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Editorial

Welcome to the first issue of the re-launched *MJLS*. The journal in its current form was launched by Lord Donaldson in 1997, having developed out of the Southampton Institute Law Review which started in 1992.

Now, in 2018, it was felt that a refreshed Editorial Board and a completely new Advisory Board would create an impetus for an open access online journal. However, the journal remains a fully blind refereed publication which publishes articles of interest to an international readership. The editor welcomes articles from authors dealing with any aspect of law and practice who have something new to say.

In this respect the current issue contains a number of articles from diverse areas of law. The first article is on a currently topical issue of plastic in the marine environment and the damage it causes to both marine flora and fauna. The author argues that in fact if current international and regional law was modified and/or enforced then the problem would be much less. It essentially needs receiving states of single use plastic waste to designate it as a 'hazardous material' which would bring it under a much stricter legal regime. There will always be, of course, the problem of plastic material ending up as maritime litter accidentally, but the author concludes that all plastic should be used more than once and then recycled, upcycled, and finally, when it has come to the end of its economic life, it should be burnt to provide energy for the local community.

The second article considers the role of the police as an informal referral agent as well as a formal referral agent under sections 135 and 136 of the Mental Health Act 1983, as amended in 2007, and the impact of the Policing and Crime Act 2017 on the formal referral role of the police. Much has been written about the role of the police as a social support agency from a medical point of view and here the author builds on that to consider the role from the mental health law perspective. The author also considers the protection of children in this respect and suggests that the government should provide the necessary resources for special facilities to be built for the protection of children.

The third article considers the value of collective litigation in antitrust enforcement policy and the compensation of victims within the concept of corrective justice. The author argues that while a collective action can lead to a better enforcement of legal norms, it may also enhance incentives for filing arbitrary claims for private gain at the expense of social welfare. He

concludes that if antitrust doctrines were clear and the courts were unerring in their application of such doctrines to particular facts, the extortion problem would disappear. Sadly, the author believes these conditions to be unachievable. The author considers the EU approach to be one of the facilitation of collective actions without any effective safeguards against the abuse of the rules.

The final article considers the defence of property in both criminal law and tort. The authors bring together these two areas of defence of an individual's real property when challenging an intruder, particularly if that intruder is armed. The main question being addressed is the thorny issue of what is 'reasonable force' when a householder is faced with an armed intruder. A number of cases are discussed and the authors conclude that with such overlap in the area of 'reasonable force', both the criminal law and the law of tort permit the householder to defend both his/her property and the loved one who may be within, but neither the police nor the courts will condone 'self-help', however appealing. It is a matter of justice that it is the jury who should decide on matters of fact as to whether the force was reasonable or not.

In the Legal Comment section, two authors give their personal views on how the government could influence the majority of the electorate to accept a 'middle way' on Brexit. They put forward compelling arguments for the UK to re-join the European Economic Area (EEA) and join with the other major economy in the EEA to influence the European Union in the future.

The Legal Comment section of the journal is a very useful forum for academics and practitioners to put forward their views on topical issues prior to developing their arguments into a full article, and we welcome such contributions as being the authors' first thoughts before others publish.

The last section is for book reviews, and we welcome any reviews of new books or new thoughts on established seminal works which are being used within teaching, research or legal practice – what, in particular, readers liked about the book and how they used the book in their practical work.

Professor Patricia Park

Editor

Can the Law Rescue ‘The Blue Planet’?

Professor Patricia Park

Abstract

Plastic waste has become a matter of social concern. The BBC series ‘Blue Planet II’ has raised the issue of plastic waste in the ocean to international audiences, while the TV company Sky has funded and supported the ‘Ocean Rescue’ campaign, but what neither programme makes clear is that if international law was sufficiently enforced, the problem would be much less. There are a number of international treaties and conventions which prohibit the dumping of waste in the ocean but the problem really starts with land-based sources of waste, and regional and national legislation with regard to waste. Who can enforce such legislation, and why is it not done? This article identifies the law on waste at each different level and considers what can be done to clean up our oceans.

Key words: maritime law; waste law; ocean pollution; circular economy; plastics; land-based pollution.

Introduction

Many authors and environmentalists have been critical of international law’s ability to provide adequate protection for the environment and the conservation of natural resources. Many consider international law unable to respond quickly to the changes required as scientific knowledge advances. It is true that environmental law has developed on a sectoral basis, often in response to disasters. It is also true that environmental law does not always reflect the interdependence of the various issues involved in protecting the environment and preserving its natural resources. But this failing does not derive from the inherent nature and structure of international law – in fact, domestic and state legal systems have also not developed on a holistic basis so far as the protection of the environment and conservation of natural resources are concerned. However, international law offers many vehicles for the necessary developments through custom, treaty, soft law, general principles, framework agreements and so on, which can be used in a variety of ways to develop and revise the law to meet new environmental perspectives. This development does not have to be slow – progress depends

on the willingness of states to resort to these processes, and the speed with which they do so depends on social, economic and political implications, which it is the responsibility of governments to weigh against environmental demands. Soft law solutions may sometimes enable agreements to be reached more quickly but there has been a remarkable growth not only in legally binding measures of environmental protection, but also in new legal concepts and principles which increasingly call into question traditional boundaries between 'public' and 'private' international law, and between national and international law.

The rising volume of plastic waste ending up in our oceans has become a particular problem. The World Economic Forum published a report in 2016[1] stating that by 2050, on current trends, there would be as much plastic in the oceans of the world as fish. In excess of eight million tonnes of plastic waste enters the marine environment each year and this is expected to double by 2030, then double again by 2050. But while the law in the area of marine pollution is reasonably clear, it is the enforcement of the law in this area which is not.

International Law

At international level it is the United Nations Convention on the Law of the Sea (UNCLOS 1982)[2] which governs the world's oceans. It took ten long years to negotiate and a further 12 before it came into force. This all reflected the difficulties of establishing a worldwide 'law of the sea'. Nevertheless, it replaced four earlier treaties and by June 2016, 168 countries plus the European Union had signed up – but in April 2018 the notable absence was the United States of America. The Convention was negotiated by consensus as an interlocking package deal and its provisions form an integral whole, protected from derogation by compulsory third-party settlement disputes, a prohibition on reservations and a ban on incompatible *inter se* agreements.[3] Within these limits, the Convention is capable of evolution by amendment,[4] the incorporation by reference of other generally accepted international agreements and standards,[5] and the adoption of additional global and regional implementing agreements and soft law. The law of the sea continues to develop through multilateral negotiating processes both at the UN and in other international

[1] <http://www3.weforum.org/docs/WEF_The_New_Plastics_Economy.pdf> accessed 16 April 2018.
[2] <http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf> accessed 16 April 2018.
[3] Articles 279–99, 309, 311(3).
[4] Articles 312–14.
[5] Articles 21(2) 119, 207–12.

organisations. However, it is the International Maritime Organization (IMO) which provides the principal forum for further law-making with respect to pollution from ships, while the Food and Agriculture Organization (FAO) oversees the further development of fisheries law.

The UNCLOS 1982 was intended to be a comprehensive restatement of almost all aspects of the Law of the Sea and thus not only attempts to provide a global framework for the rational exploitation and conservation of the sea's resources and the protection of the marine environment, but also recognises the continued importance of freedom of navigation. What is more, the Convention gives special recognition in various ways to the interests of developing states, in particular through provisions for transfer of science and technology.

One of the most important aspects of the Convention is that pollution can no longer be regarded as an implicit freedom of the seas; in fact, the diligent control from all sources is a matter of comprehensive legal obligation affecting the marine environment as a whole, and not simply the interests of other states. A second alteration is to the balance of power between flag states and coastal states, which are more concerned with effective regulation and control. Third, the emphasis is no longer placed on responsibility or liability for environmental damage, but rests primarily on international regulation and cooperation focused on protection of the marine environment. In this legal regime, flag states, coastal states, port states, international organisations and commissions each have important roles, powers and responsibilities, which in certain respects combine to produce one of the more successful international environmental regimes. The law of the sea has not remained static, however, and cannot be understood without reference to later developments, including the recommendations of the Rio Conference.

The main provisions of the UNCLOS 1982 with regard to marine pollution are as follows:

Article 1.4 provides that '"pollution of the marine environment" means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities'.

Article 194.1 requires states to '… prevent, reduce and control pollution of the marine environment from any source, using for this purpose

the best practicable means at their disposal and in accordance with their capabilities'.

Further, Article 194.2 provides that 'States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention'.

Article 194.3 continues: 'The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. These measures shall include inter alia, those designed to minimize to the fullest possible extent (a) the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources …'. This part of the Convention could not be more explicit as to the inclusion of plastic as it is generally considered to be both 'harmful' and 'persistent'.

Further, Article 194.5 contains a specific requirement to protect marine wildlife, much of which has been demonstrably harmed by plastic waste in the marine environment.

The dispute mechanism under the Convention is set out in rather complex provisions of Part XV which indicates the first step as arbitration but includes the possibility of referral to the International Court of Justice, or the International Tribunal on the Law of the Sea[6] which specifically adjudicates on disputes arising from the Convention. Since the Tribunal was set up in 1997 it has heard 25 cases; of those 25, only five were concerning pollution (mostly oil pollution from ships), and of those five none were concerning the dumping of plastic waste.

The 1972 London Dumping Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter (LDC)[7] and its 1996 Protocol restrict the dumping of wastes at sea. It entered into force in 1975 and by April 2018, 87 states parties had signed up to the Convention, with 50 going on to sign up to the 1996 Protocol, which makes 99 parties in total. While the main aim of the Convention is to prevent deliberate dumping of waste at sea that would damage the marine environment, the scope of the 1996 Protocol is somewhat wider, with Articles 1 and 2 forbidding states from causing or permitting marine plastic pollution from both marine and terrestrial sources. The fact that plastic waste may not be directly dumped

[6] <https://www.itlos.org/the-tribunal/> accessed 16 April 2018.

[7] <www.imo.org/en/OurWork/Environment/SpecialProgrammesAndInitiatives/Pages/London-Convention-and-Protocol.aspx> accessed 16 April 2018.

into the sea, but washed into the sea from land or carried there by rivers, is no defence because, as we have seen, the law includes the introduction of waste both ‘directly or indirectly’ from ‘all sources’; and the harm caused to marine wildlife has been demonstrated by TV programmes already mentioned. Again, enforcement is by means of arbitration under procedures set out in Article 16 and Annex III of the 1996 Protocol, with the judgements binding in nature.

A further international convention is the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL) which was developed by the IMO in order to prevent pollution by ships dumping oil and spillage. MARPOL came into force in 1988 and a revised Annex V in 2013 banned all garbage dumping at sea subject to specific exemptions. By 2018, 98.7 per cent of the world’s shipping tonnage are parties to the Convention. Dumping of plastic waste is specifically banned, with states being obliged to provide adequate reception facilities at ports and terminals.

It is undoubtedly the trans-boundary impact of disposal of hazardous waste which underlies the regime of shared responsibility found in the 1988 Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal (Basel Convention) and regional conventions dealing with this subject. Unlike other conventions which rely on state obligations of due diligence, notification and prior consultation, the Basel Convention firmly asserts the sovereignty of the receiving state to determine what impacts on its territory it will accept. In fact, the principle of prior informed consent on which the Convention is based points to an important difference in approach. It cannot now be assumed that waste disposal in other states is permissible unless shown to be harmful. Instead, it is the precautionary principle which obliges the exporting state to demonstrate that the wastes will be managed in an ‘environmentally sound manner’.

In respect of plastic waste, the clearest opportunity for action comes in Article 1.1(b) which provides that, as long as the receiving state designates miscellaneous plastic waste as ‘hazardous waste’ in its domestic legislation, then it can take action against the state from which the plastic waste originates. It is under Article 3 that the ‘National Definitions of Hazardous Wastes’ also set out the rules on notification. Article 9.2 places obligations on the producing state and provides remedies to the receiving state in the event of ‘illegal traffic as the result of conduct on the part of the exporter or generator, the State of export shall ensure that the wastes in question are: (a)

taken back by the exporter or the generator or, if necessary, by itself into the state of export …'

Disputes under the Basel Convention are resolved under Article 20 and Annex VI of the Convention which provide for reference to the International Court of Justice or Arbitration. It states that 'Any Party that has an interest of a legal nature in the subject matter of the dispute which may be affected by the decision in the case may intervene in the proceedings with the consent of the tribunal'. As environmental groups and NGOs have long been recognised as having legal standing in this area, the possibility of their involvement remains open.

Regional Seas Protection

Although the UNCLOS is primarily concerned with a global system of international law governing all aspects of the use of the marine environment, the Convention makes reference to regional rules, regional programmes and regional cooperation which thus allows for significant regional variations. However, nowhere does the UNCLOS define what 'regional' is. Nevertheless, some 20 treaties can be identified which could be called 'regional', and which relate to the protection of the maritime environment. These fall into two main groups: firstly, those which could be described as closed or semi-closed seas in the northern hemisphere where major problems of industrial pollution and land-based activities arise; secondly, a group of UNEP-sponsored treaties which establish a pattern of principles for a majority of developing countries mainly in the southern hemisphere. All of these treaties have mostly been amended or reinterpreted to reflect post-UNCED objectives and principles and in this respect demonstrate flexibility.

The North Sea

One example of a regional sea is the North Sea, which has a long history of regional environmental cooperation resulting in agreements which are overlapping but remain outside the UNEPS Regional Seas Programme. The declarations of a series of International North Sea Conferences have provided an important political forum in which to define and coordinate increasingly stringent environmental objectives.

The North Sea 1992 Convention on the Protection of the Marine Environment of the North-East Atlantic (OSPAR) replaced the 1972 Oslo Convention on Pollution by Dumping and the 1974 Paris Convention on

Pollution from Land-based Sources. The executive body of the Convention is the OSPAR Commission which works with the IMO to specifically tackle threats to the marine environment from shipping through the promotion of better port waste facilities and their more effective use to eliminate marine litter.

Under the North Sea Conferences, even smaller areas of the marine environment are protected, an example of which is the Wadden Sea. This was designated as a Particularly Sensitive Sea Area (PSSA) in 2002 based on research and recommendations carried out by an interdisciplinary research group from [Southampton] Solent University, within which the author was the legal expert. Under such designation,[8] the secretariat monitors and enforces specific rules for the area which include pollution from ships and land-based sources.

European Union Waters

To take a further example under the Regional Seas Conventions, the European Union's Marine Directive, adopted on 17th June 2008, aims to achieve Good Environmental Status (GES) of the EU's marine waters by 2020. In order to achieve its goal, the Directive establishes European marine regions and sub-regions on the basis of geographical and environmental criteria. Each Member State is required to develop a strategy for its marine waters.

In respect of marine litter including plastic, the European Union has a Marine Strategy Framework Directive (MSFD) which requires EU Member States to ensure that, by 2020, 'properties and quantities of marine litter do not cause harm to the coastal and maritime environment'. Because pollution of the marine environment from plastics and microplastics is one of the fastest growing threats to the health of the world's oceans, the three major areas of the 'Strategy for Plastics' adopted by the Commission on 16th January 2018 are: consideration of measures against single-use plastics and fishing gear; assessment of the need to restrict microplastics intentionally used in products under REACH;[9] and consideration of measures against microplastics generated during the life cycle of products. The Strategy also envisages 'A vision for a circular plastics economy', promoting investment in innovative solutions, and emphasises four key measures to initiate a more sustainable production, use and disposal of plastics: the improvement of the economics and quality of plastics recycling; the reduction of plastics waste

[8] <http://www.imo.org/en/OurWork/Environment/PSSAs/Pages/Default.aspx> accessed 16 April 2018.
[9] <https://echa.europa.eu/regulations/reach/understanding-reach> accessed 17 April 2018.

and littering; the increase of innovation and investment; and efforts to create global action. To achieve this ambitious aim by 2030, 100 per cent of plastics packaging put on the market must be either reusable or recyclable.

The MSFD is the dedicated binding legal instrument for assessing, monitoring, setting targets and reaching good environmental status with regard to marine litter. Also, the European Economic Area (EEA) has developed Marine Litter Watch, which is a citizen science-based tool to help fill the gap in policy while raising awareness about the problem.

But this is looking to the future, and almost daily Member States are announcing policies and measures to restrict the source of 'single-use plastics' such as disposable drinking cups and plastic straws. So what is currently in place to restrict these products ending up as marine litter?

The European Union's approach to waste management is based on the 'waste hierarchy', which sets out a priority order: prevention, reuse, recycling, recovery and, as the least preferred option, disposal, which includes landfilling and incineration without energy recovery. The main elements of waste management legislation in the European Union are by way of Framework Directives which cover a number of activities within the waste stream. These are then codified into Regulations which are directly applicable within the Member States. The Framework Directives are developed within the context of wider EU policies and programmes such as the Environmental Action Programme, the Resource Efficiency Roadmap, and the Raw Materials Initiative. The 7th Environment Action Programme[10] introduces the concept of the circular economy to improve waste management and turn waste into a resource. This has now been approved by the European Parliament and is expected to be approved by the Council of Ministers shortly.

In respect of packaging, which is a major source of plastic waste, the EU Packaging and Packaging Waste Directive was introduced in the early 1980s, and the latest update was issued on 29th April 2015 with regards to the consumption of lightweight plastic carrier bags. Together with a number of other waste stream Directives, the Packaging and Packaging Waste Directive is subject to review covering key targets.

Enforcement of EU legislation is through the Commission under Article 17(1) of the Treaty on European Union which provides that both the Treaty on European Union and the Treaty on the Functioning of the European Union, as well as measures adopted pursuant to them, are

[10] <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013D1386> accessed 17 April 2018.

correctly applied. The Directives are transposed into Member State national legislation and so are enforced through the domestic legal system. However, individuals may complain to the Commission if they consider that the Member State is not in compliance with the Directive and the Commission must investigate and take the case on by agreement.

Therefore the European Union as a region is energetically addressing plastic waste – but is there conflict between these international and regional agreements for protection of the marine environment and those international agreements dedicated to regulate and promote international trade?

International Trade Law

The promotion and liberalisation of free trade in goods and services has been the objective of international trade law since the General Agreement on Tariffs and Trade (GATT) which was first signed in 1947.[11] Many states have subsequently become parties to what is now a complex system of international trade agreements based on the GATT, with these agreements administered by the World Trade Organization (WTO) since the Marrakesh Agreement of 1994[12] entered into force. The WTO now provides the principal forum for negotiation on multilateral trading relations among Member States, and for the binding settlement of disputes arising under WTO agreements. These institutional and dispute settlement features of the WTO have fuelled the 'trade and environment' debate, with the prospect that trade and environment disputes would inevitably fall for resolution before a trade body perceived to be inimical to environmental concerns.[13] However, the protection of a nation's domestic environment may demand three different kinds of trade restrictions: firstly, import restraints against products or services that do not comply with domestic environmental norms; secondly, requirements that imported as well as domestic products comply with regulations involving such matters as labelling, packaging and recycling; and thirdly, export restrictions to conserve natural resources. Article XX(b) of the GATT and the identically worded Article XIV(b) of the GATS are applicable to justify import restraints on environmentally harmful products or services. This provision can be invoked broadly to protect the domestic environment. The trade restriction must be 'necessary', and the wording of the *chapeau* of Article XX would appear to mean that like products or services produced domestically must be similarly restricted

[11] <https://www.wto.org/english/tratop_e/gatt_e/gatt_e.htm> accessed 19 April 2018.
[12] <https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm> accessed 19 April 2018.
[13] See the Tuna-Dolphin case: <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm> accessed 19 April 2018.

and discrimination among countries similarly situated would be prohibited. The country asserting this exception would bear the burden of proof and persuasion on these matters. This would cover restrictions of waste plastic products.

Several countries have taken bold steps to introduce mandatory recycling of products and packaging to reduce the generation of waste and the resulting pollution and need for landfills. As we have seen above, the European Union adopted a Packaging Directive which sets target ranges for packaging waste recovery, recycling and so on, and this Directive applies to the packaging of all products sold in the European Union, including imports. These laws are part of an increasing trend in many industrialised countries to consider the environmental impact of products throughout their life cycles to the point of their ultimate disposal. Such laws have the potential to disrupt international trade and some manufacturing groups are alarmed that the spread of such life cycle or 'producer responsibility laws' will have a protectionist effect, isolating national markets. Developing countries are particularly concerned that their exporters will be unable to comply with these laws. Nevertheless, life cycle laws serve important purposes and the international trading system should be adjusted to accommodate them. In principle, product life cycle and producer responsibility laws are permitted under the GATT Article III, as long as they apply equally to domestic and foreign producers.

The trade–environment controversy may also arise in the context of concerns over low or non-existent environmental norms in other countries, and the question arises whether the problem can be addressed indirectly through trade sanction or restrictions to punish countries that refuse to improve environmental standards. However, such measures would engage the WTO/GATT rules.

In addition to placing environmental trade measures on products, states may also concern themselves with the production process and manufacture (PPM) of those goods. In this respect the enforcement of PPMs (in particular with regard to the recyclability of plastic products) in other countries could also be encouraged by replacing the current legal tests with a more lenient test that would allow WTO dispute settlement panels to balance the legitimacy of the protected environmental value with the disruption to trading interests. However, this proposal would grant extraordinary discretion to the ad hoc judges of the WTO panels. This may well lead to many PPM regulations being upheld, but in the international context this could encourage nations to violate fundamental principles of public

international law, which, for the sake of harmony amongst nations, restrict the exercise of jurisdiction to accepted normative concepts.[14] Therefore, instead of allowing unilateral regulation of PPMs to deal with environmental protection/pollution haven problems, other approaches might be considered, such as international environmental agreements, environmental management systems and investment standards.

It was posited above that receiving states could designate plastic waste as hazardous waste. This issue was addressed by a GATT working group in 1991, but there was no consensus on its reports and the issue was therefore transferred to the agenda of the Committee on Trade and Environment (CTE). This was followed in 1998 by the negotiation of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, establishing a prior informed consent (PIC) regime for banned or restricted chemical products and hazardous pesticide formulations that may cause health or environmental problems. However, the question is do these export control and PIC regimes for dangerous products conform with WTO rules? The relationship of the PIC Convention with the WTO agreements was a controversial issue during negotiations, with a lack of consensus on the wording of a provision establishing an order of priority between them. In the event the preamble recognises 'that trade and environmental policies should be mutually supportive with a view to achieving sustainable development'. Both the Cartagena Protocol and the 2001 Stockholm POP Convention also employ this preamble language.

As stated above, the Basel Convention requires prior notification and informed consent of the receiving country as a precondition for authorising international waste shipments. Furthermore, the Convention provides that parties must prohibit the export of waste whenever there is reason to believe that it will not be managed in an environmentally sound manner. Therefore, two aspects of the Basel Convention raise problems with respect to WTO rules. Firstly, the Conference of the Parties adopted an amendment to ban the export of hazardous wastes from industrialized countries to developing countries. The ban applies both to hazardous waste intended for disposal and, since the end of 1997, to hazardous waste intended for reuse or recycling. Secondly, Article 4(5) of the Convention prohibits exports and imports of hazardous and other wastes between party and non-party states. These trade restrictions on wastes are based upon past experiences and

[14] I. Brownlie, *Principles of Public International Law*, 5th edn (Oxford: Oxford University Press, 1998), chapter 15.

future fears concerning the exploitation of developing countries. They also reflect certain principles adopted at the 1992 UN Conference on Environment and Development, notably Principle 14 of the Rio Declaration, which provides that states should cooperate to prevent the movement of materials harmful to the environment and humans, and Principle 19, which requires prior notice to potentially affected states with regard to potentially harmful activities.

An export ban on hazardous wastes may be justified under the GATT Article XX(b) on the same basis as export restrictions on domestically prohibited goods. Hazardous wastes have the potential to endanger human health and the environment; thus Article XX(b) may be interpreted to allow export bans to protect areas outside the territory of the trade-restricting country. Even a discriminatory export ban may be upheld under Article XX(b) if the discrimination is not 'arbitrary or unjustifiable … between countries where the same conditions prevail'. A ban that distinguishes between OECD and developing countries, arguably, could pass this test because of the very different conditions in developing countries. Thus, emerging international hazardous waste regimes seem reconcilable under the WTO/GATT system.

Many commentators have called on governments and public authorities to use market-based economic incentives[15] rather than command and control regulation to improve environmental quality. As a result, taxes may be used more frequently in the future, both to raise revenue and to change people's behaviour to achieve environmental goals. An example of environmental taxes is the charge on single-use plastic bags which has had the effect of reducing the use of such bags in a number of countries.[16] The UK government has just announced a bottle/can deposit and refund scheme on plastic and glass bottles and aluminium drinks cans,[17] with the aim of reducing the number of such items either ending up in landfill or being discarded in the oceans. In the *US Superfund Case*, a GATT Panel stated that 'The General Agreement's rules on tax adjustment … give the contracting party the possibility to follow the polluter pays principle, but they do not oblige it to do so'.[18]

[15] These would include taxes or charges, transferable pollution permits, deposit/return systems and information strategies.
[16] The 5 pence charge on plastic carrier bags reduced their use by 85 per cent in England.
[17] <https://www.theguardian.com/environment/2018/mar/27/bottle-and-can-deposit-return-scheme-gets-green-light-in-england> accessed 20 April 2018.
[18] GATT bisd (34th Supp)(1988), 136, para 5.2.5.

The WTO Committee on Trade and Environment has only taken the first steps in clarifying and reconciling the conflict between protection of the environment and the rules of the multilateral trading system by ventilating the issues, marshalling different views and calling for transparency and increased cooperation among WTO members, the public and non-governmental organisations. There is an urgent need for the WTO to give specific recognition to environmental values. Article XX(b) of the GATT could be amended to provide a general exception for trade measures that are reasonably necessary for the protection of the domestic environment. This amendment would remove the overly strict 'least trade restrictive' criterion for such measures. In addition, Article XX might be amended to provide a 'safe harbour' for multilateral environmental agreements that employ trade measures which are reasonably necessary and reasonably related to the subject matter of the agreements, following the NAFTA example. We should realise, however, that there will be no grand synthesis of the trade and environment conflict; it will be an ongoing process demanding continual considerations at the WTO.

Given that some international treaties and conventions now recognise that both the atmosphere and the marine environment, beyond national jurisdiction, cannot be left to be plundered of their natural resources nor used as a 'free rider', but are considered to be part of the global commons, does customary law and the public trust doctrine help?

Customary Law

The public trust doctrine has evolved over many years and is one of the core principles for the judiciary to substantiate the legitimacy of governmental action to retain certain lands and resources in trust for the public. The doctrine is based on the notion that the public holds inviolable rights in certain lands and resources, and that regardless of title ownership. The doctrine can be traced back to the Roman Emperor Justinian when he proclaimed that 'by the law of nature these things are common to mankind … the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore … consequently all of these things were the property of no man but rather were common to all'.[19] The public law doctrine is set out in 'Conserving the Great Blue'[20] by Deborah Wright who explains how this concept of public rights goes on to

[19] <http://www.slc.ca.gov/policy_statements/public_trust/public_trust_doctrine.pdf> accessed 20 April 2018.
[20] <http://www.marinet.org.uk/wp-content/uploads/Conserving-the-Great-Blue.pdf> accessed 19 April 2018.

give the state certain rights to keep such lands and resources in trust for the public.

Early English common law also gives the king rights of title to rights of navigation and fishing, which were held by the king in inalienable trust for the public.[21] In other words, the public trust is an affirmation of the duty of the state to protect the people's common heritage of tide and submerged lands for their common use. Various public properties, including rivers, the sea shore and the air, are held by the government in trusteeship for the uninterrupted use of the public. The sovereign could not make clandestine transfer of public trust properties which the public had a right to enjoy to any private parties if such transfer, when effected, could interfere with the interest of the public at large.[22] Although the public law doctrine in the UK can be described as somewhat neglected, international jurists comment that it is increasingly accepted at international level within the treaties and conventions addressed above.

It could not be said that the public trust doctrine is without its critics. However, despite such criticism, it is being increasingly related to sustainable development, the precautionary principle, bio-diversity protection and a number of environmental law principles. The doctrine links the right of public access to public trusts with a precondition of accountability, while making decisive decisions on such resources.

The Stockholm Declaration at the United Nations Conference on the Human Environment clearly indicates recognition of the public trust doctrine when it states: 'The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural systems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate …'[23]

It could be said that the public trust doctrine was recognised further at the international level when the General Assembly of the UN passed Resolution 2749 describing the Common Heritage of Mankind, which states that the global commons, beyond national domain, are humanity's common heritage to be held in trust for the benefit of all and for future generations.[24]

Although the term 'common heritage' is used frequently by environmentalists, for legal purposes the term is currently confined to the narrow meaning attributed to it in only two conventions, one of which is the

[21] Thor Matthew Krisch 46 Duke LR 1169.
[22] Ibid.
[23] <http://legal.un.org/avl/ha/dunche/dunche.html> accessed 19 April 2018.
[24] <http://www.virginia.edu/colp/pdf/LOS-Resolution-2749.pdf> accessed 16 April 2018.

UNCLOS 1982, with the other being the 1979 Moon Treaty. It is, however, included in both as a 'Declaration of Principles Governing the Sea-bed and Ocean Floor'[25] and in Articles 136 and 137 of the UNCLOS, which pronounce the resources of the deep sea-bed beyond national jurisdiction to be 'the common heritage of mankind', vested in mankind as a whole, on whose behalf an International Sea-Bed Authority (ISBA) established under the UNCLOS shall act. In both treaties, the concept of common heritage implies that the resources of these areas cannot be appropriated to the exclusive sovereignty of states but must be conserved and exploited for the benefit of all without discrimination. Further, in 1982 the World Charter for Nature called for 'All areas of the earth, both land and sea' to be subject to the principles of conservation.

Conclusions

We have looked at the law as it stands at both international and regional levels, and also the EU's strategy for the future. So, what conclusions do we come to? A number of international agreements concerning pollution by any means of the marine environment are already in place, and yet the use and disposal of plastic waste is still carried out in an irresponsible way. It is only when international media such as the BBC and Sky News highlight the matter of plastic waste in the oceans of the world that the general public says enough is enough. The international agreements are problematic inasmuch as some are not mandatory and others can only be enforced by one state against another, which reverts to international politics and diplomacy.

Regional agreements appear to be making more progress, with enforceable legislation and strategies to reduce plastic waste at source. However, any regional agreements must also take care not to be in conflict with WTO/GATT rules.

But it is the commercial production, use and disposal of plastic waste which needs to be addressed by taxation, incentives or new business models such as the circular economy.

At a high level the concept of the circular economy is quite easy to understand. In the current system the economy mostly consumes resources extracted from our natural environment, such as fossil fuels, minerals, aggregates and forest products. These are then utilised and disposed of back into the environment as either used products or emissions, both of which contribute to pollution. In a circular economy, instead of throwing away the

[25] UNGA Res 2749 XXV(1970).

used material, it is reclaimed and reused or recycled as secondary raw materials for new products. For example, organic waste is used as soil nutrients, and energy is generated from any residual waste that cannot be recycled. This business model is now being promoted in a number of countries to address the problem of plastic waste, including the EU and the UK, and is based on the general waste hierarchy as explained above.

Professor Dame Julia Higgins,[26] who is the UK's leading polymer scientist and President of the Institute of Physics, when asked about the problems of plastics, most of which cannot be broken down to be recycled, stated that we should think of plastic/polymers being 'borrowed fossil energy' – they are made from an oil base, and we use them in a vast number of products to make our lives better, such as furniture, drugs and so on. When they have been reused, upcycled, recycled and so on, then we should incinerate them to make energy to heat homes.[27]

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[26] Dame Julia Stretton Higgins DBE FRS Hon FRSC FREng is a polymer scientist. Since 1976 she has been based at the Department of Chemical Engineering at Imperial College London, where she is Emeritus Professor and Senior Research Investigator.

[27] <https://www.humans-of-science.org/single-post/2017/04/26/Professor-Dame-Julia-Higgins-on-why-everyone-should-engage-with-science> accessed 15 April 2018.

The Role of the Police as a Referral Agency for the Mentally Disordered

Dr Benjamin Andoh

Abstract

What the police do has always been a matter of concern for the public because their powers can be intrusive and also subject to abuse. From the beginning the police did their primary task of maintaining the peace by enforcing the law and preventing crime. But later, those two modes were complemented by the provision of social support. The literature is full of works about the police generally and about their social support role (for example, their use of section136 of the Mental Health Act 1983) from a medical point of view. However, this article aims to add to that literature by considering, from a legal viewpoint, their role as a referral agency for mentally disordered persons. So, the paper focuses on their role generally, their informal and formal referral role (under sections 135 and 136 of the Mental Health Act 1983, as amended by the Mental Health Act 2007) and the impact of the 2017 legislation on their formal referral role.

Key words: police role; social support; mental health; police referrals to hospital; section 135 of the Mental Health Act 1983; section 136 of the Mental Health Act 1983; Policing and Crime Act 2017

Introduction

The role played by the police has always been a matter of public concern. It is an issue which people feel very strongly about because the police's powers can be intrusive and subject to abuse. Primarily, their task is to maintain the Queen's peace.[1] At the start they did this by enforcing the law and preventing crime. But later, those two modes were complemented by the provision of social support, which will be discussed below.

[1] Royal Commission on the Police, *Report*, Cmd. 1728 (May 1962), p. 21, para. 57.

The literature is full of works about the police generally[2] and about their social support role (for example, their use of section 136 of the Mental Health Act 1983 from a medical point of view).[3] However, this article aims to add to that literature by considering, from a legal viewpoint, their role as a referral agency for mentally disordered persons,[4] as well as the effect on this role by sections 80–83 of the Policing and Crime Act 2017.

Therefore, apart from this introductory part and the conclusion, this paper has the following parts: (i) the police role generally; (ii) their informal and formal referral role; and (iii) the impact of the 2017 legislation on their formal referral role.

I The Police Role Generally

A brief look at the general role of the police is crucial to our understanding of their referral role, informally as well as formally. This is because this referral role is part of their provision of social support, which is one of the ways in which they maintain the peace.

The 'New Police' was established by statute in the 19th century.[5] (Historically, the first police system in England was the Saxon system, under which all members of the community were responsible for each other's good behaviour. The second system, the parish constable system, was so inefficient (especially in London) that it was replaced by the 'New Police': the Metropolitan Police Force was established in 1829 by the Metropolitan Police Act 1829 and the City of London Police Force by the City of London Police Act 1839; in the counties the County Police Act 1839 empowered the Justices in Quarter Sessions to establish a police force either for the whole of each county or for any divisions of it; later, the County and Borough Police Act 1856 actually required the Justices to establish a police force for the whole of each county.) The role of the police has generally been maintenance of the Queen's peace (that is, the preservation of law and

[2] See, for example, T. Newburn, *Criminology*, 3rd edn (Routledge: Abingdon, 2017); T. Newburn, J. Peay and R. Reiner, *Policing: Politics, Culture and Control: Essays in Honour of Robert Reiner* (Oxford: Hart, 2011); and R. Reiner, *The Politics of the Police*, 4th edn (Oxford: Oxford University Press, 2010).

[3] T. Fahy, 'The Police as a Referral Agency for Psychiatric Emergencies: A Review', *Med. Sci. Law* (1989), 29, 315–22; R. Borschmann *et al.*, 'Section 136 of the Mental Health Act: A New Literature Review', *Med. Sci. Law* (2010), 50, 34–39; D.C. Apakama, 'Emergency Department as a "Place of Safety": Reviewing the Use of Section 136 of the Mental Health Act 1983 in England', *Med. Sci. Law* (January 2012), 52(1), 1–5 (Epub 28 October 2011); B. Menkes and G. Bendelow, 'Diagnosing Vulnerability and "Dangerousness": Police Use of Section 136 in England and Wales', *Journal of Public Mental Health* (2014), 13(2), 70–82; Department of Health and Home Office, *Review of the Operations of Sections 135 and 136 of the Mental Health Act 1983: A Literature Review* (December 2014).

[4] A mentally disordered person is defined by section 1(2), Mental Health Act 2007 as a person suffering from 'any disorder or disability of the mind'.

[5] T.A. Critchley, *A History of Police in England and Wales 900–1966* (London: Constable, 1967).

order). As already stated, they performed this from the beginning through enforcement of the law (detecting crime, catching criminals, and so on) and preventing crime. However, their role gradually evolved to include a variety of tasks, which indirectly prevent crime ultimately.[6] Also, regarding crime prevention today, they work in partnership with public, private and third-sector organisations.

Most of these tasks may be described broadly as provision of social support – a 'social service role'.[7] Indeed, as stated by Morgan and Newburn:

> The police frequently are the only 24-hour service agency available to respond to those in need. The result is that the police handle everything from unexpected childbirths, skid row alcoholics, drug addicts, emergency psychiatric cases, family fights, landlord-tenant disputes, and traffic violations, to … incidents of crime.[8]

Crime prevention itself has been said to be indirectly a form of provision of social support and *vice versa*; in addition, law enforcement and social support/service similarly overlap.[9] That apart, several studies have shown that a high proportion of police time is spent on matters which are not directly, but only marginally, connected with crime-fighting.[10] Therefore, the role of the police today may be summarised rightly as maintenance of the peace via crime prevention, law enforcement and provision of social support.

Specifically, as regards mentally disordered persons, the police role may be said to include mainly: (a) acting as a referral agency (that is, formally or informally referring to hospital persons they deem to be mentally disordered persons); (b) retaking absconders (mental patients who have run away from hospital) and returning them to their hospitals; (c) escorting, if required, mental patients from hospital to court and from court to prison or hospital, and *vice versa*; (d) administering 'psychiatric first aid',

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[6] Actually, what they do is so extensive that the following have been stated as just examples: acting as a lost property office; rescuing the drowning, the flooded, the snowed-in, the trapped or the burning; looking for missing persons; dealing with domestic disputes, suicide threats/ attempts, and illness in the street or in private premises; giving information to the public; dealing with alcoholics and mentally disordered persons; keeping an eye on old people living alone; informing people of the sudden death or injury of a relative; looking after children whose parents are injured in a road accident, and so on (M. Punch and T. Naylor, 'The Police: A Social Service', *New Society* (17 May 1973), 24, 358–61).

[7] R. Reiner, *The Blue-Coated Worker* (Cambridge: Cambridge University Press, 1978), p. 214.

[8] R. Morgan and T. Newburn, *The Future of Policing* (Oxford: Clarendon Press, 1997), p. 79.

[9] L. Radzinowicz and J. King, *The Growth of Crime: The International Experience* (London: Hamish Hamilton, 1977), p. 167.

[10] See, for example, M.D. Comrie and E.J. Kings, *Study of Urban Workloads*, Home Office Police Research Services Unit, 1974; S. McCabe and F. Sutcliffe, *Defining Crime: A Study of Police Decision-Making* (Oxford: Blackwell, 1978); P. Ekblom, and K. Heal, *The Police Response to Calls from the Public*, Research and Planning Unit, Paper 9 (London: Home Office, 1982); and W. Skogan, *The Police and Public in England and Wales: A British Crime Survey Report*, Home Office Research Study, no. 117 (London: H.M.S.O., 1990).

that is, giving reassurance, information, advice, and so on;[11] and (e) contacting and giving information to relatives of mentally disordered patients who are critically ill or have just died in hospital, and so on.

II The Referral Role of the Police

A Informal Referral

Informal referral of mentally disordered persons to hospital or some other treatment facility by the police usually takes the form of a police officer taking time to talk to a distraught or disturbed mentally disordered person, showing empathy and understanding to him/her, and so on. This can take place either in private premises or in a public place. The officer may then speak to that person in a manner such as the following: 'Hello Joe, how are you today? Have you had anything to eat or drink today?' Then, depending on the response of that person, the police officer may add: 'It appears you could do with some help. We can provide that help. If you would like us to do so, we could take you in our car to the local hospital, where you would be given a hot meal and, if necessary, a bed and some treatment. Would you like that?' If the person agrees, then the police can take him/her to a local mental hospital or the psychiatric unit of a general hospital, depending on the availability of a bed, for all that help, which may include admission informally, that is, without any formality. Where this happens, informal referral will have succeeded.

Such referral is much cheaper than formal referral (it saves manpower and resources, because there is no initial involvement of a police surgeon or other personnel, such as a doctor (who is not a police surgeon) or an approved mental health professional, or observation of the person by any police officer/s). It is also quicker. Accordingly, it ought to be encouraged.

B Formal Referral

Formal referral can take place when a person who is suffering from mental disorder refuses to be taken to hospital and be admitted there informally. In such a situation, the police have available for them to use, depending on where the person is, their power under section 135(1) and section 136 of the Mental Health Act 1983, as amended.

[11] E. Bittner, 'Police Discretion in Emergency Apprehension of Mentally Ill Persons', *Social* Problems (1967), 14(3), 288–90.

(i) Section 135(1), Mental Health Act 1983

Section 135(1) enables a constable, upon a warrant having been obtained from a justice of the peace by an approved social worker (now a mental health professional), to enter any premises and remove to a place of safety any person deemed to be mentally disordered, who is being ill-treated or neglected or, if they live alone, cannot care for themselves. At the place of safety, the person may be detained for up to 72 hours for the purpose of being assessed by a medical officer and interviewed by a mental health professional, so that arrangements can be made for their admission to hospital, if that proves necessary.

Its origin may be trailed to the Mental Deficiency Act 1913, s.15(2). This was precisely noted by Baroness Hale in *Ward v Commissioner of Police for the Metropolis*.[12] Section 15(2) of the Mental Deficiency Act 1913 provided as follows:

> If it appears to a justice on information on oath laid by an officer or other person authorised by the local authority that there is reasonable cause to believe that a defective is neglected or cruelly treated in any place within the jurisdiction of the justice, the justice may issue a warrant authorising any constable named therein, accompanied by the medical officer of the local authority or any other duly qualified medical practitioner named in the warrant, to search for such person, and, if it is found that he is neglected or cruelly treated, and is apparently defective, to take him to and place him in a place of safety until a petition can be presented under this Act, and any constable authorised by such warrant may enter, and if need be by force, any house, building, or other place specified in the warrant, and may remove such person therefrom.

Later, the Mental Health Act 1959 went on to apply, in its section 135(1), nearly all the provisions of section 15(2) of the Mental Deficiency Act 1913 to all persons suffering from mental disorder. Section 135(1) of the Mental Health Act 1959 was later retained by the Mental Health Act 1983, as now amended by the Mental Health Act 2007 and sections 80–83 of the Policing and Crime Act 2017.

The actual words of section 135(1) of the Mental Health Act 1983, as amended by the Mental Health Act 2007, are:

> (1) If it appears to a justice of the peace, on information on oath laid by an approved mental health professional, that there is

[12] [2005] 2 WLR 1114, at 1121.

> reasonable cause to suspect that a person believed to be suffering from mental disorder—
>
> (a) has been, or is being, ill-treated, neglected or kept otherwise than under proper control, in any place within the jurisdiction of the justice, or
>
> (b) being unable to care for himself, is living alone in any such place,
>
> the justice may issue a warrant authorising any constable to enter, if need be by force, any premises specified in the warrant in which that person is believed to be, and, if thought fit, to remove him to a place of safety with a view to the making of an application in respect of him under Part II of this Act, or of other arrangements for his treatment or care.

Therefore, before the justice can issue a warrant, four requirements must be present, namely: (a) the person to be removed under the subsection must be believed to be suffering from a mental disorder; (b) an approved mental health professional must lay information on oath before a justice that there is cause to suspect neglect, ill-treatment, or similar, of that person, or that they are living alone and cannot care for themselves; (c) the person concerned must be resident within the justice's jurisdiction; and (d) it must appear to a justice that the cause for the approved mental health professional's suspicion of ill-treatment, neglect, or similar, of the person removed is reasonable.[13]

Some observations will now be made here about the subsection. The first concerns the meaning of 'mental disorder', which a person must be believed to be suffering from before he may be subjected to section 135(1). Before 2007, that is, under the Mental Health Act 1983, s.1, 'mental disorder' was defined as including psychopathic disorder, severe mental impairment, mental impairment and mental illness. That definition has now been amended by the Mental Health Act 2007, s.1(2) so that mental disorder now has a very broad meaning, namely: 'any disorder or disability of the mind'. Thus, so long as any condition whatsoever may be said to be a disorder of the mind or a disability of the mind, it will fit the description of mental disorder.

Secondly, section 135(1) is merely a formal referral section – that is, it confers a power under which the alleged mentally disordered person may merely be removed, taken or referred to hospital or some other place of

[13] Rather than flimsy or illogical.

safety and detained there while arrangements for their admission to hospital (or similar) are made. Thus, so far as hospitals are concerned, patients first get referred there under the subsection before their actual admission, where necessary, under another section of the Mental Health Act 1983, as amended. An example of this is *Lewis v Gibson and another*,[14] where the patient in question, who was suffering from Down's syndrome (a form of mental impairment, and so, 'mental disorder'), was first referred to hospital under section 135(1) and then admitted under section 2. In *D'Souza v DPP*,[15] the admission of the patient, Clara D'Souza, followed the same pattern as did the admission of Mrs Ward in *Ward v Commissioner of Police for the Metropolis*.[16]

Thirdly, section 135(1) is not much used when compared with section 136. In fact, Baroness Hale, in *Ward v Commissioner of Police for the Metropolis and another*,[17] described it as 'little known and little used'. But it is still an important section because, without it, certain members of the public who are mentally disordered, and therefore potentially vulnerable and in need of care and/or control, will not get the help they require, either urgently or otherwise. It is also less controversial than section 136.

(ii) Section 136, Mental Health Act 1983

(a) Before 2017

The gist of section 136 of the Mental Health Act 1983 is that if a constable finds in a place to which the public have access a person that he/she believes to be suffering from mental disorder and to be in need of immediate care or control, he/she may apprehend that person and take him/her to a place of safety. At the place of safety, that person will be seen by a medical practitioner and interviewed by an approved social worker (now an approved mental health professional), so that arrangements can be made for his/her treatment or care, should that be necessary.

Origins

The origins of section 136 may be tracked to the Lunacy Acts Amendment Act 1885,[18] section 2 of which considerably increased the powers of a constable (and of certain local authority personnel). That section provided

[14] [2005] EWCA Civ. 587; [2005] 2 FCR 241; 87 BMLR 93.
[15] [1992] 1 WLR 1073 (HL).
[16] [2005] 2 WLR 1114.
[17] [2005] 2 WLR 1114, at 1117.
[18] 48 and 49 Vict., c.52.

that where a constable (or similar) was satisfied that it was necessary for the welfare of the alleged lunatic or the safety of the public that he, wandering at large and not under proper care and control or being neglected, or similar, had to, as a matter of urgency, be put under care and control, the constable (or similar), could remove him to the workhouse of the parish to be detained there for up to three days before being brought before a justice, or before information on oath was laid before a justice.

The section was preserved by the Lunacy Act 1890[19] which consolidated previous legislation including the Lunacy Acts Amendment Act 1889 (52 and 53 Vict., c.41). Then, much later, the provisions of the 1890 Act concerning the apprehension of mentally disordered persons in public (wandering) were modified by section 136 of the Mental Health Act 1959 which was preserved by the Mental Health Act 1983.

Section 136, before the changes brought in by the Policing and Crime Act 2017 were passed, provided, *inter alia*, as follows:

> …136 Mentally disordered persons found in public places.
>
> (1) If a constable finds in a place to which the public have access a person who appears to him to be suffering from mental disorder and to be in immediate need of care or control, the constable may, if he thinks it necessary to do so in the interests of that person or for the protection of other persons, remove that person to a place of safety within the meaning of section 135 above.
>
> (2) A person removed to a place of safety under this section may be detained there for a period not exceeding 72 hours for the purpose of enabling him to be examined by a registered medical practitioner and to be interviewed by an approved mental health professional and of making any necessary arrangements for his treatment or care.
>
> (3) A constable, an approved mental health professional or a person authorised by either of them for the purposes of this subsection may, before the end of the period of 72 hours mentioned in subsection (2) above, take a person detained in a place of safety under that subsection to one or more other places of safety.
>
> (4) A person taken to a place of safety under subsection (3) above may be detained there for a purpose mentioned in subsection (2)

[19] 53 Vict., c.5.

above for a period ending no later than the end of the period of 72 hours mentioned in that subsection.

Therefore, the first thing to consider is that the person concerned must be found in a place to which the public have access. A 'place to which the public have access' may be said to be a public place such as a park, local authority offices (where members of the public can go to pay their council tax, for example), a public library, a church, the highway and bridges like Tower Bridge, and so on.[20] However, there are some public places/buildings that can only be accessed by special permission, for example, the Houses of Parliament, or only at special times, for example, a magistrates' court when a case is being heard. The communal areas of a council estate also come within the meaning of 'a place to which the public have access'.[21] Also, according to section 1(6) of the Confiscation of Alcohol (Young Persons) Act 1997, '… a place is a public place if at the material time the public or any section of the public has access to it, on payment or otherwise, as of right or by virtue of express or implied permission'.

Secondly, the police must deem him/her to be: (a) mentally disordered, and (b) in need of immediate care or control. On this point an example may be given of a suitably dressed lady in a public park on a summer afternoon. While having her lunch, she is talking to the birds, singing with them and occasionally talking to a coin on the bench she is sitting on. Although she may well be deemed mentally disordered because of her bizarre behaviour, she is unlikely to be considered in immediate need of care or control. At the other end, let us look at another person, for example, a gentleman wearing only his cotton pyjama trousers and a necktie (with no shirt or jacket) and talking to (in fact, arguing with) the snow on the pavement just outside a police station on New Year's Eve. He is also threatening to slash his wrist unless the snow responds loudly to his statements to it. He is very likely to be deemed to be suffering from mental disorder, as well as to be in immediate need of care or control.

Thirdly, the police may apprehend that person deemed to be suffering from mental disorder and in need of immediate care/control, and take him to a place of safety. Section 135(6) of the Mental Health Act 1983 defined 'place of safety' as including a hospital, a police station, a residential home for mentally disordered persons, a mental nursing home, and so on. (As will

[20] See, for example, *R (on the application of Takoushis) v Inner London North Coroner and another* [2005] EWCA Civ 1440.

[21] See, for example, *Carter v Commissioner of Police for the Metropolis* [1975] 1 WLR 507; *Knox v Anderton* [1983] 76 Cr. App. R 156; and *Seal v Chief Constable of South Wales Police* [2007]1 WLR 1910.

be seen below, by virtue of the Act of 2017, the meaning of 'place of safety' has been revised, among other things.)

Fourthly, as already stated, at the place of safety the apprehended person will be interviewed by an approved mental health professional and examined by a medical practitioner so that arrangements for his/her admission to hospital, if necessary, may be made.

Fifthly, the maximum period of time during which a person might be held at the place of safety was 72 hours. In *MS v UK*,[22] the person taken to the place of safety (a police station) was held in a police cell for far more than 72 hours and not in nice conditions.[23] As we shall see below, this period has now been reduced to 24 hours (unless extended).

In order to enhance our knowledge of the section, this observation must be made: section 136, like section 135(1), is only a mode of referral, not an admission section like sections 2, 3 or 4.[24] Therefore, when a patient is taken/referred to hospital as a place of safety, he/she is only there for the purposes for which a person may be kept at a place of safety. Put another way, he/she has been referred to the hospital by the police under section 136. So it is incorrect to say that such a person has been admitted under section 136 because it is rather that – following the interview by an AMHP and assessment by a doctor (psychiatrist) within the 72-hour period (this is the period before sections 80–83 of the 2017 legislation come into effect) – he may (if not allowed to go home) be admitted informally or formally under any of the admitting sections of the Mental Health Act 1983.

Moreover, the following question is often asked. If the police are neither psychiatrists nor trained in the diagnosis of mental disorder, why should they be given so much power under section 136? One answer to this question is that certain types of behaviour are usually signs of mental disorder, as shown by the examples given earlier, and that the section 136 power has its origins way back in 1885 – the need to protect mentally disordered persons in society who are in immediate need of care/control has been there for a long time; hence the section 136 power. Moreover, in the present writer's opinion, any criticism of the section 136 power based on the lack of diagnostic expertise of the police is not strong because the section itself does not require them to have such expertise. Rather, it empowers them to exercise their discretion to remove to a place of safety persons who

[22] (2012) 55 EHRR 23.

[23] In fact he was left in a filthy state, on account of which the European Court of Human Rights held that his right under Article 3 of the European Convention on Human Rights (the right not to be subjected to degrading and inhumane treatment) was infringed.

[24] See, for example, *R (on the application of Takoushis) v Inner London North Coroner and another*, *supra.*

appear to them to be suffering from mental disorder and in need of immediate care/control.

They have also been criticized for abuse of their section 136 power,[25] and for using the section in a discriminatory manner against ethnic minorities such as Afro-Caribbeans, Africans, Asians, and so on.[26] On the other hand, several studies have found that, although they are neither psychiatrists nor trained mental health professionals, they have been largely correct in their referrals under section 136.[27] Rogers and Faulkner (1987) actually found that the vast majority (90.5 per cent) of people referred by the police under section 136 were subsequently diagnosed by psychiatrists as suffering from mental disorder.

III Impact of the Policing and Crime Act 2017, ss. 80–83

Sections 80–83 of the Policing and Crime Act 2017 have now made some significant changes to some of the provisions of section 136 (and also section 135). The Bill received Royal Assent early in 2017 but sections 80–83 of the Act of 2017 came into effect from midnight on 11th December 2017.[28]

The main changes brought in by the said sections 80–83 of the 2017 legislation will now be summarized and then commented on individually.

(a) The first concerns where the section 136 power may be exercised. According to section 136(1A), the power may be exercised where the mentally disordered person is at a place: (a) which is not a house, flat or room where he/she or any other person is residing, or (b) which is not a yard, garden or outhouse used in connection with the house, flat or room

[25] See, for example, K. Cherrett, 'Policing the Mentally Ill: An Attitudinal Study of Police Contact with Mentally Disordered Persons within the Gwent Constabulary', *Police Journal* (January 1995), 23–8.

[26] See, for example, R. Littlewood and M. Lipsedge, *Aliens and Alienists: Ethnic Minorities and Psychiatry* (Harmondsworth: Penguin, 1982); Runnymede Trust, *Bulletin* (1983), 158; Black Health Workers and Patients Group, 'Psychiatry and the Corporate State', *Race and Class* (1983), xxv, 2; K. Mercer, *Black Communities' Experiences of Psychiatric Services*, Proceedings of the Transcultural Psychiatric Society (1984); P. Bean, W. Bingley, I. Bynoe, A. Faulkner, E. Rassaby and A. Rogers, *Out of Harm's Way* (London: Mind, 1991).

[27] See, for example, H.R. Rollin, *The Mentally Abnormal Offender and the Law* (Oxford: Pergamon Press, 1969); and A. Rogers and A. Faulkner, *A Place of Safety* (London: Mind, 1987).

[28] In the interests of precision, the following must be stated. According to Regulation 3 of the Policing and Crime Act 2017 (Commencement No. 4 and Saving Provisions) Regulations 2017 (No. 1017 (C.93)):
'The day appointed for the coming into force of the following provisions of the Act is 11th December 2017—
(a) section 80 (extension of powers under sections 135 and 136 of the Mental Health Act 1983), in so far as not already in force …;
(b) section 81 (restrictions on places that may be used as places of safety), in so far as not already in force;
(c) section 82 (periods of detention in places of safety etc); and
(d) section 83 (protective searches: individuals removed etc under section 135 or 136 of the Mental Health Act 1983).

mentioned in (a) above, 'other than one that is also used in connection with one or more other houses, flats or rooms'.

Comment: Therefore, the power may be exercised in a yard, garden or outhouse that is used in connection with any house, flat or room which is not the residence of the mentally disordered person or another person. In short, the power cannot be exercised at a private residence. At first, it was proposed that the power ought to be exercised in private residences because, for example, that would reduce abuse of section 136 in that the police could no longer persuade or encourage mentally disordered persons to step outside their place of residence onto the communal walkway or corridor, and then use the section on them. However, for reasons relating to the human rights implications of this and the fear of further abuse of the section 136 power if extended to private homes, the extension was not carried through. It would really be odd if a person could be put under section 136 in his/her own home. What an intrusion into the person's privacy that would be!

(b) Also, a constable can enter by force, if necessary, any place where the power may be used (section 136(1B)).

Comment: This is a reasonable provision and is not problematic because the police, for the purpose of section 135(1) and (2), already have power to use force where necessary to enter premises specified in the warrant. But then, of course, one would expect only reasonable (not excessive) force to be used. It is also worth noting here that a constable may enter and search any premises *in order to execute a warrant of arrest issued in connection with criminal proceedings or similar.*

(c) In addition, according to section 81 of the Policing and Crime Act 2017, a private residence may be used as a place of safety with the consent/agreement of the resident/s.

Comment: This would be beneficial to the mentally disordered person because he/she would generally feel free in his/her own home. It is only where he/she is unwilling to be assessed there or where he/she poses a risk to himself/herself or to others that a compulsory admission section can be completed in his/her own home, ideally with police presence in those circumstances. So, this provision is worthy of applause.

(d) Next, the period of detention at the place of safety has been reduced from up to 72 hours to up to 24 hours initially: section 82, Policing and Crime Act 2017.

Comment: There is a lot to be said in favour of the previous 72-hour

maximum period because it gave mentally disordered persons under the influence of drugs or alcohol enough time to sober up and, therefore, not to distort their assessment at the place of safety. It also allowed for weekends, especially Bank Holiday weekends, when it could be difficult to find the right personnel to carry out the assessment.[29] *On the other hand, in some European countries (for example, Denmark, Holland, Spain, and so on) the statutory provisions equivalent to sections 135 and 136, Mental Health Act 1983 currently have 24 hours as the maximum period of detention (although that period is 48 hours in other countries such as France, Greece, Austria, and so on). Also, because of cases like* MS v UK,[30] *wherein the police detained a mentally disordered person at the police station for more than 72 hours (a clear abuse of section 136), there is a strong argument for the reduction of the period from 72 hours to 24 hours. Despite the objection to it by its critics, the reduction is thought by the present author to be reasonable because the 24-hour period is already the position in other European jurisdictions, as they consider that period adequate.*

(e) Under section 136B, extension of the period of detention may be authorised, at any time within the 24 hours, by the medical practitioner who examined the suspected mentally disordered person under section 135 or section 136. But such extension has to be for up to 12 hours, starting immediately at the end of the 24-hour period.

Comment: Two points may be made here. First, this reduction of the maximum period to 24 hours is not a novel issue. Way back in 1975, some commentators – for example, Larry Gostin of the National Association of Mental Health (MIND) – argued for that 24-hour maximum period.[31] *However, that view did not prevail, probably because it was felt in other quarters that a reduced period of 24 hours or less would make the three-fold objective of the section (namely, medical examination, interview by an approved social worker (now approved mental health professional), and the making of arrangements, if necessary, for the treatment or care of the detained person) virtually impracticable unless there were adequate resources and manpower in both urban and rural areas. It was also felt that the 72-hour period was satisfactory as it was not the normal period but rather the maximum.*[32] *Secondly, the possibility of extension of the 24-hour*

[29] See, for example, G. Riley, J. Laidlaw, D. Pugh and E. Freeman, 'The Responses of Professional Groups to the Use of Section 136 of the Mental Health Act (1983, as amended by the 2007 Act) in Gloucestershire', *Medicine, Science and the Law* (2011), 51(1), 36–42.
[30] *Supra*.
[31] L. Gostin, *A Human Condition*, vol. 1 (London: MIND, 1975).
[32] See, for example, B. Andoh, 'The Controversial Section 136, Mental Health Act 1983: A Comment', *Police Review* (March 1994), 23–4.

period is very likely to pacify the critics of the reduction of the maximum period of detention from 72 hours to 24 hours. This is because, depending on the state that the suspected mentally disordered person is in, it would sometimes simply not be practicable for him/her to be assessed or for that assessment to be completed before the expiration of the 24 hours; hence the need for extension of the 24-hour period where that is necessary.

(f) Section 136(1C) requires a constable to consult a registered doctor, a nurse or an approved mental health professional, or similar, where practicable, before taking the person deemed to be suffering from mental disorder to a place of safety.

Comment: *Although this is a good requirement, aimed at safeguarding the interests of the person concerned, it is not considered a major amendment because that person will need immediate care or control; so, where the constable must act speedily in order to keep him/her from immediate danger, he is not likely to consider it practicable to consult a doctor, or similar.*

(g) In the case of children, that is, persons aged under 18, according to section 136A, a police station may now not be used as a place of safety.[33]

Comment: This is another change that must be applauded since sending a child considered as suffering from mental disorder and to be in need of immediate care or control to a police station is simply unacceptable in the absence of a commission of a criminal offence by that child. Such a child (who may be said to be extra vulnerable) ought to be sent to a place that is both safe and appropriate, for example, a health-based facility or place of safety. For children, such a facility can be a section 136 wing or suite in a psychiatric ward or some other specialised unit. Those units may well be expensive to run, but they seem to be a far better option than police stations in the case of children who have mental health problems.

(h) According to section 136C, if a constable has reasonable grounds to believe that a person subject to section 135 or section136(2) or (4) may pose a danger to themselves or to other persons, and is hiding on his/her person a dangerous item, the constable may search that person for the purpose of finding that item and seizing it.

[33] Therefore, now a police station may only be used as a place of safety for an adult (person aged 18 and above) in certain circumstances specified in the Mental Health Act 1983 (Places of Safety) Regulations 2017. Those circumstances are when: (a) the person's behaviour presents an imminent risk of death or some serious injury to him/her or to another person; (b) because of that risk, no other place of safety in the relevant area of the police can be reasonably expected to be the place of their detention; and (c) a healthcare professional will be there (at the police station) and will also be available for that person, so far as that is reasonably feasible.

Comment: This innovation is a step in the right direction because a person subject to section 135 or section 136 ought to be kept safe. For his/her own safety and that of other persons, he/she should not be allowed to secrete on his/her person any sharp instruments/objects that can be used to cause physical harm to himself/herself or to others. Without this sort of provision, the police are very likely to be blamed for not doing their work properly whenever a patient subject to those two sections injures himself/herself or others with a dangerous item.

From the foregoing, these changes to sections 135 and 136 of the Mental Health Act 1983 may be said to be appropriate and, therefore, generally appealing. Just like the provisions they amended, they are aimed at protection of the mentally disordered person as well as other persons. But what puts them much further ahead, in the present writer's opinion, is (a) the fact that children may no longer be sent to a police station as a place of safety under sections 135 and 136, and (b) the reduction of the maximum period of detention at a place of safety from 72 hours to 24 hours in the first instance.

Conclusion

The role played by the police, as can be seen from the above discussion, may be described as important. Although that role is primarily maintenance of the Queen's peace, that is done by means of detecting crime and enforcing the law, and then by preventing crime. As part of their crime prevention role, they provide social support for members of the public including mentally disordered persons. Specifically as regards the mentally disordered, they provide a variety of services such as retaking absconders from hospital, escorting mental patients from hospital to court and from court to prison or hospital, and *vice versa*, administering 'psychiatric first aid' by way of giving reassurance, information, advice, and so on, and acting as a referral agency (they refer, informally as well as formally, mentally disordered persons to hospital).

Their formal referrals to hospital are in the form of their powers under sections 135(1) and 136 of the Mental Health Act 1983, as amended. Despite criticism of their abuse of their section 136 power, they have been found to have been largely correct in their referrals of mentally disordered persons to hospital, even though they are not psychiatrists. So, they (the police) deserve applause galore for their provision of social support, especially for mentally disordered persons.

Lastly, it must be said that, in response to public concern about the abuse of their power under section 136 regarding the length of time during which people apprehended under section 136 have been held in police stations, about the use of police stations as places of safety in the case of children, and about other matters, Parliament has responded in a significant way via the Policing and Crime Act 2017 (after the Department of Health and the Home Office had satisfactorily carried out consultations with the appropriate stakeholders). The Act of 2017 has introduced significant changes which include: extending the powers of the police under sections 135 and 136 of the Mental Health Act 1983; imposing restrictions on places that can be used as places of safety by its new definition of 'place of safety', and no longer allowing children to be sent to a police station as a place of safety; reducing the period of detention at a place of safety from a maximum of 72 hours to 24 hours initially; and enabling constables to carry out protective searches of persons who are removed under sections 135 and 136.

However, because in the case of children places other than police stations are to be used as places of safety, in such places children have to be protected and able to receive ready medical attention – ideally, health-based facilities. Maintaining the current facilities and also building new ones will require a lot of funding. Accordingly, it is strongly suggested that the government should weigh the situation very carefully and provide the necessary resources for these facilities to the best of its ability.

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Collective Redress in Antitrust Proceedings: Pro-competitive or Anti-competitive?

Dr Daniel Reed

Abstract

In essence, the value of collective litigation in antitrust enforcement policy is the compensation of victims and the notion of corrective justice. By combining potential claims that otherwise might not have been filed, the collective redress device allows the antitrust injury to be compensated. Conversely, in the absence of such a mechanism, companies who violated competition rules could not be sued effectively due to the excessive transaction costs of prosecuting a suit. Hence, in addition to the lack of redress for victims, violators are retaining their ill-gotten gains. In principle, a collective redress regime overcomes these problems. However, the bundling of rights raises concerns in relation to potential abuse of collective redress mechanisms. While a collective action can lead to a better enforcement of legal norms, it may also enhance incentives for filing arbitrary claims or for threatening arbitrary litigation, with the sole aim of forcing payment without any real legal claim. Arguably, this expanded right of action provides more incentive for not only improved competition law enforcement but also for inflated, arbitrary and exploitative antitrust litigations.

Key words: antitrust; competition law; Article 101 TFEU; Article 102 TFEU; private enforcement; collective redress; EU; antitrust settlements; compensation in antitrust litigation.

Introduction

In the European Union (EU) over the last 50 years, the enforcement of antitrust[1] rules[2] law has been predominantly via public enforcement. Private actions for damages are deemed to be in a state of total underdevelopment lagging behind other jurisdictions.[3] Consequently the European Commission (Commission) is promoting a system of private enforcement as a complement to public enforcement.[4] This paper examines the effectiveness of such a system within the EU antitrust proceedings framework, with focus on collective redress as opposed to actions by single individuals or companies. Such evaluation furthers the assessment of the efficacy of private enforcement of competition law by highlighting potential detrimental effects to competition that collective redress[5] can bring to competition in the EU. For instance, while a single person might be discouraged from filing an action for damages by the costs of bringing the action against the low financial value of a claim, an association of consumers representing several hundreds of individuals might be able to bring an action with a small contribution from each interested party. Or, worse still, an association of consumers/undertakings might decide to file a damages action simply as a matter of principle for nominal violations perceived detrimental to society.[6] Such suits could put an otherwise financially sound company out of business.

This paper argues that while in principle a collective redress mechanism could benefit consumers, in the process such a system has the

[1] The terms 'antitrust' and 'competition' will be used interchangeably throughout this paper. Antitrust is an American term originating in the 19th century movement against 'trusts' or large companies. Competition, arguably, has a wider meaning in that it also encompasses all types of regulations that affect competition, such as tax policies, intellectual property rights or sector-specific regulations such as those related to energy and telecommunication. The European Commission defines competition as the act by which 'Independent companies selling similar products or services compete with each other on, for example, price, quality and service to attract customers'. In this context, antitrust is 'Competition rules governing agreements and business practices which restrict competition and prohibiting abuses of dominant positions'; see European Commission, *EU Competition Policy and the Consumer* (Office for Official Publications of the European Communities, 2004), 27.

[2] That is, the provisions of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

[3] Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios', *Report for the European Commission*, 21 December 2007: <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html> accessed 19 January 2014, 9; Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.2.

[4] Antitrust, 'Commission Presents Policy Paper on Compensating Consumer and Business Victims of Competition Breaches', *IP/08/515*, 3 April 2008: <http://ec.europa.eu/competition/antitrust/IP/08/515/index.html> accessed 29 January 2014.

[5] The terms 'collective redress' and 'class action' will be used interchangeably to refer to any procedure in which a group of persons or companies seeks a legal remedy for violations of Articles 101 and 102 TFEU, or a procedure in which any such remedy may be sought on their behalf.

[6] For a detailed analysis of these issues, see Daniel S. Reed, 'Antitrust Collective Redress: What Are the Benefits?' *Journal of Industry Competition and Trade* (2015).

potential to affect competition detrimentally and ultimately harm consumers.[7]

The Commission's Approach to Collective Redress

Private enforcement of EU competition law can be pursued by way of individual redress. A natural or legal person could individually initiate legal proceedings to enforce their EU competition rights. However, where the same breach of competition rules harms a large group of citizens and businesses, individual lawsuits are not always an effective means to stop unlawful practices or to obtain compensation for the harm caused by these practices. Citizens and businesses are also often reluctant to initiate private lawsuits against unlawful practices, in particular if the individual loss is small in comparison to the costs of litigation. As a result, according to the Commission, continued illegal practices cause significant aggregate loss to European citizens and businesses.[8]

In the EU, 'collective redress' is a broad concept encompassing any mechanism that may accomplish the cessation or prevention of unlawful business practices which affect a multitude of claimants (consumers and/or small/medium-size businesses), or the compensation for the harm caused by such practices.[9] In that respect, distinction could be made between collective and representative action.[10] A 'representative action' is an action brought by a representative natural or legal person, such as a consumer organisation, on behalf of a group of identified individuals, usually its members, and aimed at protecting the individual rights of those represented. A 'collective action' is brought on behalf of a group of identified or identifiable individuals and aimed at protecting interests of those represented.[11]

The Commission contends that since the harm caused by antitrust infringement is often spread across a large number of victims, each single having a low-value damage, collective action may improve the chance of

[7] Arguably, victims of antitrust violations could be compensated directly by the Commission; see Daniel S. Reed, 'Compensation in Antitrust: Could It Be Awarded by the European Commission Instead of Resorting to Civil Courts?' *Competition Law Review* (2016).

[8] Viviane Reding, Joaquín Almunia and John Dalli, 'Towards a Coherent European Approach to Collective Redress: Next Steps', *SEC* (2010), 1192, para. 4.

[9] Viviane Reding, Joaquín Almunia and John Dalli, 'Towards a Coherent European Approach to Collective Redress: Next Steps', *SEC* (2010), 1192, para. 7.

[10] For the purpose of this paper, however, no such distinction is used. The terms 'collective/representative redress' and 'class action' will be used interchangeably to refer to any procedure in which a group of persons or companies seeks a legal remedy for violations of Articles 101 and 102 TFEU, or a procedure in which any such remedy may be sought on their behalf.

[11] Commission, *Staff Working Paper (Annex to the Green Paper, Damages Actions for Breaches of the EC Antitrust (Rules)* (COM (2005) 672 final), para. 192.

getting effective compensation for consumers and small/medium-size businesses. With regard to enforcement policy, the Commission admits that:

> An important instrument for ensuring effective enforcement of EU law in such cases is public enforcement by the European Commission (e.g. infringement action or competition proceedings), often based on complaints of citizens or businesses. As guardian of the Treaties, the Commission can ensure that not only individual, but also public interests and, more broadly, the Union interest are taken into account.[12]

However, because of the enlargement of the EU, the Commission argues that the number of cases requiring enforcement has increased substantially because of the larger territorial scope of application of EU law. This has brought the issue onto the agenda of whether further mechanisms of private enforcement should be added to the current system of EU remedies in order to strengthen the enforcement of EU law.[13]

The current debate regarding class actions in the EU is largely tied to a growing desire for more extensive private litigation in Europe, including the area of competition law. Back in 1998, the AG Jacobs, in his opinion in the case of Österreichischer Gewerkschaftsbund, stated that:

> Collective rights of action are an equally common feature of modern judicial systems. They are mostly encountered in areas such as consumer protection, labour law, unfair competition law or protection of the environment. The law grants associations or other representative bodies the right to bring cases either in the interest of persons which they represent or in the public interest. This furthers private enforcement of rules adopted in the public interest and supports individual complainants who are often badly equipped to face well organised and financially stronger opponents.[14]

In 2013 the Commission published a Draft Recommendation about injunctive and compensatory collective redress mechanisms, stating that:

> Amongst those areas where the supplementary private enforcement of rights granted under Union law in the form of collective redress is of value, are consumer protection,

[12] Viviane Reding, Joaquín Almunia and John Dalli, 'Towards a Coherent European Approach to Collective Redress: Next Steps', *SEC* (2010), 1192, para. 2.
[13] Viviane Reding, Joaquín Almunia and John Dalli, 'Towards a Coherent European Approach to Collective Redress: Next Steps', *SEC* (2010), 1192, para. 3.
[14] Case C – 195/98 *Österreichischer Gewerkschaftsbund v Austria* [2000] ECR I-10497, para. 47.

> competition, environment protection, protection of personal data, financial services legislation and investor protection.[15]

The Commission's initiative urges all Member States to introduce collective redress mechanisms to facilitate the enforcement of the rights common to EU citizens under EU law, including the right to compensation for antitrust harm. Hence, the Commission as proponent argues that class actions can significantly enhance a victim's ability to obtain compensation, contribute to the overall efficiency in the administration of justice, and provide a strong deterrent to businesses' antitrust malfeasance. A study conducted for the European Parliament's Committee on Economic and Monetary Affairs considers that efficient and effective schemes for collective actions are a vital component of a well-functioning judicial system, particularly in the area of antitrust where illegal conduct may cause scattered and low-value damage to a multitude of individuals, and where the individual cost for redress might be disproportionate to the damage suffered.[16]

However, private litigation is not without its faults. Indeed, it can be costly to businesses and, in turn, to the EU economy. While in the EU there is an emphasis on potential benefits, little relevance is accorded to the significant detrimental effects that collective redress carries. Considering the current state of collective action in the EU, it appears an inefficient, costly and unproven way of achieving the twin antitrust policy goals of compensation and deterrence as contended by the Commission in its proposals.[17] It is to these issues that the analysis now turns.

The State of Play of Collective Redress in the EU

Collective redress is not a new notion in the EU. All Member States have procedures in place which grant the possibility to seek an injunction to stop illegal practices. As a result of the Directive on Injunctions in 1998,[18] consumer protection authorities and consumer organisations are entitled to bring an action to stop practices infringing national and EU consumer protection rules in all Member States.[19] However, collective redress, by way

[15] Commission, 'Recommendation on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted Under Union Law', [2013] OJ L 201/60, para. 7.

[16] Paolo Buccirossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies, 2012), 10.

[17] Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.1; Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final), 3.

[18] Council Directive (EC) 98/27 on Injunctions for the Protection of Consumers' Interests [1998] OJ L 166/51.

[19] Commission, 'Towards a Coherent European Approach to Collective Redress' (Staff Working Document Public Consultation), *SEC* (2011), 173 final, 8.

of compensatory relief, has not traditionally been part of Europe's legal landscape. Collective redress mechanisms exist in most, but not all, Member States. Eight EU countries currently do not have a collective redress mechanism in place: Belgium, Cyprus, Czech Republic, Estonia, Latvia, Luxembourg, Slovakia and Slovenia. Moreover, even in those Member States that provide a collective redress mechanism, these are not specific to antitrust infringements, but they encompass a wide variety of violations. The only exception is the UK, which provides a collective redress scheme specific to antitrust infringements.[20]

In order to develop a mechanism of collective redress, in 2012, the European Parliament's Committee on Economic and Monetary Affairs requested a study specifically on collective redress in antitrust.[21] Following the assessment of the national collective redress systems, the study recommends three key legal objectives that an EU antitrust collective redress regime should achieve:

> (i) to discourage unmeritorious actions, while guaranteeing that those who have actually suffered harm obtain an adequate and fair compensation;
>
> (ii) to ensure a fair trial by providing legal certainty and consistency;
>
> (iii) to lower the financial and organisational hurdles that consumers and small businesses face.[22]

In principle, all these points are laudable objectives that in theory would deliver an excellent enforcement regime where violators of antitrust rules are punished and victims are compensated. When it comes to delivering those objectives, however, the landscape changes dramatically. One of the challenging areas of private enforcement in antitrust, whether single or collective actions, is the control of it, which appears exceptionally difficult, if at all feasible. Private enforcement is motivated by the interests of private parties regardless of its effect on competition, hence, on the economy of the country where it is in force.[23] Moreover, although the study – which suggests ideal features that a collective redress regime in the EU should contain – is based on the US class action regime, and it is considered 'a

[20] Paolo Buccirossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies, 2012), 19.
[21] Ibid.
[22] Ibid, 12.
[23] Preston R. McAfee, Hugo M. Mialon and Sue H. Mialon, 'Private v. Public Antitrust Enforcement: A Strategic Analysis' (2008), Emory Law and Economics Research Paper No 05-20 <http://ssrn.com/abstract=775245> accessed 2 February 2014; Gary S. Beker and George J. Stigler, 'Law Enforcement, Malfeasance, and Compensation of Enforcers', *Journal of Legal Studies* (1974), 3, 1.

natural point of reference and an important benchmark to assess the potential implications of changes to the EU system',[24] crucial safeguards appear to have been overlooked. For instance, measures against abusive litigation which are an integral part of the US systems, such as the strict test to obtain class certification before a legal action can be commenced and the judicial control over settlements, are not envisaged for the EU system.

As recognised by EU officials, any European approach to collective redress would have to avoid from the outset the risk of abusive litigation.[25] In the EU it is well acknowledged that:

> Such abuses have occurred in the US with its 'class actions' regime. This form of collective redress is considered to contain strong economic incentives for parties to bring a case to court even if, on the merits, it is not well founded. These incentives are the result of a combination of several factors, in particular, the availability of punitive damages, the absence of limitations as regards standing (virtually anybody can bring an action on behalf of an open class of injured parties), the possibility of contingency fees for attorneys and the wide-ranging discovery procedure for procuring evidence.[26]

At first glance, the US class action regime is condemned as it increases the risk of abusive litigation resulting from these combined incentives. Consequently, as these features are not compatible with the EU legal tradition, the approach taken is that: 'We therefore firmly oppose introducing "class actions" along the US model into the EU legal order'.[27] However, an analysis of the EU proposed collective redress regime reveals that it may have more of the US system than first spelled out by the EU officials. As there is no tradition of group litigation in Europe, most of the arguments are based on the available studies discussing the US class action.[28] Indeed the US represents a road map for changes in the EU system, and a study conducted for the EU stresses that:

> The US has been one of the first countries to introduce a collective litigation instrument and thus represents a natural point of

[24] Paolo Buccirossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies, 2012), 34.
[25] Commission, 'Towards a Coherent European Approach to Collective Redress: Next Steps' (Joint Information Note by Vice-President Viviane Reding, Vice-President Joaquín Almunia and Commissioner John Dalli), *SEC* (2010), 1192.
[26] Ibid., 17.
[27] Ibid.
[28] Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios', *Report for the European Commission*, 21 December 2007, 277 <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html> accessed 19 January 2014.

reference and an important benchmark to assess the potential implications of changes to the EU system.[29]

In order to provide a benchmark to assess the effectiveness of the collective redress regime envisaged in the EU, this paper first outlines the core features of the US class action mechanism, then considers whether features of the US regime resulting in abusive litigation are nevertheless pertinent to the EU.

The US–EU Safeguards Against Abusive Collective Litigations

An overview of the US rules related to collective redress appears necessary in the evaluation of the EU proposed regime, because the US system is used as a reference to explain benefits and to warn about disadvantages.

According to the Commission, the US system is often perceived as encouraging unmeritorious or vexatious litigation.[30] The Commission warns that such a system should be examined carefully and lessons drawn from it, as well as from the experience of other foreign jurisdictions in this field, as appropriate. The Commission emphasises that the protection of rights deriving from Community competition law is important, but it is also important to keep excessive litigation in check and to try to achieve some form of moderation in the enforcement system.[31] However, although the US system is professed as encouraging unmeritorious and indeed vexatious litigations, it contains several safeguards against such litigation which are absent in the collective redress mechanism proposed in the EU. Consequently, the concern is that, potentially, an even greater amount of abusive litigation may be experimented in the EU.

The US class action mechanism is essentially based on the Clayton Act which entitles any victim of antitrust law infringements to recover threefold the damages he/she suffered (treble damages),[32] and on the Federal Rules of Civil Procedure which govern the conduct of all civil actions brought in federal district courts, including collective actions.[33]

Before a class action lawsuit can be filed, four prerequisites must be satisfied in order to be certified as a class by the courts. Under the Federal

[29] Paolo Buccirossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies, 2012), 13.
[30] Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 47.
[31] Ibid.
[32] Clayton Act (2006) 15 U.S.C., § 4.
[33] US Federal Rules of Civil Procedure, December 2010.

Rules of Civil Procedure, one or more members of a class may sue or be sued as representative parties on behalf of all members only if:

> (a) the class has to be so numerous that the joining of other parties would be impractical;
>
> (b) there are questions of law or fact common to the class;
>
> (c) the claims or defences of a represented party are typical of those of the class; and
>
> (d) the representative party can adequately represent the interests of the entire class.[34]

In essence, a class action becomes available when the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.[35] One of the most significant features of the US class action mechanism is the 'opt-out' provision. As opposed to 'opt-in' class actions, in which all members of a class desiring to share in the recovery must come forward, opt-out class actions automatically include all members unless they affirmatively ask to be excluded (that is, 'opt-out'). Under the US opt-out scheme, for those who fail to 'opt-out' the final judgment, or settlement, is binding.[36]

In order to facilitate collective actions in the EU, the study requested by the European Parliament points out that the ability of a collective redress mechanism to bring effective compensation to the victims of a competition law infringement depends in fact on how the procedural and substantive rules affect the incentives of the parties.[37] The study stresses that 'Ideally a well-functioning mechanism should provide incentives to encourage well-grounded actions while at the same time envisaging safeguards that protect from meritless claims'.[38] In essence the study suggests that: (a) an opt-in model has the advantage of limiting the risk of unmeritorious actions, although it results in a low participation rate; (b) both representative actions and collective actions should be allowed and no restriction should be placed on the ability of any subject to bring a collective action to claim compensation; (c) the collective redress system should also be open to small enterprises; and (d) private funding mechanisms should be used to foster

[34] Ibid., rule 23 (a).
[35] Ibid., rule 23 (b) (3).
[36] For a detailed discussion of the US class action certification, see: Tiana Leia Russell, 'Exporting Class Actions to the European Union', *Boston University International Law Journal* (2010), 28, 141.
[37] Paolo Buccirossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies, 2012).
[38] Ibid., 13.

consumers and small enterprises as they are unlikely to induce excessive litigation.[39]

Considering the state of play of collective redress in the EU, it appears that there is a trend towards adopting aggregate litigation devices. The concern is that such an approach seems to leave the operation of collective actions in the hands of private parties without any effective control. The emphasis seems to be on victims' compensation, with very little importance given to side-effects, such as that of abusive litigation, stemming from private actions. The EU Parliament acknowledges the risk when it states that it:

> Notes the efforts made by the US Supreme Court to limit frivolous litigation and abuse of the US class action system, and stresses that Europe must refrain from introducing a US-style class action system or any system which does not respect European legal traditions.[40]

Nevertheless, despite this acknowledgement, the position taken by the EU Parliament seems to follow the recommendations contained in the study,[41] as those features of the US system that have proved to be detrimental to honest competition, such as unjustified out-of-court settlements,[42] in the EU appear to be encouraged. While the Parliament 'reiterates that safeguards must be put in place … in order to avoid unmeritorious claims and misuse of collective redress, so as to guarantee fair court proceedings …',[43] out-of-court settlement is considered to be an efficient mechanism to resolve antitrust disputes between private claimants and undertakings deemed to have violated competition rules. In commenting on 'Alternative Dispute Resolution' (ADR), the EU Parliament states that:

> [T]he availability of an effective judicial redress system would act as a strong incentive for parties to agree an out-of-court settlement, which is likely to avoid a considerable amount of litigation; encourages the setting-up of ADR schemes at European level so as

[39] For the full version of the recommendations, see: Paolo Buccirossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies, 2012), 13.

[40] European Parliament, 'Towards a Coherent European Approach to Collective Redress', *2011/2089(INI) Resolution of 2 February 2012*, 2 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0021+0+DOC+XML+V0//EN> accessed 3 February 2014.

[41] Paolo Buccirossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies, 2012).

[42] Christopher R. Leslie, 'De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation', *Arizona Law Review* (2008), 50, 1009, fn. 22.

[43] European Parliament, 'Towards a Coherent European Approach to Collective Redress', *2011/2089(INI) Resolution of 2 February 2012*, 20 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0021+0+DOC+XML+V0//EN> accessed 3 February 2014.

> to allow fast and cheap settlement of disputes as a more attractive option than court proceedings.[44]

The concern is: which safeguards are in place to ensure that businesses in the EU are not coerced (or at very least to limit the phenomenon) into the so called 'blackmail settlement'[45] stemming from possible abusive private actions? As commented by Leslie, the US Congress sought to prevent collusive settlements by requiring trial judges to approve all class action settlements in federal court.[46] Indeed, under the US Federal Rules of Civil Procedure, the court may approve a proposed settlement only after a hearing and on finding that it is fair, reasonable and adequate.[47] However, none of these elements appear in the envisaged EU collective redress mechanism. In turn, this could result in a propensity of private parties to commence antitrust litigation as, due to lack of safeguards, there are good chances of success, hence, of obtaining damages.

Under the US provisions, in distinguishing reasonable from inadequate settlements, courts look at a number of factors. The most common test is that provided by the US Court of Appeals in *Grinnell*, in which the court held that in order to determine the adequacy of a proposed settlement, factors specifically to be considered include:

> (1) the complexity, expense and likely duration of the litigation;
>
> (2) the reaction of the class to the settlement;
>
> (3) the stage of the proceedings and the amount of discovery completed;
>
> (4) the risks of establishing liability;
>
> (5) the risks of establishing damages;
>
> (6) the risks of maintaining the class action through the trial;
>
> (7) the ability of the defendants to withstand a greater judgment;
>
> (8) the range of reasonableness of the settlement fund in light of the best possible recovery;
>
> (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.[48]

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[44] Ibid., 25.
[45] Paolo Buccirossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies, 2012), 41; Christopher R. Leslie, 'De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation', *Arizona Law Review* (2008), 50, 1009.
[46] Christopher R. Leslie, 'De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation', *Arizona Law Review* (2008), 50, 1009, 1010.
[47] US Federal Rules of Civil Procedure, December 2010, rule 23 (e) (2).
[48] *City of Detroit v. Grinnell Corp*. 495 F2d 448, 463 (2d Cir 1974), 463.

This test has been subject to several decisions, and courts have held some factors more important than others.[49] However, perhaps the more important refinement is that the proposed settlement cannot be judged without reference to the strength of claimants' claims. Indeed, 'The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement'.[50] As Leslie emphasises,[51] all courts recognise that the adequacy of the amount offered in settlement '… must be judged not in comparison with the best possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of the plaintiffs' case'.[52] Hence, the adequacy of a proposed settlement represents a compromise between the strengths of the claimants' case and the possible success of the defendants' defences.[53] Ultimately, it appears that judges must balance the Grinnell factors to determine whether the settlement is fair, adequate and reasonable in the circumstances. Arguably, this judicial evaluation discourages unmeritorious claims by alerting potential claimants that even if they succeed in forcing defendants into a settlement, the matter must nevertheless be endorsed by the court.

This significant judicial scrutiny, however, seems to be absent from the collective redress regime envisaged in the EU. The approach taken is that 'The "loser pays" principle seems efficient and apt to discourage frivolous claims'.[54] Such an approach raises several issues, each of which requires a separate analysis – for instance, the rationale behind a decision to settle an antitrust case. What lessons can be learned from the approach taken by the US antitrust authorities towards out-of-court settlements and the consequences of an excessive reliance on the 'loser pays' rule? It is to these issues that the analysis now turns.

Antitrust Settlements

Propensity to Settle

In essence, the decision to settle is an investment decision. Whether or not to rely on the legal system and what action to take once a suit is filed depends on the net present value of the costs and benefits. Accordingly, a

[49] For a discususion on this point, see Christopher R. Leslie, 'De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation', *Arizona Law Review* (2008), 50, 1009, 1017.
[50] *City of Detroit v. Grinnell Corp.* 495 F2d 448, 463 (2d Cir 1974), 455.
[51] Christopher R. Leslie, 'De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation', *Arizona Law Review* (2008), 50, 1009, 1018.
[52] *In re PaineWebber Ltd. P'ships Litigation* 171 FRD 104, 130 (SDNY 1997), 130.
[53] *Frank v. Eastman Kodak Co.* 228 FRD 174, 186 (WDNY 2005), 186.
[54] Paolo Buccirossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies, 2012), 64.

firm propensity to settle cannot be assessed only by a legal analysis but is better explained by including an economic prospective. Furthermore, as there is evidence of settlements involving only one corporate defendant and only one corporate claimant, the antitrust defendant's propensity to settle is not only related to follow-on claims, for instance, after conclusion of the antitrust authority investigation, but is also a concern in stand-alone litigation. Due to high settlement rates of antitrust litigation, the majority of which result from private actions, the issue of propensity to settle is of relevance in the evaluation of the proposed EU collective redress mechanism. Arguably, not enough significance has been given in the EU to this matter. This part of the paper provides an appraisal of the issues involved.

Data from the Georgetown Private Antitrust Litigation Project, based on over 2,350 antitrust cases filed in five districts between 1973 and 1983, shows that 73.3 per cent of the cases were settled.[55] A study of the phenomena, taking into account the financial characteristics of the firms and their accounting data, conducted by Bizjak and Coles on a sample of 322 antitrust cases shows a settlement rate of 70 per cent.[56] A study conducted by Perloff and Rubinfeld, based on 145 observations specifically related to antitrust class action litigations, reports that 78.6 per cent of cases were settled.[57] Arguably, the similar figures resulting from different studies are consistent with the notion that settlement is more relevant to antitrust than other areas of law. Furthermore, these figures might understate the scale of settlements as it is generally accepted that while there have been more cases involving private claims for damages than those cases reported in some of the literature,[58] these have typically been settled out of court and therefore little information is available in the public domain.[59] As Breit and Elzinga

[55] Steven C. Salop and Lawrence J. White, 'Economic Analysis of Private Antitrust Litigation', *The Georgetown Law Journal* (1986), 74, 1001, 1010 table 8.

[56] John M. Bizjak and Jeffrey L. Coles, 'The Effect of Private Antitrust Litigation on the Stock-Market Valuation of the Firm', *The American Economic Review* (1995), 85, 436, 457 table 6.

[57] Jeffrey M. Perloff and Daniel L. Rubinfeld, 'Settlements in Private Antitrust Litigation', in Lawrence J. White (ed.), *Private Antitrust Litigation: New Evidence, New Learning* (Cambridge, MA: MIT Press, 1988), 166.

[58] Emily Clark, Mat Hughes and David Wirth, 'Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules', fn. 2, *Analysis of Economic Models for the Calculation of Damage, Ashurst*, 31 August 2004 <http://ec.europa.eu/competition/antitrust/actionsdamages/study.html> accessed 9 January 2014.

[59] Barry J. Rodger, 'Private Enforcement of Competition Law, the Hidden Story: Competition Litigation Settlements in the United Kingdom, 2000–2005', *European Competition Law Review*, (2008), 96; see also Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios', 39, *Report for the European Commission*, 21 December 2007 <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html> accessed 19 January 2014; Emily Clark, Mat Hughes and David Wirth, 'Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules', fn. 2, *Analysis of Economic Models for the Calculation of Damage, Ashurst*, 31 August 2004 <http://ec.europa.eu/competition/antitrust/actionsdamages/study.html> accessed 9 January 2014.

note, collecting data on the magnitude of settlements effect is problematic because:

> Defendant firms and their counsel are reluctant to provide data on either the number of such settlements or the amounts of money involved, for fear that the data would provoke the fabrication of additional lawsuits against their companies and clients, or stockholder reprisals, or both.[60]

Various authors, however, have conducted studies on the issue of antitrust settlements providing reliable data. One of these is that conducted by Bizjak and Coles.[61]

In the study performed by Bizjak and Coles, a firm enters the sample each time it is either a defendant or a claimant filing a lawsuit or settlement in an inter-firm lawsuit. In total, firms enter the sample 550 times.[62] The authors analyse how the likelihood of settlement is influenced by litigation costs and the uncertainty surrounding the outcome of the dispute. The higher the joint costs of the conflict and the more uncertainty as to the outcome, the greater is the likelihood of an out-of-court settlement. The evidence collected suggests that the potential for follow-on suits and behavioural restrictions that harm defendants more than they help claimants are major sources of costs and inconvenience for antitrust defendants. To the extent that a request for injunctive relief or higher monetary damages increases the range or uncertainty of the possible outcomes from trial, both increase the likelihood of settlement.[63] Therefore is not the prospect of high damages that in itself is a determining factor prompting a settlement; indeed according to Bizjak and Coles, 'the presence of a request for injunctive relief and higher litigation-related costs of financial distress both increase the chances that a firm will settle a dispute'.[64]

Bhagat points out that direct costs such as lawyers' fees, court costs and damages are well documented; indirect costs, in contrast, are potentially more important but less well documented.[65] These indirect costs, referred to as financial distress, are a consequence of the very fact that the company is involved in the litigation. Financial distress costs include lower sales or

[60] William Breit and Kenneth G. Elzinga, 'Private Antitrust Enforcement: The New Learning', *Journal of Law and Economics* (1985), 28(2), 405, 433.
[61] Sanjai Bhagat, James A. Brickley and Jeffrey L. Coles, 'The Costs of Inefficient Bargaining and Financial Distress', *Journal of Financial Economics* (1994), 35, 221.
[62] Ibid., 225.
[63] John M. Bizjak and Jeffrey L. Coles, 'The Effect of Private Antitrust Litigation on the Stock-Market Valuation of the Firm', *The American Economic Review* (1995), 85, 436, 453.
[64] Ibid., 438.
[65] Sanjai Bhagat, James A. Brickley and Jeffrey L. Coles, 'The Costs of Inefficient Bargaining and Financial Distress', *Journal of Financial Economics* (1994), 35, 221, 222.

higher factor costs due to the inability to do business with customers and suppliers on favourable terms, the greater difficulty of raising funds or obtaining credit, the distraction of management, and the resulting inefficient investment policy.[66] In this respect a distinction must be made between economic distress and financial distress. Economic distress is the result of poor operating performance in principle unconnected with the litigation. For instance, underlying business problems make liquidation a viable option.[67] As explained by Ross, financial distress is a situation where a firm's operating cash flows are not sufficient to satisfy current obligations (such as trade credits or interest expenses) and the firm is forced to take corrective action.[68] Financial distress results from leverage in a firm's capital structure. It occurs when the firm has trouble meeting its fixed obligations (for example, interest payments) because of insufficient cash flow. Financial distress may lead a firm to default on a contract, and it may involve financial restructuring between the firm, its creditors and its equity investors. Usually the firm is forced to take actions that it would not have taken if it had sufficient cash flow.[69] In principle, a firm can be in financial distress without being in economic distress. However, as Bhagat puts it, 'lawsuits are interesting because they can place a firm in financial distress'.[70] Consequently, a lawsuit can trigger a firm's fiscal disruption. As explained by Bhagat, 'Firms in financial distress are usually also in economic distress and hence face costs from reduced customer support, reduced trade credit, etc., independent of capital structure'.[71]

It is worth noting that at the commencement of a legal action, the antitrust defendant experiences significant losses in terms of waste of employees' time,[72] negative impact on the stock market[73] and loss of the

[66] Ibid., 223.
[67] Ibid., fn. 1.
[68] Stephen A. Ross, Randolph W. Westerfield and Jeffrey Jaffe, *Corporate Finance*, vol. 1, 6th edn (Boston, MA: McGraw-Hill Primis, 2006), 859.
[69] Ibid.
[70] Sanjai Bhagat, James A. Brickley and Jeffrey L. Coles, 'The Costs of Inefficient Bargaining and Financial Distress', *Journal of Financial Economics* (1994), 35, 221, 223.
[71] Ibid., 223.
[72] Paul V. Teplitz, 'The Georgetown Project: An Overview of the Data Set and its Collection', in Lawrence J. White (ed.), *Private Antitrust Litigation: New Evidence, New Learning* (Cambridge, MA: MIT Press, 1988), 72–73; Robert H. Lande, 'Are Antitrust "Treble" Damages Really Single Damages?' *Ohio State Law Journal* (1993), 54, 115, 142; Sanjai Bhagat, James A. Brickley and Jeffrey L. Coles, 'The Costs of Inefficient Bargaining and Financial Distress', *Journal of Financial Economics* (1994), 35, 221, 223.
[73] Daniel R. Fischel and Michael Bradley, 'The Role of Liability Rules and the Derivative Suit in Corporate Law: A Theoretical and Empirical Analysis', *Cornell Law Review* (1986), 71, 261, 277–281; Sanjai Bhagat, James A. Brickley and Jeffrey L. Coles, 'The Costs of Inefficient Bargaining and Financial Distress', *Journal of Financial Economics* (1994), 35, 221, 223.

ability to engage in preferred/profitable business practices.[74] Such circumstances create the conditions in which the defendant ends in financial distress before and, regardless of the conclusion, after the case. In turn these conditions result in the defendant's propensity to settle at an early stage. As documented by Bizjak and Coles, 'dollar damage requests do not appear to influence settlement behaviour in litigation'.[75] Rather, 'the presence of a request for injunctive relief and higher litigation-related costs of financial distress both increase the chances that a firm will settle a dispute'.[76] These results are consistent with the results of Bhagat that:

> [I]n litigation, the defendant's financial distress appears to be a net source of leakage of shareholder wealth. That wealth leakages and financial-distress costs are central in litigation suggests that these costs are also likely to be important in other potentially more significant cases of bargaining among firms.[77]

According to Bhagat, the defendant firms experience wealth gains from settling lawsuits.[78] Hence it explains the defendant's propensity to settle. Stock-market data shows a significant positive relation between abnormal market returns of defendants upon announcement of settlement and at the news of defendant relief from costs of financial distress arising from the dispute.[79] These results also show that, while the announcement of the filing results in a decline in the combined equity value of both firms, the gains from settlement are related to the defendant's relief from financial distress.[80] The authors concluded that one possible explanation for the asymmetry in wealth effects upon settlement is that the defendant receives relief from financial distress associated with the litigation, whereas the plaintiff receives no such benefits.[81] Given the damaging factors of a litigation and the relief when it is concluded, it can be seen how the antitrust defendant has a general propensity to settle. The rationale is that once the uncertainty surrounding the legal action is over, the defendant firm's officials can concentrate on running the business, the firm can resume trading in

[74] John M. Bizjak and Jeffrey L. Coles, 'The Effect of Private Antitrust Litigation on the Stock-Market Valuation of the Firm', *The American Economic Review* (1995), 85, 436, 437; Sanjai Bhagat, James A. Brickley and Jeffrey L. Coles, 'The Costs of Inefficient Bargaining and Financial Distress', *Journal of Financial Economics* (1994) 35, 221, 223.
[75] John M. Bizjak and Jeffrey L. Coles, 'The Effect of Private Antitrust Litigation on the Stock-Market Valuation of the Firm', *The American Economic Review* (1995), 85, 436, 437.
[76] Ibid., 438.
[77] Sanjai Bhagat, James A. Brickley and Jeffrey L. Coles, 'The Costs of Inefficient Bargaining and Financial Distress', *Journal of Financial Economics* (1994), 35, 221, 224.
[78] Ibid., 231.
[79] Ibid., 232 table 4.
[80] Ibid., 224.
[81] Ibid., 243.

profitable practices and in turn it regains the trust of customers and that of the stock market.

A further point to note is that, as documented by Bhagat, while the defendant firm tends to lose expected wealth from the filing of each of the various types of lawsuits, the defendant's stock-market returns at the announcement of settlement are significantly larger for antitrust suits than for other suits.[82] Stated differently, an antitrust defendant is more damaged by a lawsuit than other defendants sued for other issues, hence settling gives the antitrust defendant significant benefits. These findings are based on a sample of 330 firms involved in inter-firm lawsuits in action related to breach of contract, patent infringement, antitrust, corporate control and a group defined by the author as 'other', namely slander, product liability, securities/disclosure violations and bankruptcy.[83] The study includes both stated intent to file or settle and actual filings and settlements. Of the 83 lawsuits actually settled, 29 were antitrust cases, 15 were breach of contract, 17 were patent infringements, five were corporate control and 17 were others.[84] The authors do not fully explain the reasons why antitrust defendants have an accentuated propensity to settle. However, they indicate a few possible causes: a) court-imposed behavioural constraints that harm the defendant; b) indirect costs for the defendant from an increased probability of bankruptcy and financial distress; c) information revealed about the firm's prospects that is not directly related to the costs and benefits of the suit; and d) the possibility of follow-on suits against the defendant.[85]

Arguably, all of these issues are applicable to the collective redress mechanism envisaged in the EU. The damaging effect of court-imposed behavioural constraints and the financial and economic distress resulting from involvement in antitrust litigation are issues that cannot be denied. It is debatable whether such matters are appropriately considered in the Commission proposals. As antitrust lawsuits usually involve large companies, bad press – for instance, about the company's prospective relocation to another country revealed at the wrong time – could damage the company, and these issues are outside the remit of antitrust rules. With regard to the possibility of follow-on suits against the defendant, which appear to be particularly relevant to antitrust actions,[86] considering the approach taken in the EU, this issue too is of concern to business trading in

[82] Ibid., 229–231 table 3.
[83] Ibid., 230 table 3.
[84] Ibid., 226 table 1.
[85] Ibid., 233–234.
[86] Ibid., 229231 table 3.

the EU. Particularly in relation to collective redress (but also significant in individual actions), it is well accepted that antitrust actions often follow an antitrust decision taken either by a National Competition Authority or by the Commission.[87] Under Article 16(1) of Regulation 1/2003, the decision taken by the European Commission is binding in all Member States and represents a non-rebuttable presumption as far as the existence of the infringement is concerned.[88] Hence, the only item that a claimant has to prove before obtaining damages is simply that he was affected by the breach. Furthermore, once the defendant is found guilty of an antitrust infringement, the Commission seems to run a campaign in order to invite private parties to come forward and claim damages. Examples include the case involving 11 air cargo carriers being fined a total of €799 million by the Commission, and the case of producers of TV and computer monitor tubes being fined €1.47 billion by the Commission. In both announcements the Commission states:

> 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 and seek damages. The case law of the European Court of Justice (ECJ) and the Antitrust Regulation (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.[89]

Considering the legal basis for follow-on actions and the broadcasted possibility of damages awards, it can be seen that, confronted with a private action in the EU, antitrust defendants will have a propensity to settle at any early stage in an attempt to avoid the implications resulting from the continuation of the litigation. Whether, as a result of a private action, an early settlement is beneficial or detrimental is debatable. On one hand, the avoidance of costs and implications resulting from the litigation can be

[87] Paolo Buccirossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies, 2012), 24. See also generally Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios', *Report for the European Commission*, 21 December 2007 <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html> accessed 19 January 2014.

[88] Paolo Buccirossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies, 2012), 24.

[89] Antitrust, 'Commission Fines 11 Air Cargo Carriers €799 Million in Price Fixing Cartel', *IP/10/1487*, 9 November 2010 <http://europa.eu/rapid/press-release_IP-10-1487_en.htm?locale=en> accessed 9 January 2014; Antitrust, 'Commission Fines Producers of TV and Computer Monitor Tubes €1.47 Billion for Two Decade Long Cartels', *IP/12/1317*, 5 December 2012 <http://europa.eu/rapid/press-release_IP-12-1317_en.htm> accessed 11 March 2014.

beneficial to both the claimant and the defendant, and in turn for the public finances by saving court expenses. On the other hand, as antitrust rules are not always clear in scope, is it appropriate to settle a case out of court before it is ascertained that the defendant did in fact violate antitrust rules? This issue is explored in the next part of this paper.

The Uncertainty of Antitrust Rules

A further reason explaining both the higher tendency to settle of antitrust defendants when compared to other defendants and the higher possibility of follow-on suits which appears more accentuated in antitrust actions when compared to other areas[90] is arguably the uncertainty surrounding the prohibitions contained in antitrust rules.[91] A rational potential claimant might prefer awaiting the resolution of the antitrust authority case before filing a claim, hence free-riding over the public enforcement and making a claim only if he can foresee – now with accuracy as the breach is established – the possibility of monetary awards. Furthermore, evidence suggests that the uncertainty of antitrust rules can be exploited by private parties for private interests even before the conclusion of the antitrust authority case.

It is well documented that the lack of clarity of antitrust rules makes predicting the extent of their application a rather difficult quest. As Melamed explains, consider, for example, an information exchange through a trade association.[92] Such exchanges are generally pro-competitive, but as we move along the range, depending on the type of information exchanged, the exchange could become anti-competitive and unlawful. Or, consider a joint venture that justifies production facilities but at some point turns into an anti-competitive practice because of the creation of market power.[93] For instance, the Court of Justice in *Wouters* noted that not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties falls within antitrust prohibitions.[94] However, in these instances the line between pro-

[90] Sanjai Bhagat, James A. Brickley and Jeffrey L. Coles, 'The Costs of Inefficient Bargaining and Financial Distress', *Journal of Financial Economics* (1994), 35, 221, 229–232.
[91] For an example in which the CFI misinterpreted the concept of abuse of dominant position, see Rosa Greaves, 'Magill est arrive ... RTE and ITP v Commission of the European Communities', *European Competition Law Review* (1995), 244.
[92] Douglas A. Melamed, 'Damages, Deterrence, and Antitrust – A Comment on Cooter', *Law and Contemporary Problems* (1997), 60(3), 93, 94.
[93] Ibid.
[94] C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577, 97.

competitive and anti-competitive, lawful and unlawful, is uncertain, and the consequence of crossing the line is exposure to liability.[95]

Page explains that existing definitions of substantive antitrust liability bring many efficient business arrangements arguably within the prohibition of the antitrust laws.[96] Posner contends that if antitrust doctrine were pellucid and courts unerring in applying it to particular disputes, there would be no problem – unmeritorious cases would fail and the extortion problem would disappear – but in reality these conditions are unachievable.[97] Easterbrook emphasises:

> If the substantive rules could discriminate perfectly between efficient and monopolistic conduct, no one would worry about penalties. Those whose conduct was beneficial would be left alone; others could be hanged. But no one thinks that courts can assess the full welfare consequences of all business conduct.[98]

Cavanagh explains that antitrust laws are somewhat imprecise. The line between what is permitted and what is forbidden is often blurred.[99] McAfee points out that the antitrust field is a particular one, because claimants are often competitors or takeover targets of defendants.[100] Rodger reports that 61.1 per cent of antitrust cases filed in the UK between 2000 and 2005 were settled because of the uncertainty of litigation.[101] This means that, as emphasised by Breit and Elzinga, the vast majority of damages paid as a result of antitrust litigation (or its threat) come through the settlement process.[102]

The consequence of the uncertainty surrounding the content of antitrust rules is that, as argued by Perloff and Rubinfeld, whether parties to private antitrust lawsuits settle or go to trial depends on their 'beliefs' about the

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[95] Douglas A. Melamed, 'Damages, Deterrence, and Antitrust – A Comment on Cooter', *Law and Contemporary Problems* (1997), 60(3), 93, 94.

[96] William H. Page, 'The Scope of Liability for Antitrust Violations', *Stanford Law Review* (1985), 37, 1445, 1445.

[97] Richard A. Posner, *Antitrust Law* (Chicago: University of Chicago Press, 2001), 275. See also Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books, 1978).

[98] Frank H. Easterbrook, 'Detrebling Antitrust Damages', *Journal of Law and Economics* (1985), 28, 445, 449.

[99] Edward D. Cavanagh, 'Detrebling Antitrust Damages: An Idea Whose Time Has Come?' *Tulane Law Review* (1987), 61, 777, 780.

[100] Preston R. McAfee, Hugo M. Mialon and Sue H. Mialon, 'Private v. Public Antitrust Enforcement: A Strategic Analysis' (2008), Emory Law and Economics Research Paper No 05-20 <http://ssrn.com/abstract=775245> accessed 2 February 2014.

[101] Barry J. Rodger, 'Private Enforcement of Competition Law, the Hidden Story: Competition Litigation Settlements in the United Kingdom, 2000–2005', *European Competition Law Review* (2008), 96 table 23.

[102] William Breit and Kenneth G. Elzinga, 'Private Antitrust Enforcement: The New Learning', *Journal of Law and Economics* (1985), 28(2), 405, 421.

likely trial outcome and on their attitudes toward risk.[103] It is important to note that in such circumstances the likelihood of settlement depends on the 'parties' beliefs' about trial outcomes. Consequently, the uncertainty of antitrust rules, coupled with the power given to private parties under a private enforcement regime, makes antitrust a fertile ground for extortion by coercing defendants into the settlement of possibly unmeritorious cases.

Uncertainty about the outcome of a case calls the defendant to carry out a delicate, but highly risky, balancing exercise. The defendant must evaluate the benefits of accepting a settlement with the claimant/s against the possibility of losing the case in courts and, in addition to further disruption in defending the case, potentially being required to pay out damages exceeding the price of the settlement. Defendants considering the risks of not settling, particularly in collective actions, are confronted with potential staggering levels of liability. The US experience shows that private treble damage actions that coerce unjust settlements may have an enhanced validity in the context of class actions.[104] The next part of the analysis focuses on the issue of unwarranted settlements.

Unwarranted Settlements – The 'Loser Pays' Rule

This part of the analysis deals with a scenario in which the claimant/s in an antitrust action settle with the defendant/s after the initiation of a legal proceeding or before reaching the hearing phase, hence avoiding the judicial decision. This has to be distinguished from the administrative settlement procedure under EU Regulation 1/2003 available for and used by companies to settle their cases with the antitrust authority without court proceedings initiated by that authority.[105]

The issue of unwarranted settlement as a result of antitrust class action appears significant because, as reported by Leslie:

> Unfortunately, the pressure to settle exists even with respect to frivolous filings, which are an ongoing concern in the class action context, and are as costly to litigate as legitimate claims. The pressure on defendants to settle even non-meritorious claims gives

[103] Jeffrey M. Perloff and Daniel L. Rubinfeld, 'Settlements in Private Antitrust Litigation', in Lawrence J. White (ed.), *Private Antitrust Litigation: New Evidence, New Learning* (Cambridge, MA: MIT Press, 1988).
[104] Yosef J. Riemer, 'Sharing Agreements Among Defendants in Antitrust Cases', *The George Washington Law Review* (1983–1984), 52, 289, 294–295.
[105] Administrative settlements are Commitment Decisions under Article 9 of Regulation 1/2003 and settlement of cartel cases under Article 7 and Article 23 of Regulation 1/2003. For addition information, see Wouter P.J. Wils, 'Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No 1/2003', *World Competition* (2006), 29(3).

> plaintiffs substantial leverage – so much so that some courts and commentators characterize it as 'blackmail'.[106]

In principle, settlements produce a substantial saving in judicial resources and hence aid in reducing backlog in the courts. Defendants may find that high costs of litigation combined with the risk of an adverse judgement are less desirable than an early settlement. Claimants may also find that settlement provides at least some recovery without the burden of litigation.[107] In this respect, settlement promotes efficient use of private resources by reducing litigation and related costs. However, in the EU the problem of unduly settlements (or blackmail settlements) appears to be acknowledged,[108] but arguably not enough importance is given to an issue that can have significant detrimental effect on businesses trading in the EU. For instance, the report for the Commission on potential benefits of the notion of private enforcement and collective redress, which spreads over several hundred pages, contains very little in relation to unmeritorious claims, hence on the consequences of them, such as that of unduly settlements.[109] Indeed, the report suggests a solution to the problem which, although not without its merit, appears insufficient to effectively limit the problem of unmeritorious claims. The report states:

> [A]s regards fee allocation rules, a loser-pays rule such as the one applied – with variants – in EU countries seems to strike a more satisfactory balance than the each party bears her own cost rule, as the two-way shifting mechanism discourages unmeritorious claims – indeed, a plaintiff with a low-probability of success at trial will refrain from initiating a private action, and mostly high-probability cases will be brought.[110]

The study prepared for the EU Parliament, specifically on collective redress, contends that 'The "loser pays" principle seems efficient and apt to discourage frivolous claims'.[111] Moreover, the study stresses:

> As long as the 'loser party pays' rule remains valid and punitive damages are prohibited, we consider it unlikely that the

[106] Christopher R. Leslie, 'De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation', *Arizona Law Review* (2008), 50, 1009, fn. 22.
[107] Yosef J. Riemer, 'Sharing Agreements Among Defendants in Antitrust Cases', *The George Washington Law Review* (1983–1984), 52, 289, 306.
[108] Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios', *Report for the European Commission*, 21 December 2007 <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html> accessed 19 January 2014.
[109] Ibid.
[110] Ibid., 214.
[111] Paolo Buccirossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies, 2012), 64.

> introduction of some forms of entrepreneurship, either by lawyers or by third parties, may provoke a surge in meritless actions.[112]

Stated differently, the 'loser party pays' rule in the EU is in effect considered as the solution for all detrimental side-effects of collective action as:

> This rule is efficient because by forcing parties to consider the entire cost of the trial when making decisions it discourages frivolous claims and promotes the use of cheaper alternatives to obtain compensation (e.g. out-of-court settlements).[113]

The EU Parliament seems to endorse this strategy as it states:

> Member States are to determine their own rules on the allocation of costs, under which the unsuccessful party must bear the costs of the other party in order to avoid the proliferation of unmeritorious claims in an EU-wide collective redress mechanism.[114]

In the EU there appears to be a trend in elevating the 'loser pays' principle above its realistic applicability. For instance, in the UK the Department for Business, Innovation & Skills, with regard to the issue of vexatious claims, contends that:

> [A]s companies facing vexatious claims would be able to claim back costs in court if the case is unsuccessful, there would be a zero net cost to business. Any other costs to business would arise from not being compliant with the competition act.[115]

Such approaches, both that of the EU and that of the UK, if implemented, raise serious concerns as the 'loser pays' rules might not be as effective as it is contended. Even when the defendant succeeds in defending his actions, the costs for an antitrust defendant in dealing with a court case are well above and beyond the monetary recoup of its legal costs. Regardless of the outcome of the case, upon filing of a claim by a private party, the antitrust defendant experiences significant losses at least in three areas: first, waste of employees' time because of disruption of employees' routine, or time spent by employees discussing the case;[116] second, negative reaction of the

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[112] Ibid., 41.

[113] Ibid., 89.

[114] European Parliament, 'Towards a Coherent European Approach to Collective Redress', 20, *2011/2089(INI) Resolution of 2 February 2012* <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0021+0+DOC+XML+V0//EN> accessed 3 February 2014.

[115] Department for Business, Innovation & Skills, 'Private Actions in Competition Law: A Consultation on Options for Reform – Final Impact Assessment', 49, *BIS – 13-502*, January 2013 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69124/13-502-private-actions-in-competition-law-a-consultation-on-options-for-reform-final-impact.pdf> accessed 12 March 2014.

[116] Paul V. Teplitz, 'The Georgetown Project: An Overview of the Data Set and its Collection', in Lawrence J. White (ed.), *Private Antitrust Litigation: New Evidence, New Learning* (Cambridge, MA: MIT Press, 1988), 72–73; Robert H. Lande, 'Are Antitrust "Treble" Damages Really Single Damages?' *Ohio State Law Journal* (1993),

stock market, triggered by the potential liability for damages;[117] third, loss of the ability to engage in preferred/profitable business practices as a result of expected imposition of behavioural restraints.[118]

Furthermore, particularly when it comes to collective actions, it is rather questionable that the 'loser pays' rule is sufficient to curb unmeritorious claims. It is worth recalling that in the US, despite the general rules that each party bears its own costs irrespective of the outcome of the case, a successful antitrust claimant can recover lawyers' fees and costs together with treble damages.[119] Nevertheless, the percentage of cases actually concluded by judgement is particularly low. Indeed, the literature shows that the percentage of antitrust cases settled, for those cases where the data is available, is above 70 per cent.[120] This figure must be considered against the background that, due to the uncertainty of antitrust rules, antitrust defendants have a propensity to settle even unmeritorious cases. Accordingly, the 'loser pays' rule under which the unsuccessful party bears the costs of the other party appears inefficient to avoid the proliferation of unmeritorious claims in an EU-wide collective redress mechanism, as the Parliament contends.[121]

Funding Opportunities and Settlements

A further significant reason why the 'loser pays' rule is inadequate to limit abusive litigation is the approach taken in the EU toward funding of legal costs. Arguably, the availability of such a mechanism has the potential to nullify any constraint on abusive litigation that the 'loser pays' rule in

54, 115, 142; Sanjai Bhagat, James A. Brickley and Jeffrey L. Coles, 'The Costs of Inefficient Bargaining and Financial Distress', *Journal of Financial Economics* (1994), 35, 221, 223.

[117] Daniel R. Fischel and Michael Bradley, 'The Role of Liability Rules and the Derivative Suit in Corporate Law: A Theoretical and Empirical Analysis', *Cornell Law Review* (1986), 71, 261, 277–281; Sanjai Bhagat, James A. Brickley and Jeffrey L. Coles, 'The Costs of Inefficient Bargaining and Financial Distress', *Journal of Financial Economics* (1994), 35, 221, 223.

[118] John M. Bizjak and Jeffrey L. Coles, 'The Effect of Private Antitrust Litigation on the Stock-Market Valuation of the Firm', *The American Economic Review* (1995), 85, 436, 437; Sanjai Bhagat, James A. Brickley and Jeffrey L. Coles, 'The Costs of Inefficient Bargaining and Financial Distress', *Journal of Financial Economics* (1994), 35, 221, 223.

[119] Clayton Act (2006) 15 U.S.C., § 15a.

[120] John M. Bizjak and Jeffrey L. Coles, 'The Effect of Private Antitrust Litigation on the Stock-Market Valuation of the Firm', *The American Economic Review* (1995), 85, 436, 457; Steven C. Salop and Lawrence J. White, 'Economic Analysis of Private Antitrust Litigation', *The Georgetown Law Journal* (1986), 74, 1001, 1010 table 8; Jeffrey M. Perloff and Daniel L. Rubinfeld, 'Settlements in Private Antitrust Litigation', in Lawrence J. White (ed.), *Private Antitrust Litigation: New Evidence, New Learning* (Cambridge, MA: MIT Press, 1988), 166.

[121] European Parliament, 'Towards a Coherent European Approach to Collective Redress', 20, *2011/2089(INI) Resolution of 2 February 2012* <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0021+0+DOC+XML+V0//EN> accessed 3 February 2014.

principle could impose. Indeed, there is evidence that funding mechanisms can actually incentivise unmeritorious claims.

For antitrust victims, seeking compensation for the harm suffered could be a costly and risky activity, which may be undertaken only by victims that can rely on substantial financial and organisational resources.[122] Consequently, several funding opportunities for collective redress actions have been introduced in various Member States. They include: contingency or conditional fees; private insurance products (such as after-the-event 'ATE' insurance); legal aid; contingency Legal Aid Funds (CLAFs); and private funds acting on a commercial basis.[123] However, while these mechanisms lower the financial hurdle by allowing a multitude of victims – who individually may have suffered damages of relatively small value – to share the costs of a lawsuit and/or to benefit from these funding opportunities, all of these arrangements have a common denominator: virtually all of them are risk-free for the claimants. If the collective action eventually fails, it is the insurance or the organisation that effectively bears the costs of litigation, with little or no costs for the group of individuals that commenced it. Conversely, as discussed above (–in the 'Unwarranted Settlements – The "Loser Pays" Rule' section), the defendant, being a business, is likely to be penalised in a number of ways, for instance, by negative reaction of the stock market, by inconvenience in defending the suit and by potential bad press that an antitrust case is likely to attract.

Under the heading of 'incentives and safeguards', the study on collective redress states:

> There are clear indications that private funding mechanisms are unlikely to induce excessive litigation … Contingency and conditional fee arrangements are efficient funding solutions that allocate the risk to the subject that can bear it more efficiently and force lawyers to act as gatekeeper to justice pre-assessing the merits of a case.[124]

Although the same document asserts that the US represents a natural point of reference and an important benchmark to assess the potential implications for the EU system,[125] the US negative experience in this respect appears to be disregarded.

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[122] Paolo Buccirossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies, 2012), 70.
[123] Ibid., 32, 70.
[124] Paolo Buccirossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies, 2012), 64.
[125] Ibid., 13.

Contingency and conditional fees are both arrangements between the lawyer and client in which the client payment to the lawyer depends on the success of the case. In a contingency arrangement the client pays the lawyer only if the case is successful, usually with a share of the sum received. Under a conditional fees arrangement the client pays a premium to the lawyer, above the agreed hourly fees, in the case of success. The notion that under these arrangements lawyers are forced to act as gatekeepers to justice appears too optimistic. Like any other professionals, lawyers have an unquestionable interest in their fees. Such an interest can be significant if it is proportioned to the type of case and/or outcome. The US experience of funding mechanisms indeed shows that lawyers have attempted to obtain a class action certification under the US provisions,[126] in cases where the trivial amount recoverable would not have justified any litigation at all.

For instance, the *Concepcion* case involved a husband and wife who entered into an agreement for the sale and servicing of cellular telephones with AT&T.[127] Alleging unfair charges by the telephone company of $30.22 in sales tax to customers, the Concepcions brought a putative class action. The case eventually reached the Supreme Court which dismissed the class action proceedings. In doing so, the US Supreme Court observed: 'What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?'[128]

A similar situation arose in the case of *Carnegie*. In this instance, recipients of income-tax refunds brought class actions against bank and tax preparers. Amongst other things, the claimants argued that, as the class contained millions of members, individual litigation was unmanageable. The court held:

> The fact that class certified in consumer fraud action … contained millions of members did not, by itself, make litigation unmanageable; if no settlement occurred and liability was found, separate proceedings could be held to determine entitlements of individual class members to relief.[129]

[126] US Federal Rules of Civil Procedure, December 2010, rule 23 (a); *City of Detroit v. Grinnell Corp.* 495 F2d 448, 463 (2d Cir 1974), 463.
[127] For a detailed discussion, see Albert A. Foer and Evan P. Schultz, 'Will Two Roads Still Diverge? Private Enforcement of Antitrust Law Is Getting Harder in the United States. But Europe May Be Making it Easier', *Global Competition Litigation Review* (2011), 107.
[128] *AT&T Mobility LLC v Concepcion* 131 SCt 1740, 1761.
[129] *Lynne A. Carnegie v Household International, Inc., et al.* 376 F3d 656, 657.

The court explained that 'the *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30'.[130]

Unquestionably, these cases are a clear example of lawyers attempting to exploit class action funding mechanisms in the hope of recovering fees resulting from a potential large judgement or settlement of a class action. Consequently, it is doubtful that contingency and conditional fee arrangements are efficient solutions to force lawyers to act as gatekeepers to justice by pre-assessing the merits of a case.[131] Indeed, it appears that such funding mechanisms can result in incentivising lawyers in failing unmeritorious claims.

Arguably, the collective redress regime envisaged in the EU lacks safeguards against abusive litigation. In these circumstances, a collective actions regime is unlikely to deliver the stated aims of creation and sustainment of a competitive EU economy.[132] To the contrary, as large damages deter competitive behaviour that promotes efficiencies, encourages frivolous lawsuits and forces unduly large settlements,[133] there is a risk of an adverse effect on businesses and in turn the wider EU economy.

Conclusion

Private enforcement in antitrust, whether individually or collectively, presents the risk that a private party exploits the litigation process strategically for private gain at the expense of social welfare. Private parties, as they are often competitors or takeover targets of defendants, may sue even if they know that their competitor did not violate the antitrust laws.[134] Moreover, as Posner puts it, if antitrust doctrines were clear and courts unerring in applying them to particular facts, the extortion problem would disappear, but these conditions appear to be unachievable.[135] Furthermore,

[130] Ibid., 661.
[131] Paolo Buccirossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies, 2012), 64.
[132] Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.1.
[133] William Breit and Kenneth G. Elzinga, 'Private Antitrust Enforcement: The New Learning', *Journal of Law and Economics* (1985), 28(2), 405, 430–435; see also Jeffrey M. Perloff and Daniel L. Rubinfeld, 'Settlements in Private Antitrust Litigation', in Lawrence J. White (ed.), *Private Antitrust Litigation: New Evidence, New Learning* (Cambridge, MA: MIT Press, 1988), 154.
[134] Preston R. McAfee, Hugo M. Mialon and Sue H. Mialon, 'Private v. Public Antitrust Enforcement: A Strategic Analysis' (2008), 4, Emory Law and Economics Research Paper No 05-20 <http://ssrn.com/abstract=775245> accessed 2 February 2014.
[135] Richard A. Posner, *Antitrust Law* (Chicago: University of Chicago Press, 2001), 275.

the bundling of rights can also have unwanted side-effects, such as that it may be profitable for a lawyer to conduct a lawsuit despite nominal damages for the class members.[136] To overcome, or at least to limit, these harmful side-effects of collective actions, effective safeguards are needed in the EU to prevent the formation and continuation of unmeritorious collective actions. Arguably, in the EU the focus is on facilitating collective actions without effective safeguards against abuses of the rules. Considering the antitrust defendant's propensity to settle out of court due to the uncertainty surrounding antitrust prohibitions, in the EU there appears to be an excessive reliance on the 'loser pays' rule as a safeguard against abusive litigation. Indeed, this rule appears to be nullified by the envisaged funding schemes. On consideration of the US experience of class action, the EU approach appears to be insufficient to curb unmeritorious suits and consequently the envisaged collective redress mechanism has the potential to result in inflated and exploitative antitrust litigations.

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[136] Hans-Bernd Schaefer, 'The Bundling of Similar Interests in Litigation: The Incentives for Class Action and Legal Actions Taken by Associations', *European Journal of Law and Economics* (2000), 9(3), 183, 184.

Defence of Property in Criminal Law and Tort

Dr Benjamin Andoh, Philip Jones and Simon Parsons

Abstract

Subject to exceptions, ownership of property is protected by the Human Rights Act 1998 (Part II, The First Protocol, Article 1). At common law a person has a right to use reasonable force to defend his property. However, there has not been any express statutory definition of 'reasonable force'. The nearest there is today is section 43 of the Crime and Courts Act 2013, which only concerns landowners. That section provides that, as against an intruder, a landowner's use of force will only be unreasonable if it is grossly disproportionate in the circumstances. Even though the literature abounds with works on private and public defence in criminal law exclusively and on defence of property in the civil law, again exclusively, the topic of defence of property in both the criminal law and tort has not been covered together. This article, therefore, aims to fill this gap. The first part looks at the position under the criminal law and the second part at the position in the law of tort. The last part concludes the paper. It is observed, *inter alia*, because section 3(1) of the Criminal Law Act 1967, a statutory provision of general application, allows a person to use reasonable force to prevent the commission of an offence; by implication, one may use reasonable force to defend one's property if doing so will prevent the commission of an offence.

Key words: defence of property; criminal law; reasonable force; self-defence; tort; trespass to land; distress damage feasant; abatement of nuisance

Introduction

The defence of property is a very important issue, *inter alia*, because ownership of property is, subject to exceptions, protected by the Human Rights Act 1998.[1] Moreover, although, at common law, a person has a right

[1] See Part II, The First Protocol, Article 1.

to use reasonable force to defend his property, there has not been any express statutory definition of 'reasonable force'. However, section 76 of the Criminal Justice and Immigration Act 2008 clarified the common law defence of self-defence. That section was amended by section 148 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which added the common law defence of property to the defences listed in section 76(2) of the Act of 2008 (namely, self-defence and use of reasonable force to prevent a crime, and so on), as will be looked at below. Besides, section 43 of the Crime and Courts Act 2013 provides that, as against an intruder, a landowner's use of force will only be unreasonable if it is grossly disproportionate in the circumstances. These statutory provisions are relevant to the issue of defence of property because the common law defences of self-defence and defence of property both require that any force used must be 'reasonable'.

The literature abounds with works on private and public defence in criminal law exclusively and on defence of property in the civil law, again exclusively.[2] However, the topic of defence of property in both the criminal law and tort has not been covered together. This article, therefore, aims to fill this gap. It has three parts: Parts A and B deal with the criminal law and tort, respectively, and part C contains the conclusion.

A Criminal Law

In the criminal law there is a common-law right of a person to act in defence of their property by using reasonable force.[3] Similarly, under section 3(1) of the Criminal Law Act 1967, a person can use force such as is reasonable in the circumstances prevalent at the time to prevent the commission of a criminal offence.[4] So, there will inevitably be cases where the common law right will overlap with section 3(1) of the Criminal Law Act 1967. Where that occurs, its effect is to strengthen the justification of the defendant's act.

A key consideration in both common law and statutory defences is the requirement for the 'reasonable' use of force in defending one's property.

[2] See, for example, F. Leverick, 'The Use of Force in Public or Private Defence and Article 2: A Reply to Professor Sir John Smith', *Crim. L.R.* (2002), 963; J.C. Smith, 'The Use of Force in Public or Private Defence and Article 2', *Crim L.R.* (2002), 958; M. Watson, 'Reasonable Force and the Defence of Property', *JPN* (2002), 166, 659–61; M. Jefferson, 'Householders and the Use of Force against Intruders', *JoCL*, 69(5), 405; A. Murdie, 'The Fine Art of Chucking Out', *Criminal Law and Justice Weekly* (2003), 167, 70; M. Watson, 'Self-defence and the Home', *JPN* (2003), 167, 486; A. Dugdale, *Clerk and Lindsell on Torts*, 19th edn (London: Sweet and Maxwell, 2006), chapter 31; A. Ashworth, 'Assault: Assault Occasioning Actual Bodily Harm: Defence that Car Owner Sought to Eject Trespassing Person from Car', *Crim. L.R.* (2007), 767–9.

[3] *R v Hussey* [1924] 18 Cr App Rep 160, CCA.

[4] For example, where an offence against property is about to be committed or is being committed.

Of course, the question of whether reasonable use is considered from the subjective or objective standpoint is also pertinent.[5]

In addition, where a person acts in defence of his property but is charged with causing ordinary criminal damage, there is a defence available to him under section 5(2)(b) of the Criminal Damage Act 1971. An example of this is where D kills P's dog that is attacking his sheep. According to the said section 5(2)(b) of the Criminal Damage Act 1971, a person who destroys or damages property in order to protect property belonging to himself or to another person (or property which he believes is his or another's) has a defence if, at the time of the act/s alleged to constitute the offence, he believed:[6]

(a) that the property was in immediate need of protection; and

(b) that the means of protection adopted were reasonable having regard to all the circumstances.[7]

This involves asking, first, whether it can be said, as a matter of law, on the facts as believed by D, that D's acts were done in order to protect property. (This is an objective question for the judge.) Second, if the answer is yes, did D believe (i) that the property was in immediate need of protection (this is a subjective question for the jury, but whether the perceived need counts as 'immediate' is an objective question to be determined by the jury in the light of facts and circumstances that D believes them to exist), and (ii) that the means used were reasonable? (Section 5(3) makes it clear that what counts is D's own honest belief that his response is reasonable – a subjective question for the jury.) If this defence succeeds, the defendant will have a lawful excuse so that he cannot be guilty of ordinary criminal damage, which requires the defendant to have acted without lawful excuse.

Where the defendant is charged with an offence against the person or with any other offence (except ordinary criminal damage) and he argues that he was defending his property, he will normally be acting in the prevention of crime and, as in defence of the person, section 3(1) of the Criminal Law Act 1967 will most probably apply to afford him a defence.[8]

However, he will not have a good defence if he simply takes the law into his own hands and/or uses unreasonable force to defend his property. A recent illustration of this is *R v Burns*.[9] There the appellant, having agreed

[5] See *R v Williams* [1987] 3 All ER 411; *R v Shannon* (1980) Cr App R 192 .
[6] See section 5(3) of the Act.
[7] *Creswell v DPP* [2006] EWHC 3379 (Admin).
[8] Public defence; see, for example, S. Parsons and B. Andoh, 'Private Defence and Public Defence in the Criminal Law and in the Law of Tort', *The Journal of Criminal Law* (February 2012), 76(1), 22–8.
[9] [2010] EWCA Crim. 1023.

to take a prostitute in his car to a secluded area on the understanding that he would return her to the starting point, decided to forcibly remove her from the car at that secluded area, thereby causing her actually bodily harm. The Court of Appeal upheld his conviction for actual bodily harm, holding that the appellant did not act in private defence (self-defence) or public defence (under section 3(1) of the Criminal Law Act 1967) and that self-help or recaption of property was not justified because the appellant could have regained exclusive possession of his car by returning the victim to the starting point.

Another illustration of judicial disapproval of people taking the law into their own hands is *R v Martin*.[10] In that case, the accused (M) appealed against his conviction for murder. He had shot two people engaged in burgling his home, killing one and wounding the other. At trial he unsuccessfully raised the defence of self-defence. Upon appeal he contended that his psychiatric illness had affected his perception of the risk posed to his safety by the burglars, and that it was relevant in determining whether the amount of force he used was reasonable in the circumstances. The Court of Appeal held that psychiatric evidence to help the jury to comprehend what the defendant honestly believed was inadmissible. However, in the light of fresh evidence relating to diminished responsibility, the conviction for murder was quashed and a conviction for manslaughter by reason of diminished responsibility was substituted, with a sentence of five years' imprisonment.

Comment

As the case law shows, self-help (the non-judicial remedy of taking the law into one's own hands or acting to give justice to one's self), although quick and cheap, is not generally approved of by the judiciary except as in an emergency, as a last resort or where there is no reasonable alternative.[11] Unfortunately for the appellant, none of those two exceptions was present in *R v Burns* because, although the accused, Burns, could simply have returned the victim to the point where he picked her up from, as agreed by the two of them initially, and then regained possession of his car, he did not do that. Rather, he took the law into his own hands.

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[10] [2001] EWCA Crim 2245.

[11] See, for example, *R v Chief Constable of Devon and Cornwall, ex p. C.E.G.B.* [1982] Q.B. 458, 473; see also *Burton v Winters and Another* [1993] 1 W.L.R. 1077. In *Lloyd v DPP* [1992] 1 All ER 982, [1992] RTR 215, 156 JP 342, Nolan LJ said: 'Self-help involving the use of force can only be contemplated where there is no reasonable alternative.'

Moreover, he used unreasonable force because, in the circumstances of the case, that is to say, where there was a prior agreement or understanding between the parties, as in that case, he should not have deviated from that agreement and then applied force so as to cause the victim the injuries she sustained. Even if the agreement in question is contrary to public policy, that did not justify the use of unreasonable force.

In the second illustration, *R v Martin*, the defendant's defence at trial was that (a) by reason of past experience, he believed that his house was vulnerable to burglary, (b) he genuinely feared for his personal safety when the intruders entered the house, and (c) he discharged his gun in lawful self-defence. The prosecution challenged that account, alleging that, after the defendant had been disturbed by the approach of the intruders, the defendant had lain in wait for them and shot them at short range, intending to kill or seriously injure them. So, the defendant did not shoot his victims when they were actually attacking him or were about to do so. Therefore, he did not use reasonable force in defence of his person or property.

The common law defence of defence of property through use of reasonable force was put in statutory form by section 148 of the Legal Aid and Sentencing and Punishment of Offenders Act 2012. (This follows section 76 of the Criminal Justice and Immigration Act 2008, which clarified the common law defence of self-defence and the defences under section 3(1) of the Criminal law Act 1967 relating to the use of reasonable force in preventing a crime or making an arrest.) Section 148 of the Act of 2012 amended section 76 of the Act of 2008 by, *inter alia*, adding the common law defence of defence of property to the common law defence of self-defence and use of reasonable force to prevent a crime, and so on, in the list of defences in section 76(2) of the 2008 Act.

After the government had introduced the new clause 148 in the Legal Aid, Sentencing and Punishment of Offenders Bill 2011, Crispin Blunt, Parliamentary Under-Secretary of State for Justice, said that the aim was to make clear the law so that individuals who used reasonable force to defend their property (or themselves) could be confident that the law was on their side.[12] There were, however, two questions that would arise. The first was whether section 148 of the 2012 Act was necessary. The answer seemed to be no for the same reason that section 76 of the 2008 Act was said to be unnecessary[13] – it only put in statutory form what was available under the common law (section 76 putting into statutory form four principles

[12] HC Deb. 1 November 2011, c857.
[13] See, for example, I. Dennis, 'A Pointless Exercise', *Crim. L.R.* (2008), 507.

established by the case law, and section 148 of the 2012 Act adding the common law defence of defence of property to the defences in section 76(2) of the 2008 Act, as already mentioned).

The second question was whether there was then statutory definition of 'reasonable force'. The answer may be put this way: there is no express statutory definition as such but section 76 of the 2008 Act, as now amended, presents us with so far the best statutory indication of what reasonable force is and what it is not: (i) according to section 76(6), a disproportionate force is not to be deemed reasonable; (ii) the question whether a defendant's use of force was reasonable in the circumstances is to be decided on the basis of those circumstances that the defendant believed to exist (section 76(4)), even if the belief was mistaken and unreasonable; (iii) a defendant cannot rely on a mistaken belief about the circumstances if that is attributable to voluntarily induced intoxication; and (iv) it is relevant to take into account that any person acting for a 'legitimate purpose' (that is, self-defence under the common law, defence of property under the common law and the prevention of crime, and so on) may not be able to 'weigh to a nicety the exact measure of any necessary action' (section 76(7)(a)), and 'that evidence of a person's having only done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose' (section 76(7)(b)).

Nevertheless, as regards householders, some Members of Parliament did call for more radical reform of the law to the effect that only householders using 'grossly disproportionate force' against burglars/intruders should be prosecuted. In other words, they wanted 'unreasonable force' in the law re defence of property by householders to be replaced by 'grossly disproportionate force'. For example, according to Nick de Bois, a Tory member of the all-party Justice Select Committee:

> There is both a political and a judicial reason why we should introduce the concept of 'grossly disproportionate force' into the law to protect householders. … it's time to raise the bar so that victims of crime do not find themselves facing prosecution for defending their own homes.[14]

The problems with such fundamental reform of the law, however, were stated as follows: (a) it could encourage 'vigilantism' and 'extrajudicial

[14] See *Sunday Telegraph*, 9 September 2012 ('Conservative MPs demand greater rights for householders against burglars').

punishment';[15] and (ii) it might backfire in that, if burglars know they could be killed, they would make sure to arm themselves and/or they might use 'extreme violence'.[16]

Nevertheless, today the law allows a householder to use against an intruder force which will be unreasonable only if it is grossly disproportionate in the circumstances (see section 43, Crime and Courts Act 2013).

Having noted the position under the criminal law, the position in tort will now be looked at.

B Tort

Introduction

At common law a person is entitled to use reasonable force to defend his real property as well as his personal property.[17] There is also a statutory right to do so if that would prevent the commission of an offence because section 3(1) of the Criminal Law Act 1967 empowers a person to use reasonable force for that purpose. So, for example, if D enters B's land without B's permission and is about to steal therein or commit any other offence, B has a right to use reasonable force to prevent D from committing that offence. The problem here, however, is what constitutes reasonable force? That question, among other things, is dealt with here. This tort section on defence of property is in four parts, namely: (a) trespass to land (real property); (b) trespass to personal property; (c) abatement of a nuisance; and (d) comparison of the criminal law with tort.

Trespass to Land

(i) General

At common law a person (an owner or occupier of land – the person in actual possession or with the right of possession) can use reasonable force to eject a trespasser from his land.[18] The 'castle principle' that 'an Englishman's home is his castle' is often quoted in support of this.[19] However, the general

[15] Statement by P. Mendelle QC; see 'Fears of "licence to kill" as Tories bid to change self-defence law', *The Times*, 25 January 2010 [electronic version].
[16] Ibid.
[17] *Collins v Rennison* (1754) 1 Say. 138; *Revill v Newbery* [1996] Q.B. 567, C.A.
[18] *Harrison v Rutland (Duke)* [1893] 1 Q.B. 142; see also *Revill v Newbery*.
[19] That principle was formulated classically in 1604 in the following way: 'The house of everyone is to him as his castle and fortress, as well as for his defence against injury and violence, as for his repose' (*Semayne's case* (1604) 5 Co. Rep. 91a at 91b). The same principle can be seen in Article 8 of the European Convention on Human Rights: 'Everyone has the right to respect for his private and family life, his home and his correspondence.' Thus,

position is still that the force used to eject a trespasser must be reasonable. Thus, where the entry without permission is peaceful, the landowner must first ask the trespasser to leave before using reasonable force to eject him.[20] But if the trespasser uses violence, then the landowner may also use violence immediately without the necessity of requesting the trespasser to desist.[21]

(ii) Limits on the use of force

It cannot be over-emphasised that the force used by the landowner/occupier must always be reasonable in the circumstances.[22] What, then, is 'reasonable force'? 'Reasonable force' has been said to mean no more force than is reasonably necessary to meet the force used by the trespasser or assailant.[23] Loosely speaking, it may be said to be the type of action which the ordinary person would consider or accept as appropriate or which people in general would expect a defendant to take in any particular situation. *Black's Law Dictionary*[24] defines it as 'force that is not excessive and that is appropriate for protecting oneself or one's property'. Because it depends on the circumstances of the particular person exercising the force, it cannot be measured by the use of 'jeweller's scales'.[25]

Therefore, what is 'reasonable force' varies from case to case, depending upon context. Accordingly, the type of force which would be reasonably expected to be used against a burglar by a householder is likely to be different from that which a defendant would be expected to use against a person parking his car on his property without a permit. For example, in 1893, Willes J., in answer to the question, 'What can I do if a burglar comes into the house?', stated: 'Take a double-barrelled gun, carefully load both barrels, and then without attracting the burglar's attention, aim steadily at his heart and shoot him dead.'[26] That cannot be the correct approach today because it would be viewed as extremist and inappropriate since it does not take into account whether or not the burglar is armed with a lethal weapon.

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unsurprisingly, Munby J. said in *R (on the application of Bempoa) v Southwark London Borough Council* [2002] EWHC 153 (admin), at paragraph 10: 'Rightly, both the civil law and the criminal law take an exceedingly serious view of any violation of the home.' However, today there are legal incursions into the principle; see, for example, Article 8(2) of the European Convention on Human Rights, compulsory purchase orders, and section 66 of the Serious Organised Crime and Police Act 2005.

[20] See *Robson v Hallett* [1967] 2 QB 939.

[21] *Polkinghorn v Wright* [1845] 8 Q.B. 197. (This is similar to the requirement of the law, relating to self-defence, that the exercise of self-defence must be in the heat of the moment – at the same time as, or immediately following, the assailant's act – and must be proportionate to the force used by that assailant.)

[22] *Collins v Rennison*; *Revill v Newbery*.

[23] *AG's Ref. (No.2 of 1983) [1984] AC 456*.

[24] Bryan A. Garner (ed. in chief), *Black's Law Dictionary*, 7th edn (St Paul, MN: West Group, 1999), 656.

[25] See Glanville Williams, *Textbook of Criminal Law* (London: Stevens, 1978), 451.

[26] Reported in *The Saturday Review*, 11 November 1893.

Reasonable force has to be both appropriate (measured in response to perceived threat) and necessary.

Therefore, the meaning of 'reasonable force' has also changed over the years; what would be considered reasonable a century ago would not necessarily be so today. Indeed, Millett L.J. in *Revill v Newbery* stated:

> For centuries the common law has permitted reasonable force to be used in defence of the person or property. Violence may be returned with necessary violence. But the force used must not exceed the limits of what is reasonable in the circumstances. Changes in society and in social perceptions have meant that what might have been considered reasonable at one time would no longer be so regarded; but the principle remains the same. The assailant or intruder may be met with reasonable force but no more; the use of excessive violence against him is an actionable wrong.[27]

So, objectively, we can see a socially acceptable standard for behaviour – but this needs to be set against the subjective aspects of what the person actually believed was necessary at the time. (As already mentioned, according to section 43 of the Crime and Courts Act 2013, now a landowner's use of force against an intruder will only be unreasonable if it is grossly disproportionate in the circumstances.)

(iii) Trespassing animals

A trespassing animal, for example, a dog, may be scared off by a landowner as a way of ejecting it from the land. The landowner is generally not allowed to kill such an animal.[28] However, at common law, the landowner could justify his shooting of a dog trespassing on his land if such shooting is necessary to save game or other animals in actual danger; then he bears the burden of proving that (a) the dog was actually attacking or would attack again unless stopped, and (b) that was the only practicable means of protecting his animals at that point in time or that he acted reasonably in considering that the shooting was necessary.[29]

The position is now governed by section 9 of the Animals Act 1971, under which it is a defence in civil proceedings for a landowner to put down a dog worrying his livestock (described by section 11 as including cattle, horses, asses, mules, hinnies, sheep, pigs, goats, poultry, and so on). As

[27] [1996] Q.B. 567, at 580.
[28] *Barnard v Evans* [1925] 2 K.B. 794.
[29] *Cresswell v Sirl* [1948] 1 K.B. 241.

section 9 concerns only liability for killing or injuring a dog, the position of other trespassing animals is still governed by the common law.

(iv) Distress damage feasant

The right of 'distress damage feasant' is a self-help remedy (a unilateral, non-judicial remedy that makes unnecessary the duty to mitigate one's loss and, as already stated, is cheap and speedy). It is, specifically, the right of a person in occupation of land (a) to seize any chattels which come onto his land unlawfully and are doing damage there, and (b) to detain them until their owner has paid compensation for the damage so caused. So, it is different from section 3(1) of the Criminal Law Act 1967. Regarding animals, the right is, today, in statutory form, namely, the Animals Act 1971, section 7 of which abolished the right to seize and detain animals and put in its place a statutory procedure. That procedure is as follows: the occupier may detain livestock that has strayed onto his land and which is then under any person's control (section 7(2)); that detention, however, must end:

> (a) after 48 hours unless the occupier has given notice to a police station and to the owner of the animal, if they are known (section 7(3));
>
> (b) if sufficient compensation is paid to the occupier (section 7(3)(b)); or
>
> (c) if, where compensation is not required or due under section 4 of the Act, a person entitled to possession of the animal claims it (section 7(3)(b) and (c)).

In the case of non-animals, the right is still extant, except that today, according to section 54 of the Protection of Freedoms Act 2012, wheel-clamping on private land is an offence in English law (it has been illegal in Scotland since the 1990s).[30] Nevertheless, the pre-2012 English wheel-clamping cases explain the old position nicely, so some of them are briefly referred to here. Where a landowner had put up a visible sign or notice[31] that cars illegally parked there (that is to say, parked there without a permit) would have their wheel clamped and that the clamp would be removed only by payment of a stated fee, the landowner would be acting within their rights. This was because, given that an occupier of land has the right to act reasonably in ejecting a trespasser or protecting/defending his property, any car owner who saw the notice but ignored it would be deemed to have

[30] See, for example, *Black v Carmichael* [1992] SCCR 709; [1992] SLT 897; *The Guardian*, 8 July 1992; *The Times*, 25 June 1992.
[31] *Vine v LB of Waltham Forest* [2000] 4 All ER 169; [2000] 1 WLR 2383.

consented to the clamping. If, therefore, the car owner removed the clamp forcibly and thereby damaged it, his action constituted criminal damage, as occurred in *Stear v Scott*,[32] *Lloyd v DPP*[33] and *R v Carl Mitchell*.[34] For the right of distress damage feasant to be lawfully exercised by the wheel-clamping occupier of land, however, as observed by Sir Thomas Bingham Master of the Rolls (as he then was) in *Arthur v Anker and another*,[35] the parked car must have been doing damage on the land, the mere fact of unlawful parking being insufficient.[36] But this point of Sir Thomas Bingham[37] could be countered by the argument that the unlawfully parked car had deprived or was depriving the landowner of some parking fee/s and that should be deemed the 'damage' caused or being caused at the time.

Trespass to Personal Property

Trespass to goods is one aspect of 'wrongful interference with goods', according to section 1 of the Torts (Interference with Goods) Act 1977.[38] In the case of trespass to other (personal) property, the person with actual possession or the right of possession of the property may use reasonable force to defend that right.[39] He must use reasonable force because unreasonable force would nullify the defence[40] and be tantamount to taking the law into one's own hands, the type of behaviour frowned upon by the judiciary.

There is also the right of recaption, that is, the right to retake one's personal property (chattel) that has been unlawfully taken by another person. In certain circumstances the right extends to entering the land of the person wrongfully detaining the property in order to retake it. But here again, reasonable force (that is, such force as is no more than necessary to enable recaption) must be used by the owner/possessor of the property.[41]

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[32] [1992] RTR 226.
[33] [1992] RTR 215; [1992] 1 All ER 982, where the car was parked outside Overline House in Southampton.
[34] [2003] EWCA Crim. 2188; [2004] RTR 14, where the car in question was trespassing because M, the owner, by writing the wrong date and time on the permit, had, accordingly, not displayed the correct permit.
[35] [1996] 3 All ER 783; *The Times*, 1 December 1995.
[36] Similarly, in *Forfan and Real Estates v Hallet and Vancouver Auto Towing Service* (1959) 19 DLR (2d) 756 – County Court, British Columbia, the Vancouver County Court held that actual damage had to be proved in order to sustain a defence of distress damage feasant for an automobile parked on another's land without permission to be impounded.
[37] Later Lord Bingham, R.I.P.
[38] The others are conversion of goods or trover, negligence causing damage to goods or interest in goods, and any other tort resulting in damage to goods or to an interest in goods.
[39] *Harrison v Rutland (Duke)* [1893] 1 Q.B. 142 .
[40] See *Revill v Newbery*.
[41] See *Anthony v Haney* (8 Bing. 186; 1 M. & Scott, 300); *Patrick v Colerick* (1838) 3 Meeson and Welsby 483, (1838) 150 E.R. 1235; *Devoe v Long* [1951] 1 D.L.R. 203; see also *R v Milton* (1827) 1 M. & M. 107 and *R v*

Abatement of a Nuisance

The right of abatement is the right to reduce or stop a nuisance via taking reasonable action. The right, however, only arises, as regards defence of property, where the nuisance is in the form of, or also constitutes, trespass to land. Therefore, the owner/occupier of land can cut off branches of his neighbour's tree overhanging his property (as they are trespassing into his airspace). But, of course, since the tree is not his, he must return the severed branches to his neighbour; and if they happen to be apples, he must still return them rather than appropriate them, for example, going to sell them at the market, because that would be conversion pure and simple.[42]

Moreover, according to *Lagan Navigation Co. v Lambeg Bleaching, Dyeing and Finishing Co. Ltd.*,[43] the right of abatement of a nuisance is subject to requirements such as: (i) it must be exercised peacefully (thus, any force used must be reasonable, for example, using force to enter another person's premises if the circumstances are most exceptional such as in a fire or other life-threatening emergency); (ii) notice must be given by the abator to the creator of the nuisance to remedy it; (iii) the abator must not cause any unnecessary damage.

From the foregoing, the common problematic theme may be said to be what 'reasonable force' really is. That issue has been addressed by judicial pronouncements, as already pointed out. It was addressed by section 76(2) of the Criminal Justice and Immigration Act 2008, now amended by section 148 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 as shown in the 'Criminal Law' part of this paper (part A). However, those two sections (section 76 of the 2008 Act and section 148 of the 2012 Act) have been noted as not adding anything new (unnecessary) except that they clarify the law and, as a result of section 148 of the 2012 Act, we now have, clearly set out in one place, the law on self-defence, defence of property and acting to prevent crime, and so on. (Of course, today, in line with section 43 of the Crime and Courts Act 2013, the force used by a householder against an intruder will be unreasonable only if it is grossly disproportionate in the circumstances.)

Having said that, a perusal of the primary and secondary sources reveals some interesting similarities and one very significant difference

Mitchell ([2003] EWCA Crim 2188); [2004] R.T.R. 14, where the Court of Appeal (Criminal Division) confirmed wrongful detention or retention of the chattel as required for the right of recaption to arise.

[42] *Mills v Brooker* [1919] 1 K.B. 555.

[43] [1927] A.C. 226.

between the criminal law and the civil law as regards defence of property. These will now be looked at.

Criminal Law Compared with Tort

A very significant difference between the criminal law and tort is in the burden of proof: unlike the position in the criminal law, where proof without reasonable doubt is required,[44] the civil law (for example, tort) requires proof on a balance/preponderance of probabilities, as shown by *Ashley*. This distinction is logical because of the different consequences for the wrongdoer. The defendant in a tort action usually faces only a financial penalty, namely compensation by way of damages being awarded against him. His only chance of losing his liberty (going to prison) is where he is in contempt of court. However, in a criminal trial, the accused's personal liberty is at stake. If convicted, he may be given a prison sentence (if not fined). Therefore, it makes sense that the burden of proof be higher in a criminal trial than in a civil case.

But then in three respects the criminal law is similar to tort regarding defence of property. First, in both areas of the law a person has the right to defend his property. Second, both areas of the law require that the force used must be reasonable. Third, section 3(1) of the Criminal Law Act 1967, being a statute of general application, applies to the criminal law as well as to tort.[45] As already stated, under section 3(1) of the Criminal Law Act 1967, a person can use reasonable force to prevent the commission of an offence. Lastly, in neither the criminal law nor in tort do the courts approve of self-help, that is, the taking of the law into one's own hands. Except in an emergency or as a last resort, there is judicial abhorrence of self-help.[46] This is because, although it is quick and cheap, as already noted, and it is also advantageous in that it makes unnecessary the need for the person exercising that right to mitigate his loss, it is risky since it can lead to violation of the law, as *Burton v Winters*, *R v Martin* and *R v Burns* show.

C Conclusion

As the foregoing shows, in both the criminal law and tort, there is a common-law right to use reasonable force to defend one's property, real or

[44] *Woolmington v DPP* [1935] A.C. 462.

[45] See *Roberts v Chief Constable of Kent* [2008] EWCA Civ. 1588 (per Aikens LJ at paragraph 23); see also Criminal Law Revision Committee, *14th Report on Offences against the Person* (1980), paragraph 283; and David Ormerod and Karl Laird, *Smith and Hogan's Criminal Law*, 11th edn (Oxford: Oxford University Press, 2014), 333.

[46] See, for example, *Burton v Winters and Another* [1993] 1 WLR 1077; and *R v Burns* [2010] EWCA Crim. 1023.

personal. Various instances of this right have been looked at. In addition, it has been noted that section 3(1) of the Criminal Law Act 1967, a statutory provision of general application, allows a person to use reasonable force to prevent the commission of an offence; by implication, therefore, one may use reasonable force to defend one's property if doing so will prevent the commission of an offence.

What constitutes reasonable force has also been considered in the light of judicial pronouncements and statutory provisions.

The position in criminal law has, in addition, been compared with that in the law of tort. The fact that there are similarities between the law of tort and criminal law regarding the defence of property demonstrates to some extent that the law does not exist in a vacuum. Its various areas do often overlap. Again, as already pointed out, the courts do not generally approve of people taking the law into their own hands, that is, exercising self-help. Although self-help is appealing and has some moral justification, especially where the defence of property is concerned, that moral justification is limited somehow because the person exercising self-help must use only reasonable force in doing so.

It is, accordingly, imperative that, for a person to act lawfully in defence of their property, he must use reasonable force, that is, such force as is reasonable in all the circumstances.

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Legal Opinion

Selling the ‘Soft’ Brexit

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Abstract

Brexit has assumed a prominence in political and legal debate since the 2016 referendum result. This work argues that, contrary to the official position of both the main UK political parties, a different, more nuanced approach adopted in negotiations has/had the potential to satisfy the important centre ground of UK opinion and represent less of a risk to the UK economy and even potentially to the future of the UK itself.

Key words: EU law; Brexit; negotiations; alternatives; freedom of movement; Court of Justice; Single Market; EEA; customs union

Introduction

The result of the general election on 8 June 2017, whether it was fought on the issue of Brexit or not, has had a profound effect upon it. The key issue that has risen in the public consciousness has been the issue of ‘soft’ vs ‘hard’ Brexit, previously scotched by Theresa May’s declaration that a ‘hard’ Brexit would be sought in negotiations. However, with calls from some in the Cabinet for a Brexit that helps the economy and business (amongst others), the ‘soft’ Brexit issue refuses to disappear, but remains controversial for both parties, as sackings of three Shadow Cabinet members illustrate.

For those at the extreme ends of the Brexit spectrum, a soft Brexit might be the Brexit for the 0 per cent. So how might this be ‘sold’ to remain and leave supporters alike? Labour’s insistence on exiting the Single Market can be attributed to the need to attract voters from the 52 per cent of leavers, many in traditional Labour heartland areas. Just how many of those voted for a hard Brexit offered by the Conservatives is unclear. Most polls, for

what they are worth, do appear to show that a majority of all voters do wish to retain free trade.

A Quick History of European Integration

Out of the ashes of the Second World War two European phoenixes arose: the Council of Europe, responsible for the European Convention on Human Rights, drafted by English lawyers; and a plan for closer economic and social integration, firstly in the area of coal and steel in the European Coal and Steel Community in 1951, via the Treaty Of Paris, then, with the addition of EURATOM and a wider general ecoemphasis, the EEC in 1957 via the Treaty of Rome, the EC in 1986 via the Single European Act and the EU in 1992 via the Maastricht Treaty. The most current version of the main EU Treaty is the Lisbon Treaty 2010. Along the way a rival, somewhat looser, free trade agreement, EFTA, was agreed by several European countries including the UK in the 1960s, while in the EEC the French 'empty seat' crisis was a factor in the European Court of Justice landmark cases of *Costa*[1] and *Van Gend en Loos*,[2] confirming the supremacy of EEC law over national law and its 'direct effect'. The UK joined the EU by virtue of the European Communities Act 1972, and this was sold to the British public at the time as joining the Common Market for free trade. However, even then we can see that our politicians could be economical with the truth, as by that time the supremacy of the EEC Treaty and secondary laws was already well established.

The Maastricht Treaty introduced the concept of EU citizenship and the single currency, to widespread opposition particularly from Conservative MPs for whom it was a step too far. Now the UK stands at a crossroads and a great period of uncertainty following two referenda called largely for the apparent benefit of the Conservative Party, neither of which reached their instigator's desired outcomes and have left a divided country in their wake. A weakened Prime Minister will have to compromise with others, and this reopens the possibility of several outcomes including a softer Brexit. What might this entail, and can the 52 per cent who voted leave be persuaded that they have indeed taken back at least some control? Are there any changes to European Union law which would make issues affecting all Member States, such as migration, more palatable to their populaces. In many ways this softer Brexit might roll back the UK to a position more akin to EEC

[1] Case 6/64 Flaminio Costa v ENEL [1964] ECR 585.
[2] Case 26/62 NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen [1963] ECR 1.

membership in the 1980s, rather than an 'ever closer union' that the UK was given the choice of opting out of after David Cameron's negotiations.[3]

Single Market Membership

The idea of a 'soft' Brexit has often been referred to as the 'Norway Option',[4] as it involves membership of the European Economic Area such as that enjoyed by Norway – but what does this really mean? Much was made about it being like EU membership but a 'light' version. However, it is not as simple as this, as there are some key differences between membership of the EU (as this also involves membership of a customs union) and the EEA agreement, and it can only be properly understood by looking at the detail. Customs union membership has assumed particular significance in 2018 due to its inherent incompatibility with freedom to pursue trade agreements with the rest of the world, and its importance in resolving issues surrounding the border between Northern Ireland and the Republic of Ireland.

The main difference between the two is that EEA membership does mean being subject to EU regulation but no longer being part of the decision-making process in making those laws. It does not involve being in a customs union. However (as discussed below), based upon the greatly increased use of qualified majority voting in the EU, whereby laws can be passed without the agreement of up to a third of the EU Member States' representatives, it does call into question the extent to which the veto can be used by EU Member States in the law-making process. There is still a big difference between having something of a say in key decision-making and having no say (beyond an advisory one) in EU regulations that you may be subject to.

There are important policy areas that EEA Member States are not subject to. The House of Commons Library Research Paper *Leaving the EU*[5] lists the areas of EU regulation that EEA countries are not bound by:

- Common Agricultural Policy and Common Fisheries Policy

[3] EUCO 4/16, Draft Decision of the Heads of State or Government, meeting within the European Council, concerning a New Settlement for the United Kingdom within the European Union, Brussels, 2 February 2016 < http://www.consilium.europa.eu/media/21980/decision-new-settlementen16.pdf> accessed 12 February 2018.

[4] So-called because it mirrors Norway's current relationship with the EU; see https://www.theguardian.com/politics/2015/oct/28/the-norway-option-what-is-it-and-what-does-it-mean-for-britain, accessed 7 February 2018.

[5] House of Commons Library research paper 13/42 (1 July 2013) *Leaving the EU*, 18 <http://researchbriefings.files.parliament.uk/documents/RP13-42/RP13-42.pdf> accessed 7 February 2018.

- Customs Union
- Common Trade Policy
- Common Foreign and Security Policy
- Justice and Home Affairs
- Monetary Union

This does represent a sizeable portion of EU regulation. For example, for Norway and Iceland, being outside of the Common Fisheries Policy is of particular importance. As an island nation with similar interests in fishing, this therefore represents an important policy consideration for the UK too, and this was evident in the discussions around the referendum regarding fishing regulations within the EU.

Also, to put this in perspective, EEA Member States such as Norway are required to comply with only 28 per cent of EU laws passed by the institutions of the EU in the form of certain Directives, Regulations and Decisions.[6] This represents a significant reduction in EU regulation for those who cited freedom from EU laws as a reason to leave – there is some significant 'taking back control'[7] here as potentially *tens of thousands* of Directives and Regulations would no longer apply.

However, included amongst those areas of law that would still need to be adhered to are the policy areas of education, social policy, the environment and consumer protection. Some supporters of escaping such regulations may see these as ones on their hit-list. However, as many of these policy areas involve regulation that gives protection or rights to individuals, then keeping them would certainly have some public support. Maintaining equivalence of standards with the EU would also assist UK businesses exporting to the rest of the Single Market, as reflected in the 'full alignment' language of the Joint Report on Phase 1 of the negotiations.[8]

EEA membership does mean satisfying one of Theresa May's main aims, that of escaping the jurisdiction of the Court of Justice of the EU (CJEU) – disputes in the EEA are dealt with by the EFTA Court rather than the CJEU, the EU's central court, although as the EFTA Court has agreed to follow judgments of the CJEU and EU General Court, the reality of life

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[6] 'Norway, Switzerland and EU Laws' <https://fullfact.org/europe/norway-switzerland-eu-laws/> accessed 12 February 2018.

[7] 'Take back control' was a key slogan of the Leave.EU campaign <http://leave.eu/>.

[8] Prime Minister's Office & Department for Exiting the EU, *Policy Paper: Joint Report on Progress During Phase 1 of Negotiations Under Article 50 TEU on the United Kingdom's Orderly Withdrawal from the European Union* <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/665869/Joint_report_on_progress_during_phase_1_of_negotiations_under_Article_50_TEU_on_the_United_Kingdom_s_orderly_withdrawal_from_the_European_Union.pdf> accessed 12 February 2018.

under this court's judgments is likely to be largely the same as inside the EU, albeit in more confined areas such as trade.[9]

Also, much was made prior to the EU referendum of the budget contribution made into the EU by the UK. Contributions would continue as an EEA member, but they would most likely be reduced. By how much would depend upon the negotiations with the EU, but if the UK was outside the Common Agricultural and Fisheries Policies, then this would reduce contributions as these are both major parts of the EU financial burden. Such negotiations would also decide whether Margaret Thatcher's budget rebate would survive. EEA Member States can also opt into EU schemes at further cost – for example, Norway pays into the EU's science and research funding in order to be part of that scheme. The UK government would therefore need to consider what might be in the interests of the UK's economy to participate in, in exchange for the additional cost. The loss of the UK's current rebate would make this amount not as significant as it might otherwise have been.

The Bone of Contention – Freedom of Movement

Free movement of persons is a controversial topic, with the Conservative government in effect treating the Brexit vote as a vote on immigration, and it is willing to court economic disaster by sacrificing the UK's Single Market membership on the altar of immigration control. The converse European position is that the four freedoms are inseparable. This has certainly been the position since the European Coal and Steel Community, but even today there is a conflict within Europe between seeing EU workers as 'units of production' and seeing freedom of movement as part of citizens' rights. EU law on freedom of movement comes from a variety of sources: the Lisbon Treaty, secondary legislation – particularly the 2004 Citizens' Rights Directive (CRD)[10] – and, importantly for our perspective, decisions of the Court of Justice of the European Union (CJEU).

Under the CRD an EU citizen and close family can enter another Member State for any purpose for three months,[11] but to stay longer than that period a person must either be a worker,[12] self-supporting,[13] in full-time education,[14] or a family member.[15] Workers and their families are entitled

[9] See *Opinion 1/92 (EEA Agreement II)* [1992] ECR I-2821.
[10] Directive 2004/38/EC.
[11] Article 6.
[12] Article 7(1)(a).
[13] Article 7(1)(b).
[14] Article 7(1)(c).
[15] Article 7(1)(d).

to work-related benefits after a period working in the Member State, and are also generally to be treated in a non-discriminatory manner.[16] Quotas based on nationality are illegal. Those who are not and never have been economically active are generally entitled to nothing. The image of the EU benefit scrounger perpetuated by the UK right-wing press can be added to their long list of misdemeanours.

EU citizens, including workers, may be refused entry on the grounds of public policy, public security or public health,[17] and this can extend to present concerns such as, for example, membership of extreme organisations such as Jihadi groups or those with convictions for serious offences. Instances of known killers from other EU Member States being let into the UK to re-offend reflect more on shambolic UK government policy and underfunding of border control than they do on EU freedoms.

Effecting change to the Treaties is a long and involved process,[18] as is introducing or amending secondary legislation. In both instances a consensus has to be achieved across a majority of Member States. Many areas which had previously required unaniminity prior to the Lisbon Treaty of 2010 are now decided by a qualified majority – in effect greatly reducing the importance of the national veto to a narrow number of nonetheless important areas.[19] However, decisions of the CJEU (especially as it does not follow precedent in the same way as courts in the UK do) could affect change rapidly, though this is the choice of the court due to its independence. This is a key aspect of freedom of movement which is not set in stone.

The definition of what constitutes a worker is found exclusively in CJEU cases. According to cases such as *Lawrie Blum*[20] a worker is someone who performs services by or under the direction of another in return for remuneration; nothing too controversial there – in effect you work for someone and get paid.

More controversial is the requirement that the work be 'genuine and effective',[21] which is vague in the extreme and has been subject to an

[16] Article 45(2) TFEU and Paragraph 20 of the preamble of Dir 2004/38/EC.
[17] Article 27(1) Dir. 2004/38/EC.
[18] See Article 48 TEU.
[19] Including: Union membership; taxation; finance of the Union; social security and social protection; justice and home affairs; common foreign, security and defence policy; citizenship and anti-discrimination; and Treaty Revision.
[20] Case 66/85 Lawrie Blum v. Land Baden-Württemberg [1986] ECR 212.
[21] Case 53/81 Levin v. Staatssecretaris van Justitie [1982] ECR 1035; Case 139/85 Kempf v. Staatssecretaris van Justitie [1986] ECR 1741; Case 196/87 Steymann v. Staatssecretaris van Justitie [1988] ECR 6159; Case 344/87 Bettray v. Staatssecretaris van Justitie [1989] ECR 1621; Case 66/85 Lawrie Blum v. Land Baden-Württemburg

astonishingly wide interpretation by the CJEU. '[G]enuine and effective' does not even closely approximate to 'self-supporting', with, in one well-known case, 60 hours of work in the previous six months being found to be 'genuine and effective'.[22] In another case a person who received bed and board and a small amount of pocket money was likewise found to be a worker.[23] It seems that, except in instances where an activity is undertaken, for example, for rehabilitation purposes, it is likely to be seen by the CJEU as 'genuine and effective',[24] with the attendant cost consequences for the Member State hosting the worker in terms of, for example, tax credits or other work-related benefits. One of the few now largely forgotten concessions that David Cameron managed to obtain from the EU prior to the 2016 referendum was a moratorium on in-work benefits.[25] It is also notable that, for the purposes of being treated as a worker, the UK's own regulations treat 'genuine and effective' to be in effect at the level required for National Insurance contributions to be payable – already arguably considerably higher than the level of 'genuine and effective' found in CJEU cases, but in most cases still not a living wage.[26]

What is interesting here is that the main EU Treaty, the Lisbon Treaty, itself provides for free movement – in this context, workers and establishment are relevant to immigration as services implies something temporary. The Lisbon Treaty, by Article 21, also provides that *EU citizens* have free movement across Member States subject to the other laws enacted – in this context mostly Article 5-7 of the 2004 Citizens Rights Directive.

However, the Lisbon Treaty would not apply if the UK was outside the EU but in the Single Market by virtue of being in the EEA – it would instead be the EEA agreement that applied. The EEA agreement has no equivalent of Lisbon Article 21 but does require free movement of *workers* by virtue of Article 28. If the definition of what constituted genuine and effective was in some way narrowed – towards, for example, self-supporting by the CJEU and therefore the EFTA Court – and this was limited to those who have obtained work before entering the UK, this might be an acceptable compromise to explore. The Citizens' Rights Directive already recognises this concept of 'self-supporting' as a requirement for persons who are not

[1986] ECR 212; C-357/89 Raulin v. Minister van Onderwijs en Wetenshcappen [1992] ECR 1-1027; C-3/90 Bernini v. Minister van Onderwijs en Wetenschappen [1992] ECR 1-1071.

[22] C-357/89 Raulin v. Minister van Onderwijs en Wetenshcappen [1992] ECR 1-1027.

[23] Case 196/87 Steymann v. Staatssecretaris van Justitie [1988] ECR 6159.

[24] Case 344/87 Bettray v. Staatssecretaris van Justitie [1989] ECR 1621.

[25] <http://www.bbc.co.uk/news/uk-politics-eu-referendum-35622105> accessed 12 February 2018.

[26] <https://www.gov.uk/government/news/minimum-earnings-threshold-for-eea-migrants-introduced> accessed 12 February 2018.

workers or full-time students for the reason that they would otherwise be a burden on a Member State. Why is this permissible while a person who has previously only worked 60 hours in the previous six months is not seen as a burden on the Member State? The counter-argument to this is that it would be a limit on labour mobility to allow movement only once a job has been secured. In certain circumstances it might be seen as a bit of a Catch-22: you cannot move until you have secured a job, but cannot secure a job without physically going and looking for one. Prior to the Citizens' Rights Directive it was generally assumed that 'worker' in EU law included persons in search of work.[27]

Even while the UK remains a member of the EU for now, the signs are not propitious. We are already seeing a significant drop in recruitment of trained nurses for the NHS from the EU in 2017. It was recently revealed in surveys by the BBC and British Summer Fruits that there are already difficulties emerging regarding getting enough employees to collect the summer harvest, with the potential of crops going uncollected or production being scaled back as a result.[28] This might cause an increase in imports of fruit and vegetables, which can attract high tariffs under WTO rules, which could mean higher food costs, though this might be offset by being outside the Common Agricultural Policy which still accounts for around 40 per cent of EU expenditure. This might be alleviated via work permits in a post-Single Market UK, but the success of this compared to current arrangements is not guaranteed, nor is it guaranteed that working in the UK would be the attractive option it once was, driven by perceptions of no longer feeling welcome or more concrete economic factors such as a fall in the value of the pound.

The key to selling a soft Brexit is compromise: the 23 June 2016 referendum was about whether Britain left the European Union, not a vote on immigration, and nor was it a vote on a no-deal hard Brexit. Extreme remainers and leavers will not be happy with any outcome which does not correlate with their views. The question is where the centre ground and the majority lies. Many more moderate leavers, it could be argued, see the benefit of keeping free trade and being in the customs union, but wish to take a step back from 'ever closer union', which the EU accepted in David Cameron's negotiations[29] – there are recorded instances of politicians

[27] Case C-292/89 Regina v Immigration Appeal Tribunal, ex parte Antonissen [1991] ECR I-745.
[28] <http://www.bbc.co.uk/news/business-40354331> accessed 12 February 2018.
[29] EUCO 4/16, *Draft Decision of the Heads of State or Government, meeting within the European Council, concerning a New Settlement for the United Kingdom within the European Union*, Brussels, 2 February 2016 <http://www.consilium.europa.eu/media/21980/decision-new-settlementen16.pdf> accessed 12 February 2018.

strongly associated with Leave, such as Nigel Farage and Boris Johnson, advocating the ‘Norway Option’ before the leave vote. They became extreme afterwards as might be expected – emboldened, they displayed their true colours. Meanwhile, many moderate remainers – who would prefer to stay in the EU – could live with Single Market membership instead. Whichever party is in power should take note: completely disregarding the views of half of the electorate – whether leaver or remainer – is done at their peril.

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Book Review

Cheating: Ethics in Everyday Life, by Deborah L. Rhode, Oxford University Press (2018).

Hardback (138 pages + preface, acknowledgements and index)

Mark Wing

The author of this work (a Professor of Law at Stanford University) sets herself a daunting task – an appraisal of the concept of cheating across many diverse areas of society. The perspective taken reflects the author's background as an eminent academic in the area of legal ethics. Not only is analysis made of most imaginable areas of cheating – whether it be in sports, in organisations, in finance, in academia, in marriage or by intellectual property piracy – but little of relevance escapes the author's attention. In her conclusion, the author recognises the challenging nature of this subject matter:

> Writing about cheating is a perilous project, it is difficult to avoid seeming platitudinous, hypocritical or both … The fear of a response such as 'Where does *she* get off writing about cheating' may be one reason that the subject has attracted inadequate attention from serious scholars. (p. 153)

The work is presented in a very accessible and 'punchy' style, the author making extensive use of a wide range of sources, frequently touching on (among others) theoretical underpinnings, leaning heavily on psychological studies, empirical data and news items to illustrate the forces that drive cheating. This often makes for quite grim but nonetheless compelling reading. Not content with being a mere narrator, however, the author also aims to provide strategies to address cheating. Aside from pure moral and ethical concerns, the cost to the American economy from cheating totals 'somewhere in the neighbourhood of a trillion dollars annually'.

Rhode takes the view that cheating is frequently context-sensitive, and so after an introduction which looks at the concept of cheating generally and

provides an overview of what is to come, further chapters focus on specific areas.

Chapter 2 looks at cheating in sports. This covers cheating in a wide spectrum of activities, from sport as a leisure activity to sport in the professional arena. According to this account, cheating at golf seems to be almost *de rigueur* for US presidents, before the analysis moves closer to the professional end of sport by engagement in doping, match rigging, equipment tampering, recruitment and 'professional' assaults, fouls and 'diving'. College athletics – a big business in the USA – receives an especially thorough treatment from Rhode. The revelation that some universities have undertaken dubious practices in recruiting and retaining physically talented but not necessarily academically gifted or even competent students will be quite startling to a reader from the UK. Tutors providing simplified courses or even writing students' essays is not unheard of. One of Rhode's main suggestions for combatting this state of affairs is to return to both coaches and families encouraging a 'sportsmanlike' outlook, rather than the prevalent 'competitive' outlook.

Chapter 3 focuses on cheating in organisations. This chapter's main focus is organisational culture and cheating in three broad categories – cheating the organisation by the employee, cheating the employee by the organisation, and cheating that serves the organisation at the expense of third parties. As may be imagined, here much of the discussion focuses on the financial sector and the pressures which facilitate a dysfunctional ethical environment, such as that which led to the Enron and Volkswagen scandals. Whistle-blowing receives a merited discussion, along with the pressures that prevent this. Rhode then discusses remedial strategies and the need for ethical leadership, ethics codes and training, as well as protection for whistle-blowers. This chapter in particular should be compulsory reading for any CEOs as to how ethical rot can quite insidiously infest even well-meaning organisations.

Chapter 4 focuses on an apparently endemic problem, cheating on taxes. The American IRS estimates that this costs the US economy $450 billion a year. Here Rhode reviews the nature and frequency of cheating, the dynamics which perpetuate it and strategies to combat it. A distinction is drawn between tax evasion (illegal) and tax avoidance (legal), only the former meriting direct consideration. Some high-profile examples of tax evaders are provided, though it is suggested that this remains the tip of a very large iceberg, and while tax evasion by the wealthy features prominently in the media, it is in fact endemic at all levels of US society,

largely through under-reporting of income. The author argues that decisions to cheat are based on an individual's honesty, and an assessment of risks versus rewards of cheating. Rhode demonstrates that few tax returns are in fact audited and even if an individual is caught, fines are generally not an effective deterrent in terms of their financial level. The ambivalent attitude that many US citizens display to this issue is demonstrated by news surveys. The author concludes here by offering various interesting strategies to counter this serious problem. While this work is by its nature US–centric, there is no real mention of corporate tax avoidance which, while probably legal, is seen by many to be morally wrong and has assumed some prominence in the European news discourse in recent years, with figures as high as £160 billion and $130 billion in the US itself lost to governments in revenue.

Chapter 5 focuses on cheating in academia and plagiarism in professional settings. Rhode starts with examples of the long history of cheating. Frequency of cheating draws on research where those who cheated self-reported cheating, with relatively little based on actual factual data. This data, as Rhode alludes to, may be likely to under-report cheating due to participants' unwillingness to participate in studies (p. 77). Whichever data is used, perhaps the most reliable figure (from alumni) that 82 per cent of respondents had engaged in misconduct makes for depressing reading for anyone engaged in academia. Culture can also not be ignored as a contributing factor, with very low academic misconduct in Nordic countries compared to significantly higher figures in Eastern European and Asian countries. Demographic factors appear to play little part in cheating – though other factors do play a clearer role, with cheating identified as more likely among both low-achieving and high-achieving students with a pithy and well-selected quote: 'cheat to survive and cheat to thrive' (p. 79) – the social context being a more significant factor still. The author then discusses responses to student cheating and argues for the promotion of cultures of integrity and environments conducive to learning, clear rules in colleges and consistent and fair application of sanctions (p. 80). Rhode then moves on to research misconduct and notes the paucity of empirical research in this area, though what is available suggests that it has grown steadily since the 1990s and is likely to continue to do so. Again various solutions to this problem are offered. Finally in this chapter, plagiarism in its widest context is examined. This focuses not as a reader might expect on student plagiarism, which has already been more than adequately discussed earlier in the student context, but instead on common practices elsewhere, such as 'ghostwriters' and scholars publishing papers written by their assistants, with no attribution

or a mere footnote acknowledgement. Leading historical figures, politicians and internationally known authors have not avoided the practice. Surprisingly, there appears to be no settled definition of plagiarism, with some requiring intentional conduct, while others will penalise sloppy scholarship. The waters are muddied further by unconscious plagiarism – *Cryptomnesia*. This chapter concludes with a call for a more serious approach to plagiarism from institutions, publishers and professional associations, among others.

Chapter 6 looks at copyright infringement and, as in previous chapters, outlines the staggering scale of the problem, with the music and film industries particularly badly affected – some estimates put the cost of piracy at $250 billion a year. Here there seems to be little guilt on the part of those illegally downloading copyright works, who know that it is wrong, but see it as a largely victimless crime (p. 95) – in this area legal and social norms are clearly out of step. The author then engages in a very perceptive and well-informed discussion of responses to infringement under the following headings: *Deterrence* (stronger laws and enforcement) – the author quite rightly concludes that this approach, tried in the late 1990s and 2000s, has failed. *Adaptation* – she recommends changing approach, chiefly by the use of warning letters by internet providers, such as universities and domestic ISPs, and the adoption of new business models by copyright owners, such as streaming and providing high-quality products at low cost with greater ease of access. This approach – of unlimited content for a flat fee offered by providers such as Netflix and Spotify – has been a singular success. *Persuasion* is another solution offered, and relates to educating pirates as to the consequences of their actions and therefore creating a positive moral climate. Finally, Rhode considers *Surrender*, looking at alternatives to the current copyright system and indeed even questioning the traditional justification for copyright – as an incentive to create in the modern digital world.

Chapter 7 considers cheating in insurance and mortgages. Again, as a start, Rhode illustrates the significant financial scale of the problem: billions of dollars are involved and most insurance fraud is of the ‘soft’ variety – widespread padding of legitimate claims or misrepresenting facts. The vast majority goes unpunished and padding is both widespread and socially acceptable for a large number of people, with a widespread negative perception of the insurance industry being a significant contributing factor. The author then looks at specific sectors – auto insurance, workers’ compensation, health insurance and mortgage fraud – before again offering strategies for combatting fraud.

The final substantive chapter covers cheating in marriage and, as might be envisaged, this is one of the longer chapters. The balanced and nuanced approach evident in the rest of the work is present here. While the harms associated with marital cheating are neither glossed over nor ignored, the author notes '… those harms do not justify the archaic criminal, civil and military sanctions that current laws impose'. The scope of this chapter is confined to adultery between same-sex married couples. Again, the demographic data and causes of and motivations for cheating are discussed, before the widely varying consequences. Ninety per cent of Americans think that cheating in marriage is wrong, but a significant number – at least 20 per cent (likely an under-report) – engage in it. The chapter concludes with legal and political sanctions. From a UK lawyers' perception, the criminal legal sanctions available for adultery in the USA in 21 states, though often unenforced in practice, are somewhat of a surprise, as are the military criminal penalties for adultery. Several examples are provided of the political consequences of adultery, with career-ending consequences for some, and lesser final consequences for others such as Bill Clinton.

The conclusion draws general lessons from the analysis of previous chapters, and offers suggestions for the most promising responses. Cheating depends on social norms, rewards and penalties in a given context (p. 156). Attitudes to cheating revealed from surveys suggest a disturbingly high level of acceptance of it among the young, and to change this disturbing state of affairs, education about integrity and authoritative parenting by example need to start at an early age, and continue through education and into the world of work. In work, organisations need to be ethically led, check their ethical climate with surveys, and then provide ethical infrastructures and integrate concerns about honesty into official policies and reward systems, including effective whistle-blowing policies. The author concludes: 'Sustaining a culture that actively discourages cheating is a collective obligation, and one in which we all have a substantial stake.'

The work as a whole is eminently readable and extremely well researched and referenced, showing a true multidisciplinary approach to a concept of high complexity. The author never gets bogged down in technicality, but keeps the text engaging to read by interspersing hard academic data with items from the news and punchy quotes from literature. It is recommended reading for professionals of many disciplines.

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