Discussion Points

Presented by the Business and Industry Advisory Committee (BIAC) to the OECD Working Party No. 3 on Cooperation and Enforcement

Roundtable Discussion on Private Remedies: Collective Actions/Class Actions and the Interface between Public Enforcement and Private Enforcement

June 7, 2006

I. Introduction

1. BIAC is pleased to provide some comments on collective/class actions and the interface between public and private enforcement in light of the Green Paper by the European Commission. As stated in our paper of February 2006, BIAC welcomes the Commission's launch of a debate on the future development of private antitrust litigation within the EC. It is in the light of the need to strike the right balance between facilitating some further private enforcement and protecting against abusive, speculative, spurious or vexatious litigation that BIAC has formulated its views on each topic as the issues upon which written contributions have been requested raise significant policy and practical issues in this regard.

II. Collective Action/Class Action

2. Granting enhanced rights to bring collective or class actions in the EU risks introducing some of the main excesses of the existing US private antitrust enforcement systems that most wish to avoid. The business community would strongly oppose any such initiatives. As such, jurisdictions should be very careful in assessing such consequences in considering whether or not to proceed down such a road.

3. Many jurisdictions within the OECD have different tools available that broadly fall under the “collective action/class action” heading. Appropriately designed, they can be a tool for more efficient case management and court utilisation. Moreover, it might be superficially attractive to see such tools as potentially relevant in overcoming possible difficulties that may arise due

1 Paper prepared on behalf of BIAC by Keith Jones, Partner, Baker & McKenzie LLP, and Alan Wiseman, Partner and Co-Chair of Antitrust Practice Group, Howrey LLP, with substantial contribution from BIAC Competition Committee members, including Rufus A. Ogilvie Smals, Vice Chair, BIAC Competition Committee and Elizabeth Morony, Partner, Clifford Chance.


3 Summary of Discussion Points Presented by the Business and Industry Advisory Committee (BIAC) to the OECD at the OECD Competition Committee Working Party No. 3, Private Remedies: Passing-on Defence; Indirect Purchaser Standing; Definition of Damages, (Feb. 7, 2006).
to the nature of certain competition law claims. In particular, to the extent that individual consumers may be harmed by a competition law infringement, but such harm is relatively small financially, it may be tempting to turn to collective or class actions as one possible method of ensuring that there is a cost effective remedy.

4. At the same time, however, it must be remembered that the misuse of the class action system has been arguably one of the main drivers behind the perceived excesses of the US antitrust private enforcement regime. This has been a significant contributory factor driving the efforts of the US Supreme Court and legislature, particularly over the last decade or so, to limit the availability and stiffen the requirements for class actions. In diagnosing the US class action antitrust system’s problems, it is useful to separate the problems from their causes.

   A. Problems

5. There are several features of the US class action antitrust system that could and should be avoided in the EU.

   a. US class action antitrust cases almost never go to trial, due to the pressures to settle. As a result, plaintiffs’ theories are almost never put to the test, lawyers are encouraged to bring yet more cases, and disputes about how a trial of a class action would operate remain almost entirely theoretical.

   b. US class action antitrust cases spend an enormous amount of time and money fighting over procedural questions, such as whether to certify the class, where the case should be heard, what discovery the class representatives and absent class members must provide, how the conflicting state and federal legal systems should govern, among other issues. Comparatively little time and attention is devoted to the real question of whether the defendant(s) violated the antitrust law.

   c. US antitrust class actions typically involve a swarm of lawsuits, often in the dozens, typically brought by “me, too” lawyers who have made no independent investigation of the facts and simply want a piece of the action.

   d. The lawyers often are rewarded far beyond what efforts they have made and what results they have delivered for the class members.

   e. Class actions on behalf of consumers who receive a trivial check in the mail as compared to millions of dollars awarded to attorneys.

   B. Causes and Solutions

6. There are several avoidable features of the US class action antitrust system that have led to these misuses and excesses.

   a. The treble damages feature of US antitrust law, especially when applied in the context of nationwide class actions, creates undue pressure on defendants to settle, even where the case has little or no merit. A class action, by itself, places enormous pressure on a defendant. Adding a treble damages feature multiplies these risks beyond all reason and far beyond what is necessary to deter would-be violators. This is compounded by joint and several liability, with no right of contribution to limit damages based upon a
company’s own sales. BIAC would propose that multiple damages not be allowed for class actions.

b. Class actions on behalf of all purchasers, rather than excluding large purchasers who can bring their own cases, and limited to those claimants whose claims are so small that they need the economies of aggregating claims to justify incurring litigation costs to recover.

c. The confusing overlap between federal and state law systems further multiplies a defendant’s exposure (and the corresponding unwillingness to take a case to trial) and also creates an immense amount of procedural wrangling between the parties. For example, under the Supreme Court’s decision in *Hanover Shoe*, a class of direct purchasers can sue for the entirety of a price-fixing overcharge with no defence that they, in turn, passed on the higher prices to their customers. Under the laws of many states, including some of the most populous, these customers can sue for the entirety of damages passed-on to them. The combination of those two legal systems allows two separate groups each to sue for the entirety of damages – exposing a defendant to sextuple damages and immense procedural complications. The economic evidence of pass-on on a class-wide basis is suspect. As set out in its previous papers on this subject BIAC would propose that any private remedies be limited to the direct purchasers only.

d. The class certification process should not allow generalized economic theories of injury on class-wide basis, without taking into account the individual nature of purchasers’ negotiations with suppliers.

e. The method for compensating class action lawyers creates undue incentives to bring cases of minimal value and to run-up hours rather than seek efficient resolution of claims. In some instances, lawyers have obtained recoveries consisting of virtually worthless coupons for the class, while the lawyers received cash (from the settling defendants) for their efforts. It would be more appropriate if lawyer compensation in cases where the class did not receive cash be based on the actual value of the non-cash items, in light of their actual redemption rates by class members. Another concern is that, where the class receives cash, the percentages of that cash that go to the lawyers result in a huge windfall that unduly encourages other lawsuits. Lawyer recoveries of 25-30% of the cash are not uncommon. An appropriate limit on attorney’s fees is required.

f. Class representatives are purely figureheads. They have no real responsibility for overseeing the case and monitoring the lawyers. Instead, they lend their name to the case, provide minimal discovery, and then sit back and see whether the case goes well and, if so, the court typically awards them a tidy sum. It would be preferable for class representatives to be able to show an ability and willingness to actively monitor the case at all stages and that the lawyers be required to certify at each step that the class representatives have been involved in the decision.

7. The EC should specifically seek to avoid repeating the same mistakes which resulted in a private enforcement “industry” developing largely regardless of the merits and where

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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.”5

8. Of course, it is not just one factor in isolation that is problematic. The right of lawyers in the
US to take a significant percentage of an award contributes as does the ability of a group of
claimants to create a “fighting fund,” by settling for a relatively small amount (as compared to
the treble damages claim) and then use this in order to pursue other parties.

9. Given the dangers associated with the use of class actions, BIAC is strongly opposed to the
extension or encouragement of class action rights. They inevitably promote a litigation
culture and the possible increase in competition cases does not justify the risk of introducing
or recommending such mechanisms.

10. To the extent that any kind of collective action is needed, it may be more appropriate for a
designated and approved consumers association to bring any such claims. Such associations
should act only cases of genuine concern to the consumers they represent, rather than as a
speculative means of obtaining windfall damages or commercial advantage. In this way, the
balance can be struck between legitimate enforcement and discouraging abusive litigation. In
this regard, BIAC notes that the UK has adopted a model of fast tracking complaints of
publicly approved consumers associations but no consumer body claims have been brought
before the UK's Competition Appeal Tribunal to date.

11. Other issues raised in the Green Paper relate to the responsibility for costs in private actions.
There is a proposition that private remedies would be encouraged if potential claimants were
not at risk of having to pay or at least contribute to the costs of the other party should its claim
not succeed. This is notwithstanding that in many jurisdictions the claimant can recover at
least a significant proportion of its costs from the other party in the event that its claim is held
to be well founded. Such virtual immunity from having to meet the respondent's costs except,
perhaps, in cases where a claim is found to be vexatious or malicious, has been another
important contributory factor to the abuses which have been seen in US jurisdictions. In the
view of BIAC a costs risk is critical to achieving an appropriate balance between claimants
and defendants as well as between the need to encourage claims whilst discouraging
vexatious, speculative or spurious litigation. Accordingly, BIAC is strongly opposed to any
such model being adopted within the EU or elsewhere, notwithstanding the comments of the
UK's Competition Appeal Tribunal.6

III. Interface between Public Enforcement and Private Enforcement

12. BIAC has previously stated that, in principle, it is not against some increase in private
enforcement as a complement to public enforcement provided that the floodgates are not
opened to abusive, speculative, vexatious or spurious litigation. The burden on industry can
be particularly severe in the context of discovery and gathering of evidence.

5 Commission Staff Working Paper, Annex to the Green Paper, Damages actions for breach of the EC antitrust rules,
6 See, BCL Old Co Ltd v Aventis and Others, judgment on security of costs [2005] CAT 2.
13. In the EU and most of its Member States, it has long been the case that public enforcement has been viewed as the primary mechanism for competition law enforcement. In many ways, this can be viewed as sensible with public authorities being unaffected by commercial considerations and able to pursue a case - and any decision to settle - with the public interest in the effectiveness of competition firmly in mind. Indeed, a regulator-lead process ensures that the courts themselves are not used for anti-competitive purposes, avoiding allegations, as have been seen in the US, that settlements in suits between patented and generics drugs are themselves an anti-competitive tool.

14. Regulator-lead enforcement also ensures that decisions, often with far reaching economic impact, are taken by officials who are competition law specialists with the “public interest” in mind. As the EC itself has noted there is a real question as to whether national courts have the background or expertise to deal with complex, data-intensive, economics driven cases. Even if there are, these are often hired hands, such that the smaller players involved are at a disadvantage. This is not altered by the a single, court appointed expert - this would merely lead to the parties, or at least the well financed ones, having better expert advice in order to persuade the single expert. In any event, in complex commercial cases it is unlikely that a single expert would be appointed.

15. BIAC notes that some consider that a change in the balance between public and private enforcement is needed due to the lack of resources in public enforcement bodies and to create additional deterrence. Nevertheless, in BIAC's view, in the EU at least, private enforcement should not be seen as a substitute for public enforcement which may have become sub-optimal because of inefficiencies and/or resource issues.

16. BIAC notes that many authorities, such as the UK's OFT, have come under criticism for not making effective use of their powers and resources. The infringement cases brought by the OFT are few and far between and there have been no cases by the UK “sectoral” regulators, which have concurrent competition law powers. Many other authorities in the EU are still coming to terms with the powers that they now have available, with the ECN (European Competition Network) still working on many relevant issues.

17. As such it is both premature and inappropriate to alter the “balance” until it is clearer how the NCAs in the EU will work both together and individually in what has been a rapidly changing environment in recent years. The solution to poor public enforcement is to encourage agencies to become more efficient and to target their resources. Encouraging a rush to take speculative private damages claims to court is not the appropriate response.

18. The issue of the appropriate interface may differ in other jurisdictions, particularly in the US, with different traditions applying and different policy considerations/decisions having been taken about the design of the competition law enforcement regime. In the US regulators prosecute criminal charges in court proceedings rather than as autonomous administrative decision makers. As BIAC has previously stated, there is no one single right answer and such differences should be respected.

19. However, certain specific issues require particular attention. It is important for the right balance to be struck and maintained between leniency applications, a central driver of the public enforcement process with respect to cartels, and private enforcement. So far in the EU, the threat of private enforcement follow-on claims does not appear to have been a significant
factor, at least to date, in the decision by undertakings as to whether or not to apply for leniency.

20. However, in BIAC's view, this is changing and it is important to protect the integrity of leniency programmes and incentivise applications. The US has in part recognised and addressed this through reducing the amount of damages that a successful leniency applicant can have awarded against it from treble to single damages. BIAC also notes that the Green Paper considers the introduction of “double” damages for cartels but would reduce them to single damages for (presumably only qualifying) leniency applicants. Whatever changes are introduced with respect to the level of damages (as to which, please see BIAC's previous paper), the leniency applicant should be protected.

21. Arguably, it would enhance the leniency application regime if complete immunity, even as to damages claims, was introduced (subject, perhaps, to an ability for claims to be brought if there were no other possible claimant e.g. if all other cartelists had been declared bankrupt). This would, of course, raise issues of public policy but the importance of leniency programmes to public enforcement may well justify some such exceptional preference.

22. It is also important to note that, as previously stated, issues regarding access to evidence arise when considering the interface between public and private enforcement. The Commission is conscious of this. It seeks to ensure that evidence such as oral statements provided to it in the context of leniency applications are not disclosable in subsequent litigation, whether in the EU Member States or the US. BIAC fully supports this policy and would encourage all courts and regulators to adopt and respect it even in relation to jurisdictions outside their own.