

## Summary of Discussion Points

### Presented by the Business and Industry Advisory Committee (BIAC) to the OECD Competition Committee Working Party No. 3

### Roundtable on the Relationship Between Public and Private Enforcement

June 15, 2015

#### I. Introduction

1. The Business and Industry Advisory Committee (BIAC) of the OECD appreciates the opportunity to contribute to the OECD Competition Committee's Roundtable on the relationship between public and private antitrust enforcement. In BIAC's view, the current balance between public and private antitrust enforcement across many jurisdictions is both inconsistent and unsatisfactory. While several jurisdictions have been encouraging more private enforcement to achieve the goals of deterrence and compensation, it is important to keep safeguards in place so as not to stifle pro-competitive business conduct or overcompensate victims. The OECD is in a position to propose convergence measures that would create more consistency across jurisdictions, and promote the appropriate balance between public and private antitrust enforcement.

2. In this paper, public enforcement refers to enforcement of antitrust laws by competition authorities, while private enforcement generally refers to litigation initiated by a party in the Courts, seeking a remedy for an infringement of antitrust law.<sup>1</sup> Such private litigation can either be a stand-alone action or a "follow-on" action, that is, following public enforcement for the same infringement.<sup>2</sup> There are also hybrid models for enforcement, such as, for example, private access to the Competition Tribunal in Canada.<sup>3</sup>

3. In this paper, organized under the principal headings of Deterrence and Compensation, Advantages and Disadvantages of Public and Private Enforcement, Damages, Class Actions and Disclosure Issues in Parallel Public and Private Proceedings, BIAC puts forward certain considerations

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<sup>1</sup> The remedy sought might be either an injunction or interim measure or a claim for damages suffered as a consequence of an infringement of competition law. In this paper we will focus mainly on the second type of remedy.

<sup>2</sup> Kai Huschelrath & Sebastian Peyer, *Public and Private Enforcement of Competition Law: A Differentiated Approach* (2013) Centre for Competition Policy Working Paper 13-5, available at <http://competitionpolicy.ac.uk/publications/working-papers>.

<sup>3</sup> *Competition Act*, R.S.C. 1985, c. C-34 s. 75, as am.; under which a private party may, with leave of the Competition Tribunal, seek a remedy in relation to a supplier's "refusal to deal."

with respect to the optimal balance between public and private antitrust enforcement. The examples and discussion provided are taken primarily from experience in the United Kingdom (U.K.), European Union (EU), the United States (U.S.) and Canada; however, BIAC recognizes relevant examples from other jurisdictions may also exist.

4. Finally it should also be pointed out that businesses as well as consumers are victims of infringements of competition law and so effective deterrence, enforcement and compensation are important to business as well.

## **II. Deterrence and Compensation**

5. An analysis of the appropriate balance between public and private antitrust enforcement must necessarily begin with the goals of antitrust enforcement, generally. The first goal of antitrust enforcement is to ensure the effectiveness of antitrust regimes aimed at promoting competitive and efficient markets. In order to secure this goal, and to ensure that antitrust rules are not infringed, deterrence constitutes a credible threat of sanctions to discourage potential antitrust infringers from violating the law. A second goal of antitrust enforcement is to compensate victims who have suffered injuries as a result of antitrust infringements, that is, to put them back in the position they would have been in without the infringement.

6. Although, at least in principle, each of deterrence and compensation can be pursued by either a public or private enforcement system, it is commonly recognized that deterrence is the primary objective of public enforcement and, as such, better pursued by competition authorities.<sup>4</sup> Deterrence is attained primarily through the imposition of fines and/or incarceration, which not only serves to punish and discourage actual offenders from breaching antitrust law in the future, but also to deter other individuals from engaging in behavior that is contrary to antitrust laws.<sup>5</sup>

7. Private enforcement can also play a role in deterrence, a role that is frequently emphasized in antitrust legal systems such as that of the U.S., in which the role of a litigant in private antitrust cases is seen as vital to closing the so-called “enforcement gap” created by the perceived inability of public enforcement authorities to deal with all cases due to resource constraints. To that end, actions brought by private litigants in the U.S. are encouraged by deterrence-oriented features of U.S. law, such as the award of treble damages, which will be elaborated on in Part IV of this paper. As well, in the EU, it has been contended that the very presence of private enforcement actually furthers the deterring effect of the law by adding costs and risks for wrongdoers.<sup>6</sup>

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<sup>4</sup> Wouter P.J. Wils, *The Relationship Between Public Enforcement and Private Actions for Damages*, (2009) 32:1 World Competition 8.

<sup>5</sup> European Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of regulation No 1/2003, [2006] O.J. C 210/2 at para. 4; *ACF Chemiefarma v. Commission*, C-41/69, [1971] E.C.R. 397 at para. 173; *SGL Carbon AG v. Commission*, C-308/04, [2006] E.C.R. 5977 at para. 37; *Britannia Alloys & Chemicals Ltd v. Commission*, C-76/06 P, [2007] E.C.R. 4405 at para. 22.

<sup>6</sup> European Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of regulation No 1/2003, [2006] OJ C 210/2, para. 4; Case 41/69, *ACF Chemiefarma v Commission* [1971] ECR 397, para. 173; Case C-308/04, *SGL Carbon*

8. Notwithstanding the complementary role of private enforcement in deterring violations of antitrust law, it is commonly recognized that the main objective of private enforcement is that of compensating the victims of antitrust infringements. The system of private enforcement enables those who have suffered injury as a result of infringement of antitrust laws to seek redress, which would often not be forthcoming in a system solely comprised of public enforcement.

9. However, just as private enforcement may have a role in relation to the objective of deterrence, public enforcement may have a role in relation to compensating victims. Competition authorities in Europe have demonstrated that public enforcement may exceptionally include compensation. For example, in December 2006, the U.K. Office of Fair Trading (OFT) published a decision involving a price-fixing cartel among independent schools in the U.K. Despite the anti-competitive behavior of the violators, the OFT decided not to impose heavy fines as it normally would, but rather preferred to settle the case by accepting a financial commitment to compensate the victims of the cartel. The new Consumer Rights Act 2015 has an express provision that allows the UK competition authority to consider an application of a redress scheme by the party under investigation. Additionally, in some competition regimes such as those of France and the U.S., public authorities have the power to claim damages on behalf of individuals who have been harmed by anti-competitive conduct.<sup>7</sup>

10. In the EU, public competition authorities help to promote private enforcement by intervening in private proceedings as *amicus curiae*.<sup>8</sup> Moreover, the European Court of Justice (ECJ) has eliminated any doubt about the primacy of public interest considerations; private interests being pursued in private litigation must ultimately be consistent with the protection of the public interest.<sup>9</sup> An efficient and effective system of private enforcement should not alter the basic mandate of competition law, which is “to safeguard the public interest in maintaining free and undistorted competition” and not to protect competitors. Private enforcement, therefore, “should by no means be thought of as antagonistic to the public enforcement model.”<sup>10</sup> In other words, if a competitor alleges the anti-competitive effects of a practice that in reality enhances effective competition, such a private action should fail out of consideration for the public interest.

11. Countries with different legal traditions have taken varying approaches to the question of compensation, as reflected in the jurisprudence concerning complex issues in private enforcement such as the compensation of indirect purchasers and the availability of the “passing-on” defence.

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*AG v Commission* [2006] ECR-5977, para. 37; *Case C-76/06 P, Britannia Alloys & Chemicals Ltd v Commission* [2007] ECR-4405, para. 22.

<sup>7</sup> 1 ABA, SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 753 (7th ed. 2012).

<sup>8</sup> Rincazaux, ‘Les autorités de la concurrence doivent-elles être autorisées à intervenir dans les procédures relatives à des problèmes de concurrence, plus particulièrement lorsqu’elles sont menées devant les juridictions ordinaires? Dans l’affirmative, quel devrait être le fondement de leur pouvoir d’intervention? Rapport international’, LIDC Questions 2001/2002, at 1.

<sup>9</sup> *Pfleiderer AG v. Bundeskartellamt*, C-360/09, [2011] E.C.R. at para. 19.

<sup>10</sup> Assimakis P. Komninos, *Private enforcement in the EU with emphasis on damages actions* in Ioannis Lianos & Damien Geradin, eds., *HANDBOOK ON EUROPEAN COMPETITION LAW: ENFORCEMENT AND PROCEDURE* (Cheltenham, U.K.: Edward Elgar, 2013) 228 at 234.

12. With regard to purchasers who have acquired products that were subject to price-fixing agreements for resale or as components, fundamental economics suggest that they are likely to pass on at least part of the overcharge to other, indirect purchasers.<sup>11</sup> In the U.S., in a rule adopted by the Supreme Court in the name of judicial economy, direct purchasers can recover the whole overcharge, even if they have passed such on to their customers in its entirety, and indirect customers cannot sue for damages under federal law.<sup>12</sup> If corrective justice through compensation is the goal, this simplifying rule is arguably inequitable, as it grants direct purchasers unjustified windfalls. Determining how much of an overcharge has been passed on is, however, a difficult task.

13. In Europe, many of these issues are arising in cases in front of national courts sometimes with divergent outcomes. It is well established in all EU countries that, as recognized by the ECJ law in its groundbreaking judgment in *Courage*<sup>13</sup> as well as in *Manfredi*,<sup>14</sup> there is the right of any individual to claim damages for infringements of antitrust law. However, notwithstanding the clear principles, in the years following those judgments there were not many cases of private action. In an effort to foster private action, the European Commission published a Green Paper and later a White Paper on Damages Actions for Breach of the EC antitrust rules.<sup>15</sup> Finally last year Directive 2014/104/EU (The EU Directive) was adopted and will be soon transposed into national law.<sup>16</sup> The EU Directive includes specific measures designed to allow victims of antitrust infringements to effectively access redress mechanisms and fully recover damages.<sup>17</sup>

14. Pending full implementation of the EU Directive, private parties (both direct and indirect purchasers) in certain countries in Europe currently encounter procedural difficulties before their national courts. In relation to passing on, the EU Directive permits the defence but creates a rebuttable presumption of harm in favour of both direct and indirect purchasers in cartel cases, with the onus being on the infringer, in cases brought by indirect buyers, to demonstrate that actual loss has not been passed on, creating a risk of double recovery.<sup>18</sup>

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<sup>11</sup> See, e.g., Robert G. Harris & Lawrence A. Sullivan, *Passing On the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. Pa. L. Rev. 269 (1979).

<sup>12</sup> *Hanover Shoe v. United Shoe Machinery*, 392 U.S. 481 (1968) and *Illinois Brick v. Illinois*, 431 U.S. 720 (1977) (“*Illinois Brick*”). A number of states allow however for indirect purchasers to sue under state law. In *California v. ARC America*, 490 U.S. 93 (1989), the U.S. Supreme Court held that such state laws are not preempted by section 4 of the Clayton Act. In response to *Illinois Brick*, many states created “repealer” provisions that permitted by statute or case law, indirect purchasers to maintain damage claims under state-law antitrust statutes. Courts initially address whether federal antitrust standing principles as established by the Supreme Court in *Assoc. Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983), should be applied or whether antitrust standing principles under applicable state laws should be applied.

<sup>13</sup> *Courage v. Bernard Crehan*, C-453/99, [2001] E.C.R. at I-6314.

<sup>14</sup> *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA*, [Manfredi] C-295/04 and *Pasqualina Murgolo v. Assitalia SpA*, C-298/04, [2006] E.C.R. I-06619.

<sup>15</sup> EC, “White Paper on Damages Actions for Breach of the EC antitrust rules,” (2008) 165, Brussels, 2.4.2008.

<sup>16</sup> Directive 2014/104/EU of 26 November 2014 OJ 5 December 2014 L349. The deadline for implementation is 27 December 2016.

<sup>17</sup> *Supra* note 15.

<sup>18</sup> Norton Rose Fulbright, “Competition litigation - Should the passing on defence be recognised? France and the U.K. try to grapple with a key issue when cartel victims sue for damages” (July 2012), available at

15. In Canada, in 2013 the Supreme Court of Canada released a trilogy of decisions respecting competition class actions: *Pro-Sys Consultants Ltd. v. Microsoft*,<sup>19</sup> *Sun-Rype v. Archer Daniels Midland Company*,<sup>20</sup> and *Infineon Technologies AG v. Option consommateurs*.<sup>21</sup> In *Pro-Sys Consultants Ltd. v. Microsoft*, the Supreme Court of Canada confirmed that indirect purchasers have a right to bring an action under competition law principles to recover losses passed on to them by other purchasers in the distribution channel.<sup>22</sup> In doing so, the Supreme Court of Canada firmly rejected the approach in *Hanover Shoe* and *Illinois Brick*.<sup>23</sup>

16. The different approaches taken to the questions of recoverability of indirect damages and the availability of a passing-on defence highlight the degree of variation in prioritization of the goals of deterrence and compensation in the private antitrust enforcement regimes of different countries.

### III. Advantages and Disadvantages of Public and Private Enforcement

17. Public enforcement and private enforcement each have advantages and disadvantages associated with them. In this part of the paper, BIAC describes how specific elements of these enforcement regimes can affect whether an appropriate balance is being achieved.

18. Many authors agree that there are two advantages of public enforcement over private enforcement. First, public enforcement benefits from more effective investigative and sanctioning powers. Second, public enforcement is less costly for society than private enforcement. Each of these advantages is discussed further below.

19. Competition authorities can be more effective than private litigants at discovering and proving antitrust violations because they possess wider investigative powers.<sup>24</sup> This disparity is even wider in many EU member states, where private plaintiffs or complainants generally do not have the benefit of the broad discovery rules that are present in the U.S. or U.K., for example.<sup>25</sup> Public enforcement also has more effective sanctions available, allowing not only for the imposition of monetary sanctions in the form of fines, but also other types of sanctions impacting individuals and not just the businesses involved, such as director disqualifications and incarceration. In contrast, apart from injunctive or interim relief, private enforcement can only lead to the imposition of monetary sanctions in the form of damages.

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<sup>19</sup> *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57.

<sup>20</sup> *Sun-Rype v. Archer Daniels Midland Company*, 2013 SCC 58.

<sup>21</sup> *Infineon Technologies AG v. Option Consommateurs*, 2013 SCC 59.

<sup>22</sup> *Supra* note 19 at para. 60.

<sup>23</sup> *Supra* note 19 at para. 59.

<sup>24</sup> Wouter P.J. Wils, *Should private antitrust enforcement be encouraged in Europe?*, (2003) 26(3) *World Competition* 473.

<sup>25</sup> *Ibid.* The EU Directive aims to raise minimum levels of discovery - see para 31 below.

20. Public enforcement also affords better control over the optimal amount of monetary sanctions. In principle, the amount of monetary sanctions could be set by reference to the gain obtained by the antitrust infringer, by reference to social loss, or by a penalty intended to be punitive in nature. However, in private litigation, when the sanction consists of damages, it becomes very difficult to target the optimal amount because damages are calculated only by reference to the losses proven by those plaintiffs who happen to bring claims.<sup>26</sup> In any event, in many countries, such as France, administrative fines sought by competition authorities already take into account all damage created by the anti-competitive practice in issue.

21. With respect to cost, public enforcement can prove less expensive for society than private enforcement for two reasons. First, in private enforcement, more resources have to be spent in determining and allocating damages, as compared to the setting of sanctions in public enforcement.<sup>27</sup> Second, public enforcement may generally be cheaper because of the specific expertise of the competition authorities and, where applicable, the lower cost of administrative procedures as compared to private enforcement.<sup>28</sup> These two disadvantages of private enforcement are all the more pronounced in class actions, which tend to be very expensive.<sup>29</sup>

22. There are, however, perceived limitations to public enforcement. Public enforcement is sometimes cited as being less effective at detecting and prosecuting certain violations, for example those involving vertical restraints and monopoly abuse, as well as violations in industries with very specialized considerations. Of course, due to budget constraints and priorities, competition authorities are also required to be selective in deciding which violations to pursue. Some of the advantages accruing to private enforcement, however, are realized specifically where it follows on public enforcement. For example, the discovery of evidence may be easier and more efficient than in follow-on actions for damages, depending on the level of access to public prosecution evidence in a given jurisdiction. In the U.S., for example, convictions or guilty pleas in public prosecutions constitute *prima facie* evidence in follow-on actions for damages against those convicted.<sup>30</sup> These advantages may, therefore, be less of a relative advantage for private enforcement than a collateral benefit of public enforcement that flows to private litigants.

23. The reverse can also be true – private enforcement can serve as an important means of filling an enforcement gap, for example when the case is not one the authority decides to pursue for administrative reasons. Roach and Treblicock note that the case for private enforcement is “based positively on the advantages of giving a multiplicity of individuals and groups an opportunity to enforce

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<sup>26</sup> *Ibid.*

<sup>27</sup> KENNETH G. ELZINGA & WILLIAM BREIT, *THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS* (Yale University Press: 1976) at 95.

<sup>28</sup> *Wils, supra* note 24 at 15.

<sup>29</sup> Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits - The Twenty-Third Annual Antitrust Review*, 71 COLUMBIA L. REV. 1, 9-10 (1971).

<sup>30</sup> 15 U.S.C. § 16(a). Article 9 of the EU Directive provides that national competition agency decisions should be accepted as irrefutably establishing an infringement before national courts and such decisions by agencies in other member states should be at least *prima facie* evidence. Under Article 16 of Regulation 1/2003, national courts and agencies already cannot take decisions running counter to decisions of the European Commission.

and elaborate public standards and obtain corrective justice and negatively on the dangers of exclusive reliance on public enforcement.”<sup>31</sup>

24. There are commonly recognized disadvantages of private enforcement, however. These include the real possibilities of overcompensation,<sup>32</sup> and the existence of strategic litigation that may conflict with public interest.<sup>33</sup> These issues – which have raised significant concerns – are discussed at greater length in Parts IV and VI of this paper.

#### IV. Damages

25. The measure of damages and scope of relief that may be available to a private litigant arguably constitutes the most contentious feature of private enforcement. BIAC considers that such remedial regimes should be designed to fulfill a compensatory, rather than punitive, function.

26. In the U.S., section 4 of the *Clayton Act* enables private persons to bring antitrust suits for treble damages for damage suffered as a result of any antitrust violation.<sup>34</sup> In addition, section 16 of the *Clayton Act* permits private parties who have suffered injury as a result of any antitrust violation, or are threatened with injury, to seek equitable relief from the courts, including, most prominently, injunctive relief.<sup>35</sup> In addition to the prospect of large jury verdicts and settlements, there are other features of the U.S. regime that dramatically increase both the attractiveness of bringing private claims and the stakes for defendants, such as: the award of attorneys’ fees and costs; the use of contingency fees; generous claim aggregation through class actions and multidistrict litigation; joint and several liability rules with no right to contribution; and broad discovery rules. Private enforcement of antitrust law is encouraged by U.S. law. Not surprisingly, a high percentage of antitrust cases in the U.S. comprise private actions.<sup>36</sup>

27. Influenced by the U.S. and the *Clayton Act*, Canada also provides a civil remedy for parties injured by a violation of Canadian competition laws. Section 36 of the *Competition Act*<sup>37</sup> creates a cause of action for persons injured by conduct in violation of Part VI of the *Competition Act*, which includes restrictions on conspiracy, bid-rigging, various advertising offences and pyramid schemes.<sup>38</sup> The defendant need not be convicted of the related criminal offence before a plaintiff can commence a civil

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<sup>31</sup> Kent Roach & Michael J. Trebilcock, *Private Enforcement of Competition Laws*, 34 OSGOODE HALL L.J. 461, 465 (1996).

<sup>32</sup> While private litigants may have the initial advantage of detecting violations and possessing information, they are not as effective at gathering information in order to identify antitrust infringers or to find the evidence needed to show that a breach of antitrust law occurred.

<sup>33</sup> *Supra* note 31 at 489.

<sup>34</sup> 15 U.S.C. § 15.

<sup>35</sup> 15 U.S.C. § 26.

<sup>36</sup> As high as 90% in certain years. U.K. Department of Trade and Industry, “Productivity and Enterprise – A World Class Competition Regime” (2001), available at <http://iiglobal.org/component/jdownloads/finish/389/1401.html>.

<sup>37</sup> *Competition Act*, R.S.C. 1985, c. C-34, s. 36(1).

<sup>38</sup> *Ibid.* Part VI – Offences in Relation to Competition.

action under section 36 - if the plaintiff can prove the defendant engaged in conduct contrary to Part VI of the *Competition Act*, the civil action can be maintained independently.<sup>39</sup>

28. Although the Canadian private right of action was based on the U.S. experience under the *Clayton Act*, section 36 of the *Competition Act* only provides for single damages in respect of actual loss, as opposed to the treble damages found under section 4 of the *Clayton Act*.<sup>40</sup> Commentators have suggested that the clear explanation for the distinction is that, while the purpose of the Canadian provision is to compensate victims of anticompetitive behaviour, the *Clayton Act* remedy can be interpreted as being a tool meant for deterrence.<sup>41</sup>

29. There are several reasons to justify this argument. First, the broad purposes stated for recommending a private right of action in a 1969 Interim Report on Competition Policy by the Economic Council of Canada,<sup>42</sup> specifically “to improve [the government’s competition policy’s] relevance to economic goals, its effectiveness, and its acceptability to the public,” has been interpreted to suggest compensation goals.<sup>43</sup> Second, following the rejection of a proposed 1971 bill that would have provided for double damages for private parties injured by antitrust violations, Roach and Trebilcock suggest that the enactment of section 36 of the *Competition Act* can be interpreted as recognition of a compensation rather than a deterrence goal for private enforcement, founded on principles of corrective justice.<sup>44</sup> Finally, the ‘piggy-back’ feature (in that it allows for private action in addition to public enforcement against antitrust violations) of section 36 of the *Competition Act* suggests a compensation rather than a deterrence rationale for private enforcement.<sup>45</sup>

30. The relationship between the EU and national law is a major factor in private antitrust enforcement in Europe. Victims of competition law infringements in the EU are entitled to full compensation for the harm they have suffered, according to the European Court of Justice.<sup>46</sup> In practice, however, the ability to seek compensation can vary from country to country. As the Court has stated, it is up to the legal system of each member state to prescribe the rules governing the existence of a causal link between an antitrust infringement and the harm suffered, as long as the principles of equivalence and effectiveness are observed.<sup>47</sup>

31. To reduce the difficulties caused by differences between national laws, the EU Directive provides a measure of harmonization of the procedural rules and provisions governing actions for

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<sup>39</sup> Calvin S. Goldman, *The Constitutionality of the Combines Investigation Act Civil Damages Remedy*, 11 CAN. BUS. L.J. 385, 387 (1985).

<sup>40</sup> Jason Potts, *The Direct Injury Rule in Canada: An Indirect Analysis*, 34 CAN. BUS. L.J. 114, 125 (2001).

<sup>41</sup> *Ibid.*

<sup>42</sup> *Supra* note 31 at 46, citing Economic Council of Canada, Interim Report on Competition Policy (Ottawa: Queen's Printer, 1969).

<sup>43</sup> *Supra* note 40 at 125.

<sup>44</sup> *Supra* note 31 at 497.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Supra* note 14 at paras. 95-97.

<sup>47</sup> *Supra* note 13 at para. 27; *supra* note 14 at para. 64.

damages in competition cases and it opts firmly for the principle of full compensation but not overcompensation, whether by punitive, multiple or other forms of additional damages.<sup>48</sup> The quantification of harm is a fundamental issue in respect of damages awards. The European Commission held a public consultation and in June 2013 published a “Communication on quantifying harms in actions for damages.”<sup>49</sup> The EU Directive provides a rebuttable presumption that cartel infringements cause harm<sup>50</sup>, which is problematic in a system where both serious cartel conduct and less serious exchanges of sensitive information are considered infringements by object which can be proven without any examination of effects on competition. In addition, the EU Directive provides for national courts to request assistance from their competition authority in respect of quantification,<sup>51</sup> but it properly, in BIAC's opinion, does not adopt any presumption as to the quantum of harm.<sup>52</sup> There are few decisions of national courts quantifying the harm in private antitrust enforcement cases; frequently, settlements have been arrived at instead.<sup>53</sup> The EU Directive, which is scheduled for implementation by the end of 2016, deals with disclosure issues and should significantly assist claimants in Europe.

32. The quantification of harm should rely on a proper identification of the counterfactual situation, that is, the situation that would have prevailed, absent the practices. Indeed, the harm caused by a given anticompetitive practice (in terms of overprice, quantity, lost revenues, etc.) derives from the comparison between the observed variable (price, quantity, revenue) and its counterfactual value. This requires a practical modelling of the economic equilibrium that would prevail under competitive conditions. In order to construct such a model, economists have to determine the main characteristics of the market and the nature of competition in the normal state. Is there price or quantity competition? Are products differentiated? Are there barriers to entry? After this market has been described, a model can be econometrically estimated on data related to a “control group,” that is, a group of observations as to period, customers, locations, etc. unaffected by the practices in issue. Finally, a quantitative estimation of the counterfactual variables, e.g. price, quantity, revenue allows for the computation of the damages due to the anti-competitive practices.

33. Based on the collective experiences of the U.S., Canada, and the EU, it is BIAC's position that employing multiple damages as part of a private antitrust enforcement system creates a real danger of overcompensation resulting in an unjustified windfall. Severe penalties may deter companies from engaging in behavior that actually benefits consumers for fear that a jury or court will determine that the companies' conduct harmed competition more than helped it. Even if some conduct (such as price-fixing and market allocation) may call for harsh penalties, BIAC would submit that these should be primarily deterred by administrative and criminal enforcement rather than private litigation. Even more

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<sup>48</sup> EU Directive Articles 3.1 and 3.2.

<sup>49</sup> [http://ec.europa.eu/competition/antitrust/actionsdamages/quantification\\_en.html](http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_en.html)

<sup>50</sup> EU Directive Article 17.2.

<sup>51</sup> EU Directive 17.3.

<sup>52</sup> See also paragraph 14, above, in respect of the presumption of harm being problematic.

<sup>53</sup> For example, at least four cases brought before the U.K. Competition Appeal Tribunal under *U.K. Competition Act 1998*, ss. 47A and 47B have been settled.

clearly, other less egregious antitrust infringements should not automatically lead to multiple damages in addition to fines and other administrative and criminal sanctions.

34. In BIAC's opinion, the more recent considerations of the issues by Canada and the EU have arrived at the correct conclusion that the measure of damages in private enforcement actions should be limited to compensating the claimant for its proven loss caused by the infringement.

#### V. Class Actions

35. Central to the debate of whether or not, and to what extent, to encourage private enforcement is the question of the proper role of class actions within a private antitrust enforcement system. Proponents argue that class actions can significantly enhance victims' ability to obtain compensation, contribute to the overall efficiency of the administration of justice, and provide a strong deterrent to corporate malfeasance. However, critics argue that class actions are a complex, costly and unproven way of achieving the goals of compensation and deterrence.<sup>54</sup> In some cases they might lead to speculative, opportunistic claims and excessive litigation.

36. In Canada, class actions have become an area of growing importance in the antitrust enforcement landscape.<sup>55</sup> Beginning first with follow-on class proceedings – those initiated in response to investigations by the Canadian Competition Bureau or another foreign competition authority – in recent years, Canada has seen a trend of aggressively pursued competition law class proceedings even in the absence of convictions, guilty pleas or investigations by Competition authorities, Canadian or otherwise.<sup>56</sup> Certain practitioners have declared that Canada is experiencing a new liberal and pro-certification approach to antitrust class actions.<sup>57</sup>

37. While class actions in the antitrust context have only recently begun to proliferate in Canada, they have long been a prominent feature in the U.S. Rule 23 of the *Federal Rules of Civil Procedure* permits an antitrust claimant to bring an action on behalf of an entire class of persons with similar claims.<sup>58</sup> However, litigating antitrust class actions in the U.S. has become increasingly complex, costly and time-consuming,<sup>59</sup> as preliminary pleading, discovery, certification and other motions require the expenditure of significant resources.<sup>60</sup> As a result of the proliferation of class cases, the threshold for certifying a U.S. class action has become somewhat more stringent in recent years as a result of

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<sup>54</sup> Commission White Paper, "Damages Actions for Breach of EC Antitrust Rules" (2008) 165 at 2-4 (Final).

<sup>55</sup> Kent E. Thomson, Adam F. Fanaki & Davit D. Akman, *One Hand Taketh Away: Recent Developments in Indirect Purchaser Competition Class Actions in Canada*, 38 *Adv. Q.* 266, 266 (2011).

<sup>56</sup> *Ibid.*

<sup>57</sup> Michael A. Eizenga, Dany H. Assaf & Emrys Davis, *Antitrust Class Actions: A Tale of Two Countries*, 25 *ANTITRUST L.J.* 83, 83 (2010).

<sup>58</sup> *FED. R. CIV. P.* 23.

<sup>59</sup> Compared to the U.S., it has been suggested that class certification proceedings in Canada are arguably less expensive, less complex and more likely to result in certification; Ellen Meriwether & Andrew J. Morganti, *Emerging Trends in Certification of Antitrust Class Actions in Canada*, 24 *ANTITRUST L.J.* 71, 74 (2009).

<sup>60</sup> *Ibid* at 71.

decisions that increased the plaintiffs' evidentiary burden, such as *In re IPO Securities Litigation*<sup>61</sup> and *In re Hydrogen Peroxide Antitrust Litigation*.<sup>62</sup>

38. The U.S. experience serves as a cautionary tale for the EU, where class actions have been one of the main points of contention in the European Commission's legislative proposals in the area of private enforcement.<sup>63</sup> Some member states "recognize the need for the law to make possible a degree of aggregation of claims and thus have recently introduced legislation providing for opt-in class action possibilities."<sup>64</sup>

39. The Consumer Right Act 2015 in the UK introduces an opt-out collective redress mechanism. It has to be said that the UK, mindful of the excesses of the US class action system, has built into the system considerable safeguards that should avoid speculative and opportunistic claims.

40. The EU directive does not deal with collective redress. However, in June 2013, the European Commission adopted a non binding recommendation on collective redress that invited member States to introduce by July 2015 collective actions, including actions for damages, in line with the principles set out in the Recommendation.<sup>65</sup>

41. The approach in Europe differs significantly from North American practice, particularly with regard to class representation, group cohesion, and options for refusal of class membership. These rules vary country by country and it is also relevant that in most European countries only opt-in is available.

## **VI. Disclosure Issues in Parallel Public and Private Proceedings**

42. In some jurisdictions, such as the U.S. and Canada, it is quite common for public and private proceedings to be pursued contemporaneously. However, the interaction between contemporaneous public and private proceedings creates dilemmas as to whether or not private claimants should have access to evidence collected by the government. While there is an interest in protecting the integrity and secrecy of public prosecutions, this objective may be at odds with the interest of private parties wishing to pursue their claims expediently and effectively.

43. In Canada, recent developments have increased evidentiary access for antitrust class action plaintiffs, placing defendants at a strategic disadvantage. First, in recent years there have been several instances of class-action plaintiffs: (1) being granted intervener status in parallel U.S. litigation for the

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<sup>61</sup> *In re IPO Securities Litigation*, 483 F.3d 70 (2nd Cir. 2006).

<sup>62</sup> *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3rd Cir. 2009); see also Meriwether & Morganiti, *supra* note 59 at 71.

<sup>63</sup> *Supra* note 10 at 261.

<sup>64</sup> *Ibid.*

<sup>65</sup> Press Release, Eur. Comm'n, Antitrust: Commission welcomes Council adoption of Directive on antitrust damages actions (Nov. 10, 2014), available at [http://europa.eu/rapid/press-release\\_IP-14-1580\\_en.htm](http://europa.eu/rapid/press-release_IP-14-1580_en.htm).

purpose of accessing information and documentation disclosed therein;<sup>66</sup> and (2) retaining the same experts involved in the parallel U.S. proceeding to draft expert reports,<sup>67</sup> as they have access to information and documents covered by a U.S. court's protective order.<sup>68</sup> The result of these developments has been that Canadian plaintiffs are finding ways to access pre-certification discovery in parallel U.S. class actions prior to discovery rights arising in the Canadian litigation. This has placed Canadian defendants at a significant informational and strategic disadvantage and raised questions of procedural fairness.<sup>69</sup>

44. The second recent development stems from the 2014 decision by the Supreme Court of Canada in *Jacques c. Pétroles Irving Inc.*<sup>70</sup> As a result of this decision, plaintiffs bringing follow-on actions under the Competition Act can be expected to request production of certain relevant evidence procured by authorities in criminal competition actions that was produced to defence counsel in the related criminal proceedings. This decision by the Supreme Court of Canada represents the latest example of Canada's recent plaintiff-friendly approach to antitrust class actions.

45. In the U.S., parties litigating antitrust cases in U.S. courts generally benefit from broad pretrial discovery rights that enable them to access relevant evidence. In addition, public prosecutions may help private litigants by providing them access to information from cartel conspirators who are granted amnesty.

46. The *Antitrust Criminal Penalty Enhancement and Reform Act of 2004* provides incentive to conspirators to seek amnesty by limiting private parties' monetary recovery from them to actual, single, damages rather than the usual treble damages, on the condition that the amnesty applicant co-operate fully with private claimants.<sup>71</sup> In practice, conspirators granted amnesty end up avoiding any criminal penalties and sometimes settle early with private claimants on the basis of single damages, while agreeing to provide extensive interviews, documents, and other information to help the claimants continue their treble damages claims against other cartel co-conspirators who remain jointly and severally liable for treble damages.

47. Notwithstanding that plaintiffs have broad pretrial discovery rights and access to information from cartel conspirators who have been granted amnesty, the U.S. has still sought to protect the integrity and secrecy of criminal proceedings. In recent years, the U.S. Department of Justice has aggressively sought and obtained either full or partial discovery stays in civil actions pending the

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<sup>66</sup> *Vitapharm Can. Ltd. v. Hoffmann-LaRoche Ltd.* (2001), 11 C.P.R. (4th) 2301 at para. 50 (Ont. Sup. Ct.), *aff'd.*, (2003), 223 D.L.R. (4th) 445 (Ont. C.A.); Pretrial Order No 77, *In re Baycol Products Litigation*, (2003) MDL No 1431 (D Minn); *In re Linerboard Antitrust Litigation*, (2004) 333 F Supp. 2d 333 (United States District Court for the Eastern District of Pennsylvania ) ED Pa.

<sup>67</sup> *Irving Paper Ltd. v. Atofina Chemicals Inc.* (2009), 99 O.R. (3d) 358. (ONT. Sup. Ct.).

<sup>68</sup> David Martin Low & Lisa Parliament, *Protecting Protective Orders: Misuse of U.S. Discovery in Canadian Antitrust Litigation*, 26 ANTITRUST L.J. 38, 38 (2011).

<sup>69</sup> *Ibid* at 43.

<sup>70</sup> *Jacques c. Pétroles Irving Inc.*, 2014 SCC 66.

<sup>71</sup> Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237 (codified at 15 U.S.C. § 1 note).

conclusion of parallel criminal proceedings to prevent discovery in civil actions from trampling on their investigative process.<sup>72</sup>

48. This is in contrast to civil law countries like Germany or France, where pretrial discovery has up to now been generally non-existent, although the EU Directive provides additional powers to the Courts to allow them to order the parties and third parties to reveal evidence in their possession and also to order disclosure of documents in competition authority files, subject to protection of leniency statements and settlement submissions and to respect for ongoing investigations.<sup>73</sup> The EU Directive also includes innovative provisions incentivizing consensual dispute resolution of damages claims.<sup>74</sup> It is BIAC's view that consensual dispute resolution should be encouraged more broadly in order to seek to control the extreme costs and efforts expended in adjudicating damages claims before the courts.

49. A serious issue that continues to trouble business and competition law enforcement authorities is the discoverability in civil proceedings of corporate statements that have been submitted to competition authorities in the context of a leniency application.<sup>75</sup>

50. Many authors have argued and BIAC is concerned that an increasing exposure of corporate statements, especially across borders, to plaintiffs seeking to opportunistically extend the scope of conduct as broadly as possible may weaken leniency programs.<sup>76</sup> Indeed, while leniency programs protect the leniency applicant from prosecution, the applicant will not be protected from the civil law consequences that may arise from the infringement.<sup>77</sup> Therefore, cartel victims will be encouraged to bring claims for damages against a leniency applicant once the leniency application has been made or the content of the application has been revealed to the victims.<sup>78</sup> The risk of damages claims against a leniency applicant is increasing continuously in a number of jurisdictions,<sup>79</sup> to the extent that leniency applicants may find themselves in a worse position than non-cooperating infringers with the attendant consequence of discouraging cartel participants from seeking protection through leniency programs. This would significantly obstruct the discovery and punishment of cartels.

51. It is BIAC's position that there are several narrow limitations that can be placed on discovery to both preserve the integrity of a public investigation while still allowing private litigants to effectively prosecute their cases. For example, a Court can act as an intermediary to ensure that discovery in the private action does not jeopardize the public investigation. Further, the court can limit discovery to

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<sup>72</sup> *In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. 07-1819 (N.D. Cal.).

<sup>73</sup> EU Directive Articles 5 and 6.

<sup>74</sup> EU Directive Articles 18 and 19.

<sup>75</sup> Commission Notice on immunity from fines and reduction of fines in cartel cases (Leniency Notice), [2006] O.J. C 298/17 [hereinafter Leniency Notice].

<sup>76</sup> Christopher Hodges, *Competition enforcement, regulation and civil justice: what is the case?*, (2006) 43:5 C.M.L. Rev. 1390 at 1390.

<sup>77</sup> Leniency Notice, *supra* note 75, n. 39.

<sup>78</sup> Caroline Cauffman, *The interaction of Leniency Programmes and Actions for Damages*, (2011) 7:2 Competition L. Rev. 181 at 181-220.

<sup>79</sup> Alan Riley, *The Modernization of EU Anti-cartel Enforcement: Will the Commission Grasp the Opportunity?*, (2010) E.C.L.R. 195 at 195.

information that is not directly tied to the public investigation. By strategically focusing discovery away from the government's public investigation, plaintiffs may gather relevant material in a timely fashion while effectively reducing the likelihood that such discovery will compromise the government's public investigation. BIAC is also of the opinion that it remains vital to protect the effectiveness of leniency programs to provide that leniency statements are not subject to disclosure, thereby ensuring that the leniency applicant is not placed at a disadvantage in damages actions by comparison to non-cooperating infringers.

## **VII. Conclusion**

52. Identifying the appropriate balance between public and private antitrust enforcement for a given jurisdiction's legal system will ultimately depend on that jurisdiction's particular political and regulatory context. Surely, no one solution will fit all. In general, however, BIAC would suggest that a primary role should be given to public enforcement in antitrust enforcement systems. Private enforcement should be limited to compensation, not overcompensation. Rules on disclosure should protect leniency statements to avoid placing leniency applicants at a disadvantage by reference to other infringers. There should be a respect for confidential information in public enforcement proceedings, and more support for alternative dispute resolution processes, particularly for defendants involved in leniency and settlement procedures.