BIAC is pleased to provide some preliminary comments on the passing-on defence, the standing of indirect purchasers and the calculation of damages in light of the recent Green Paper by the European Commission¹. BIAC welcomes the Commission having launched a debate on the future development of private antitrust litigation within the European Community (“EC”) and broadly welcomes *appropriate* initiatives that facilitate private enforcement. Competition policy has been one of the success stories of the EC in terms of promoting the smooth functioning of markets and helping create a level playing field across the EC. Private enforcement can further contribute to the success of EC competition policy.

It is important, however, to develop an approach that does not unduly burden business and which avoids the excesses of the US system. While recognising the benefit of encouraging more private enforcement, it is essential to achieve a balance between the interests of claimants and defendants. Issues relating to multiple damages, for example, must be considered in the light of this. It is also important to develop an approach which is harmonised, in so far as is possible, across the twenty-five EC Member States. The introduction of new rules across Member States presents its own challenges. Additional infrastructure, support, training and procedural rules will be necessary to ensure consistent application in each jurisdiction. This will also help develop and maintain a level regulatory/legal playing field across the EC. A pan-EC solution would help avoid inefficient “forum shopping” by claimants according to whether, for example, multiple damages are awarded or pre-judgment interest is available.

**Introduction**

1. BIAC is not against some increase in private enforcement as a complement to public enforcement. It considers that specific issues must be assessed within the wider policy context being pursued by EC competition law, in particular, guaranteeing the effectiveness of Community law and ensuring that there is a sufficient deterrent effect associated with EC competition rules. However, at the same time, it is crucial that the implications of any policy developments for business be kept fully in mind. Clearly, the desire to facilitate private anti-trust litigation, whilst acceptable in principle,

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¹ Paper prepared on behalf of BIAC by Keith Jones, Competition Law Partner at Baker & McKenzie LLP, London, and member of Baker & McKenzie's Competition Litigation Unit with substantial comments from BIAC members including Rufus A Ogilvie Smals, Vice Chair of the BIAC Competition Committee.

should not be at the undue expense of the business community or economic efficiency. A “chilling effect” on competition and innovation should not be created. The EC should specifically seek to avoid the excesses of the US system, where a private enforcement “industry” has developed largely regardless of the merits and where vexatious and/or spurious antitrust litigation is not uncommon. As the Commission itself notes in its Working Paper, “[t]he ultimate objective should be to foster a competition culture, not a litigation culture.”

2. This is a sentiment that was shared by BIAC in its comments on discovery and gathering of evidence; in that submission, BIAC emphasised the need to avoid:

   “the undesirable consequence of opening the flood gates to speculative and even vexatious proceedings with all the wasted cost and disruption to legitimate commercial activities which can result.”

3. It is in the light of the need to strike the right balance between facilitating some further private enforcement and protecting against abusive and/or spurious litigation that BIAC has formulated its views on each of the passing-on defence, indirect purchaser standing and the definition of damages. Striking the right balance is crucial to promoting the fundamental objective of the Lisbon Agenda of making the EC the “world's most dynamic and competitive economy”.

The passing-on defence and indirect purchaser standing

4. BIAC addresses the issues of passing-on and indirect purchaser standing together as they are inextricably linked. It is clear that the resolution of this issue is fundamental to ensuring an effective system of private enforcement in Member States.

5. In relation to the passing-on defence, there is no easy solution, as evidenced by the varying approaches taken to date in different Member States. There are two opposing objectives that need to be taken into account. First, allowing the defendant to raise the passing-on defence will inevitably add complexity (and, therefore, further costs) to any litigation, thereby discouraging direct purchasers from pursuing potential litigation. This would go against the stated desire of the Commission to facilitate private enforcement. On the other hand, the exclusion of such a defence could result in direct purchasers being over-compensated subject to whatever claims the indirect purchasers may have against them.

6. In BIAC's view, the proper balance on this issue is that indirect purchasers should not be permitted to make a claim for losses suffered as a result of breaches of EC competition law. In our view the increased complexity and cost of such litigation is

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3 BIAC Summary of Discussion Points relating to discovery and gathering of evidence. Paper prepared by Rufus A. Ogilvie Smals, 31 May 2005. Further general observations in relation to private enforcement are set out in this paper.

4 BIAC recognises that there may be issues in this regard given the ECJ's judgment in Crehan v Courage Case C-453/99, [2001] ECR I-6297. An alternative method of dealing with issues of complexity and of limiting the costs would be to encourage consolidation of multiple suits commenced by both direct and indirect purchasers and to ensure effective case management. However, careful consideration needs to be given to the appropriate
not justified by the risk of indirect purchasers being without an effective remedy for what would otherwise be valid claims under Community or national competition laws.

7. By the same token, it is for consideration whether defendants should be able to rely upon the passing-on defence. From one perspective it would be inequitable to allow defendants to rely upon such arguments in circumstances that indirect purchasers would have no remedy. Whilst this may work to the particular advantage of a direct purchaser, one can envisage policy grounds for such an outcome where the alternative is for a defendant to benefit from conduct which is found to have been illegal.

8. Clearly, BIAC considers the position in the EC should not differ materially from the US in this regard.

**Definition of damages**

9. A key issue relating to the definition of damages is whether damages awarded to claimants should be compensatory, restitutionary and/or punitive in nature. The compensation method would entitle claimants to claim for losses suffered, whilst the restitution method would entitle claimants to the illegal gain obtained by the infringer. Punitive damages may be linked to the loss suffered or the illegal gain, but not necessarily limited by it. BIAC recommends that claimants should base a claim on the compensatory method. A claim in restitution should not be made available since it should be for the regulatory authorities to take appropriate action to deny the infringer the right to retain the illegal gain. BIAC does not believe that it is desirable for a method to be available which could result in claimants being over-compensated, particularly given the range of situations that anti-trust infringements cover (both “object” and “effect” cases). In adopting a compensatory approach based on the losses of the claimant, BIAC agrees that account should be taken of losses arising both from the increase in price and the reduction in quantity purchased.

10. A related but separate issue is that of punitive damages - should there be a punitive element (or, viewed from the claimant's side, a windfall element). The US adopted a clear position on this many years ago, inspired by the English Statute of Monopolies. However, this should not be followed automatically in the EC. Whilst exemplary or punitive damages can provide a deterrent effect, they raise public policy or constitutional issues in many EC Member States.⁵

11. BIAC recognises that certain legal systems consider that punitive damages can serve a useful policy goal. For example, under English law, exemplary damages are available inter alia where there is “wrongful conduct which has been calculated by the defendant to make a profit for himself which may well exceed the compensation payable to the claimant”⁶. Nevertheless, BIAC considers that exemplary awards are an inappropriate head of damages since this purpose is already served by any procedural mechanisms for such collective claims, bearing in mind the need to guard against promoting lawyer driven class action cases so regularly seen in the US.

⁵ BIAC notes that in the very recent Advocate General's Opinion in Manfredi v Fondiaria Sai Assicurazioni (Joined Cases C-295/04, C-296-04, C-297-04), the Advocate General was of the view that whether exemplary damages are available in private antitrust claims is a matter for national law (paragraph 69 of the Opinion). In Germany, BIAC understands punitive damages would be regarded as unconstitutional.

⁶ Per Lord Devlin in Rookes v Barnard [1964] AC 1129.
regulatory fines imposed by the Commission or national competition authorities. The award of exemplary damages in addition to the imposition of a regulatory fine may also infringe against the fundamental principle of non bis in idem. Indeed, BIAC's view is that such an award would be inappropriate even if no fine has been imposed on the infringer by a competition authority - there may be good policy reasons why no fine has been imposed, e.g. in the context of leniency programmes.

12. A further issue that is relevant to the definition of damages is whether pre-judgment interest on damages should be available, which is not the case in the US. BIAC considers that interest would be appropriate in order to provide full and fair compensation to claimants in a manner that would not unduly burden defendants. A simple award of damages would not reflect the fact that the claimant would also have seen a return on the relevant losses suffered as a result of the infringement. This has been recognised by the ECJ in its jurisprudence:

“full compensation for the loss and damage sustained… cannot leave out of account factors, such as the effluxion of time, which may in fact reduce its value. The award of interest, in accordance with the applicable national rules, must therefore be regarded as an essential component of compensation”7.

13. To ignore this time element would deprive a claim of effectiveness.8 Its absence is one of the justifications for multiple damages in the US.

14. Finally, BIAC considers that multipliers should not be applied automatically in the calculation of damages. To do so risks introducing the excesses of the US system (although equally significant factors are the nature of the “class action” system in the US and the fact that liability is not joint - encouraging smaller parties to settle and give (unmeritorious) groups of claimants a fighting fund). The availability of compensatory claims and pre-judgment interest (as well as other initiatives) should provide a sufficient incentive to claimants to bring actions. Indeed, the award of pre-judgment interest may even bring the level of damages close to the level that would exist following the application of a 'double' multiplier to an award. Whilst the risk of double damages would further deter potential infringers, the risk of regulatory fines and exemplary damages (where fines have not been imposed) should still constitute a sufficient deterrent. BIAC also believes that it is inappropriate to award victims of anti-competitive conduct with a possible windfall. The prospect of such windfall winnings even if limited to hardcore clear cut infringements such as cartels could incite spurious claims.

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7 Marshall v Southampton and South-West Hampshire Area Health Authority, Case C-271/91.
8 BIAC notes that economists in the US generally agree that anti-trust damages should be more than singlefold to compensate for detection problems, proof problems and risk aversion. Some also question whether treble damages are really that due, for example, to the lack of pre-judgment interest available. See Gary S Becker, Crime and Punishment: An Economic Approach, 76 J.Pol.Econ, 169 (1968); Robert H. Larde "Are Antitrust "Treble" Damages Really Single Damages?" 54 Ohio St. L.J.155 (1993).