide the same level of control and flexibility in resolution—including potential commercial settlement and additional value for a global release—that opt-out claims can.

Counsel should consider the size of the potential claim, the supplier relationship, and the strength of collusion evidence when deciding whether to opt out of a class. An additional question to ask: Is this a direct or indirect claim?

- If direct, the business issues may be especially pronounced, and the supplier will likely argue for a pass-on reduction in a European claim.
- If indirect, a U.S. claim will be limited to states that allow indirect purchaser claims.[19]
- If both direct and indirect, it is important to consider the possibility that including an indirect claim could weaken the direct claim by providing defendants ammunition to support a pass-on argument.
- As a further consideration, the company may enter into an assignment of a claim from a direct purchaser that supplies it (or vice versa), sharing the recovery in exchange for the reduced litigation costs.

Staying with the Class. If a company elects to remain in the class, a range of options exist, from active involvement as a class representative to passive participation. In considering whether to become a visible class representative, counsel should consider:

- The need for an alternative supplier if cut off by a defendant supplier, or willingness to lodge a possible group boycott claim if cut off by multiple suppliers; and
- The need to endure discovery, business distraction, and time commitment, as opposed to simply monitoring class action developments.

There are benefits to acting as a class representative, however, including:

- Potentially increasing overall settlement value due to industry knowledge and leverage;
- Exercising more control over the litigation, including appointment of class counsel and settlement strategy; and
- Potentially obtaining expense reimbursement or an incentive award (though usually insubstantial).

Opting Out. When deciding whether to pursue an opt-out claim, corporate alignment is critical, as the business team needs to understand the commitment involved in actively litigating a case, including the attendant costs, time, distraction, potential for tension in supplier relationships (possibly even concern among other suppliers not involved in the litigation at hand), and the risk of loss. Opting out means intentionally putting your company front and center as a named plaintiff in litigation and publicly accepting the challenge of demonstrating that your company's likely current suppliers have indeed engaged in cartel activity for which the company is entitled to damages.

Weighing the prospects of recovery with the steps necessary to obtain a settlement or judgment can be a useful tool to help the client decide whether to pursue the claim. Some key questions to consider in deciding whether to pursue an opt-out claim include:

- Do we have adequate records to run an opt-out claim?
- Should we only opt out if there are many other similar buyers also opting out? This decision will require balancing the cost savings and the potentially stronger group claim with the flexibility of an individual claim (recognizing, too, that there are certain significant unknown factors, such as the level at which claims may be submitted in a class action).
- Should my company take a lead role in a group opt-out action? The considerations here are similar to those involved in deciding to become a class representative (absent an explicit incentive reward).
- Is there a statute of limitations issue? Has the claim been tolled by a class case or government investigation? If not, should we obtain standstill agreements from our suppliers to prevent the statute of limitations from running out while we evaluate our claim? Such concerns present an important reason to engage in proactive monitoring.
- If we opt out, what financial arrangements should we make with our outside counsel? How does opting out with other companies in a group impact those arrangements? The strength of the case will play a role in this analysis, but it may be difficult to determine prior to obtaining a damages estimate. If we agree on a contingency fee, what is a reasonable percentage and should we include expenses (e.g., economists)?
- Should we work with a litigation funder (or allow outside counsel to do so)? If so, how will this affect control over strategic decisions and what input will the funder have regarding settlements?
- Where should we litigate the claim? Multijurisdictional claims present several benefits, including increased leverage in settlement negotiations. As such, selecting a litigation forum is a key decision in cross-border cartel cases, as there are often multiple possible routes to court. Some factors to consider in identifying a suitable forum include whether the claim is direct or indirect, the location of the supplier and/or purchases, the cost involved in filing a claim, the availability of and cost involved in discovery, the presence of "loser pays" rules, and the value of filing in a "home court."
- When should we file a claim? This is an extremely individualized decision that will depend on many factors, such as a standstill in settlement negotiations, the nature of the

supplier relationship, whether the client is a private or public company, the value of the claim, and the adverse cost risk and need for funding or insurance.
- What expenses and other costs should we expect if we opt out? This can include time and money incurred in offensive and defensive discovery, general counsel time involved in supervising and communicating with outside counsel, business time collecting purchase data and responding to defendants' factual arguments, and record retention costs. Is the business team ready to take on the additional work of broad discovery requests and deposition notices?
- How will we manage privilege issues in Europe (where the "legal professional privilege" extends to written legal advice provided only by outside counsel and documents prepared only for the purpose of seeking such advice)? This consideration can affect the decision to seek litigation funding, as well as the challenges implicated when including multiple parties from multiple jurisdictions in the same case.

Settlement

Class Settlements. Corporate counsel must measure the value of the settlement against the additional work involved in an opt-out claim, with an eye to maximizing recovery while avoiding time-consuming and potentially risky individual litigation. Consider:
- Are the terms favorable for the entire class, the named plaintiff, and/or absent class members?
  - If this is an "icebreaker" settlement, is a discount justified based on cost savings and valuable cooperation or other consideration?
  - Does the recovery sufficiently reflect the added time and cost involved in reaching the settlement? This question may be particularly relevant when evaluating a settlement with the last remaining defendant.
- Is there a reduction in the settlement based on opt-out percentages? If so, have the terms been negotiated in a way that will not adversely affect class members' recovery?
- Is there a most-favored nation provision (MFN)? If so, are the terms reasonable (i.e., does it utilize an appropriate benchmark to measure a "better" deal)? Is the MFN based on relative market shares? Does it provide for a "first out discount" that may necessitate a premium for future settlements? Does the MFN contain a sunset provision (e.g., expiration if the class is certified or at the beginning of trial)?
- Is the release appropriately narrow or broad? Under the identical factual predicate doctrine, a settlement should not require class members to release future-conduct claims beyond those that arise from the materially identical continuation of the defendant's past conduct.[20]

Opt-Out Settlements. As a preliminary matter, counsel should review supplier contracts to determine whether mediation and/or arbitration is required and, if so, whether it is possible to participate in a group or if the company is limited to individual adjudication. This issue may arise early in the class context as well, particularly if individual arbitrations are required, but the strategic impact there will be assessed by class counsel. Of course, counsel may decide to pursue mediation as a tool to move the discussion forward, regardless.

Group Opt-Outs. A threshold (and sometimes recurring) question is whether to act and negotiate individually or as part of a group. While group negotiations may result in cost savings, if the company has large claims and strong supplier relationships, acting quickly in individual negotiations can allow for better control over strategy and the terms of the settlement. Issues to consider include:
- How does opt-out counsel plan to manage the group of clients?
- Can our company—and should I—participate as a lead in negotiations?
- Can our company have private case conversations with defendant firms?
- Is there a perception benefit of being part of an opt-out group and acting jointly so as to maximize group recovery?
- Can we change our mind, and settle individually with defendants? Is there a penalty for withdrawal from the group? This will be a key question if reaching a business settlement is an option, as such agreements depend on future relationships and therefore are necessarily one-to-one.

Individual Opt-Outs. For a large company that is a particularly important customer for a defendant, one-to-one negotiations may be an attractive option in some cases. However, individual negotiations will likely require greater oversight by corporate counsel, particularly if the following questions arise:
- Should we raise litigation arguments or negotiate "commercially"? If one side raises these points, the other side will generally respond accordingly.
  - Common points plaintiffs might raise include: litigation risks, treble damages in the United States, simple or compound interest assessed on past damages in Europe (which can be even more significant on concealed cartels), joint and several liability, umbrella damages in Europe, increased damages due to a "run-off" period following the end of the cartel, and the possibility of a longer damages period or greater product scope than contemplated in government findings.
  - Common points defendants might raise include: time and scope limitations in government findings, economic analysis showing zero overcharge or unreliable plaintiff economics, pass-on (for direct purchaser claims in Europe), the value of cooperation, and litigation risks (such as territorial restrictions, statutes of limitations, and "loser pays" rules in certain jurisdictions).
- What is a reasonable settlement in an opt-out action? Should we work from single damages only? Should we provide discounting for the first settling defendant (in exchange for cooperation), and will the last settling defen-

dant be moved by the potential to be left "holding the bag"? Should we provide a discount if we didn't have to file a claim or seek a premium if we did?
  - Is there a leniency applicant? If so, these circumstances may motivate an early settlement with the amnesty applicant in exchange for the cooperation that applicant is required to provide to civil claimants in order to obtain protection under the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA).[21]
- If we are suing a supplier, should we consider a forward-looking business solution? If so, are there any related legal issues to consider (e.g., price discrimination)?
  - If this is an anticipated option, it may impact whether to engage external counsel on an hourly fee basis, as opposed to a contingency fee, so as to ensure aligned interests and eliminate uncertainty on valuation of a business resolution. It may also complicate use of litigation funding.
- How broad should the release be? If the company is providing a global release, the settlement value should reflect that, even if some purchases occurred in regions where litigation may be a less likely threat (such as Asia and South America).
  - In Europe, defendants may seek a release against contribution claims by other defendants. Such releases should be limited to the value of the claim against that particular supplier.
  - In the United States, defendants may seek a release of class claims, but such releases should be limited to a settlement with or judgment against the settling supplier.
- Should we give early settling defendants an MFN? Should we ask for an MFN as to other large opt-outs with which defendants are negotiating?
- How long before we receive payment? After all, while holding out may result in greater leverage, prompt payment and resolution offers the company commercial certainty.

Conclusion

Recovery of damages from alleged cartels can be a passive process. However, in-house counsel can best serve their companies—and potentially hand over to their CEOs substantial checks—by remaining sensitive to business needs and commercial relationships while keeping vigilant for recovery opportunities. ■

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[1] *See, e.g.*, Donald C. Klawiter, *Cartel Enforcement Today: The Perils of the Economic Downturn*, GCP (Sept. 2008), https://www.competitionpolicyinternational.com/assets/0d358061e11f2708ad9d62634c6c40ad/Klawiter%20GCP%20Sep-08(2).pdf.

[2] *See, e.g.*, U.S. Dep't of Justice, Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For, "Conditions Favorable to Collusion" (June 25, 2015), https://www.justice.gov/atr/price-fixing-bid-rigging-and-market-allocation-schemes.

[3] European Comm'n, Sector inquiry into e-commerce (Oct. 5, 2017), http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html.

[4] *See, e.g.*, U.S. Dep't of Justice, Press Release, Nine Automobile Parts Manufacturers and Two Executives Agree to Plead Guilty to Fixing Prices on Automobile Parts Sold to U.S. Car Manufacturers and Installed in U.S. Cars (Sept. 26, 2013), https://www.justice.gov/opa/pr/nine-automobile-parts-manufacturers-and-two-executives-agree-plead-guilty-fixing-prices.

[5] *See, e.g.*, Sonya Lalli, *Enforcers Debate Their Role in Private Enforcement*, GCR (May 8, 2017), http://globalcompetitionreview.com/article/1141143/enforcers-debate-their-role-in-private-enforcement?utm_source=Law%20Business%20Research&utm_medium=email&utm_campaign=8272530_GCR%20Headlines%2008%2F05%2F2017&dm_i=1KSF,4XB4I,KI8806,IORHF,1.

[6] Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

[7] Ashcroft v. Iqbal, 556 U.S. 662 (2009).

[8] Edmund W. Searby, *United States: Private Antitrust Litigation—Class Actions*, *in* The Antitrust Review of the Americas 2015, at 45.

[9] *See, e.g.*, Class Action Compl., *In re* Blue Cross Blue Shield Antitrust Litig., MDL 2406 (N.D. Ala. Dec. 19, 2014), ECF No. 244 (consolidated amended complaint of subscriber plaintiffs class exceeded 300 pages); Corrected Consolidated Am. Class Action Compl., *In re* Valve Timing Control Devices, MDL No. 2311 (E.D. Mich. Jan. 16, 2015), ECF No. 27 (consolidated amended complaint of end payer plaintiffs exceeded 100 pages).

[10] No. 2:12-md-02311-MOB-MKM.

[11] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) (holding that a "rigorous analysis" is required for adjudicating class certification, often necessarily overlapping with inquiry into some of the merits of the underlying claims).

[12] Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013) (reaffirming *Dukes*' rigorous analysis standard, to be established through evidentiary proof, and requiring a proffered expert's model establish that damages can be measured on a class-wide basis).

[13] Council Directive 2014/104/EU, 2014 O.J. (L 349) 1.

[14] Commission Recommendation of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted Under Union Law, COM(2013)396final (July 26, 2013), http://eur-lex.europa.eu/legal content/EN/TXT/?uri=celex%3A32013H0396.

[15] Council Directive 2014/104/EU, art. 21.

[16] John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries Are Mostly Less than Single Damages*, 100 Iowa L. Rev. 1997, 1998 (2015).

[17] *See, e.g.*, *In re* Air Cargo Shipping Servs. Antitrust Litig., E.D.N.Y. Master File No. 06-MD-1775 (BMC) (VVP) (Settlements ranged from 2% to 10% of relevant sales.).

[18] For example, in the Maritime Car Carriers case, General Motors filed an individual claim before the Federal Maritime Commission several months before the direct purchaser class complaint was filed and subsequently settled with all named respondents (defendants) before the class briefed motions to dismiss. Order Denying Motions to Stay and Scheduling Briefing, Cargo Agents, Inc. v. Nippon Yusen Kabushiki Kaisha, FMC Docket No. 16-01, Doc. No. 19 (Mar. 16, 2017) (ordering respondents in the direct and indirect purchaser class cases to file their consolidated motions to dismiss by April 16, 2017); Initial Decision Approving Confidential Settlement Between General Motors and Nippon Yusen Kabushiki Kaisha, General Motors LLC v. Nippon Yusen Kabushiki Kaisha, FMC Docket No. 15-08, Doc. No. 23 (Oct. 14, 2016) (approving the settlement between General Motors and the final respondent and dismissing the proceeding).

[19] Indirect purchases are often a treated as a business issue in the United States, where recovery is substantially more difficult (due to challenges at class certification and the limitation to claims in states that have enacted statutes in response to the direct-purchaser rule in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977)). Nevertheless, some major purchases may be made through an intermediary, such as shipping purchases, which large companies often purchase both directly and through freight forwarders. It also is possible that there may be an exception to *Illinois Brick* available (for example, a cost-plus contract). This underscores the importance of monitoring, because if the overcharge was passed on, the downstream purchaser must ensure that it is not unfairly treated, which may require either an assignment of the claim or a strong business message to the interme-

diary to share the wealth—including for non-repealer states—that may equitably belong to the downstream purchaser.

[20] *See, e.g.*, Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch., 660 F.2d 9, 18 (2d Cir. 1981) ("If a judgment after trial cannot extinguish claims not asserted in the class action complaint, a judgment approving a settlement in such an action ordinarily should not be able to do so either.").

[21] ACPERA limits the leniency applicants' civil exposure to single damages based on its individual sales, as opposed to treble damages and joint and several liability. Antitrust Criminal Penalty Enhancement and Reform Act, P.L. 108-237 § 213(a)–(b).