



## POLICY ROUNDTABLES

### Private Remedies

2007

#### Introduction

The OECD Competition Committee debated private remedies in June 2006. This document includes: an introduction by Mr. Andreas Reindl for the OECD and written submissions from Australia, the Czech Republic, Denmark, Finland, Germany, Hungary, Indonesia, Ireland, Japan, Lithuania, the Netherlands, Norway, Romania, Switzerland, Chinese Taipei, Turkey, the United Kingdom, the United States, the EU Commission, BAC as well as papers by MM. Richard A. Epstein, William H. Page, Andrew I. Gavil and summaries of discussions.

#### Overview

The roundtable focused on class actions/collective actions and the interface between private enforcement and public enforcement:

- *Class Actions/Collective Actions:* There is a strong case for the use of class actions/collective actions to raise levels of deterrence and achieve greater compliance with competition laws, as these actions may be the only practical way to ensure that customers with small claims also have their day in court.
- *Interface between Public and Private Enforcement:* There is a widely shared concern that private litigation in competition cases can interfere with leniency programs in cartel cases. There is a trade-off between enabling the victims of a cartel to recover damages and incentives for cartel members to come forward, and no-one really knows with certainty how much protection from private litigation and damage awards is necessary so as not to deter leniency applicants. The prevailing view is that the integrity of leniency programs should be protected by a range of measures that limit a leniency applicant's exposure to civil damages, but some delegates felt that the current trend provided unnecessary protection to leniency applicants to the detriment of private plaintiffs.

#### Related Topics

Prosecuting Cartels without Direct Evidence (2006)

Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations (2005)

Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation (2005)

Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes (2002)

Recommendation of the Council concerning Effective Action against Hard Core Cartels (1998)

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## **FOREWORD**

This document comprises proceedings in the original languages of several Roundtable discussions on Private Remedies, held by the Competition Committee between October 2004 and June 2006.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

## **PRÉFACE**

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à plusieurs discussions en table ronde sur l'application du droit par voie d'action civile, qui ont eu lieu entre octobre 2004 et juin 2006 dans le cadre du Comité de la concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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## **INTRODUCTION**

## PRIVATE COMPETITION LAW ENFORCEMENT

*by the Secretariat\**

Between October 2004 and June 2006, the OECD's Competition Committee held a series of four roundtable discussions on private enforcement in competition cases. The discussions focused on general principles and policies as well as a number of specific issues related in particular to private actions for damages. This volume includes the proceedings of these discussions, including submissions by member countries, observers, and BIAC, summaries of discussion, and papers prepared by experts.<sup>1</sup>

The Committee's interest in the subject of private antitrust enforcement was particularly timely in light of the ongoing European debate about private actions for damages in competition cases and the need of reforms to encourage more private enforcement. The selection of topics for discussion in many ways followed the 2004 Report on private remedies in EU member states,<sup>2</sup> commissioned by the European Commission.

The reader will find that Committee's discussions, although they were not aimed at providing a comprehensive examination of all relevant aspects related to private enforcement of competition laws, produced a broad range of views and opinions on private enforcement of competition laws, in particular by governments and competition authorities. It is noteworthy that the discussions went beyond the more typical comparison between European and United States private enforcement regimes and included contributions by other countries with valuable experience in private competition law enforcement such as Australia and Canada. To some extent, experiences in these countries might be more directly relevant for jurisdictions seeking to develop and strengthen their private enforcement regime than experiences in the much more mature U.S. system.

The discussions benefited also from the insightful contributions of several expert speakers from academia, the judiciary, and private practice. The speakers included (in alphabetical order) Mr. Michael Baron, Sir Christopher Bellamy, Professor Richard Epstein, Professor David Hyman, Professor Andrew Gavil, Mr. Donald Houston, Mr. Laddie Montague, and Professor William Page. They represented a broad and diverse spectrum of views, ranging from generally skeptic views of private enforcement in competition cases, to views that were broadly supportive of the role of private enforcement in a sound competition regime.

The following Section provides a combined summary of all four roundtables which highlights some of the main themes that emerged from the discussions. The Section draws some general conclusions, although it should not be read as suggesting that in the course of the roundtable discussion the Committee agreed on a set of good or best practices for private competition enforcement. Rather, the discussions

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\* This paper has been prepared by Andreas Reindl, now at Fordham Law School and Fordham Competition Law Institute. Mr Reindl is a former member of the OECD Competition Division.

<sup>1</sup> There were no submissions by members and observers to the first roundtable, and no background papers were prepared by the Secretariat for any of the roundtables.

<sup>2</sup> Ashurst, Study on the conditions of claims for damages in case of infringement of EC competition rules, Comparative report prepared for the European Commission's DG Comp (2004).

confirmed that it remains a challenging task for each jurisdiction to design private enforcement rules that move a competition regime towards optimal enforcement, seeking to maximize deterrence while avoiding excessive costs and burdens. Experiments in individual jurisdictions, and adjustments to initially adopted rules appear inevitable for the foreseeable future. As more countries experiment with carefully designed solutions within their respective civil procedure systems and court structures, they may have sufficient combined experience and expertise in the future to seek to identify a set of good practices in private competition enforcement that appear to be effective across jurisdictions.

Following the summary section, the materials are organized in accordance with the four roundtable discussions. Section II includes the documents from the initial roundtable on general principles and policies related to private competition law enforcement; Section III covers the second discussion which focused on evidence, including discovery of documents and expert witnesses; Section IV addresses indirect purchaser standing and passing-on defence, and the assessment of damages; materials from the final roundtable, which covered class actions or collective actions as well as the relationship between private and public antitrust enforcement can be found in Section V.<sup>3</sup>

## Summary

### *General Policies and Principles*

The first roundtable addressed a broad range of principles and policies concerning private competition law enforcement, including the desirability of private enforcement in general, policy goals it should pursue, and the interdependence of private and public enforcement. Many of these policy concerns were echoed in subsequent discussions as well.

- (1) *Private antitrust enforcement can substantially improve the functioning of a competition regime. But more private enforcement is not always beneficial. Getting the "dosage" right must be a key objective of reforms, in order to ensure that private antitrust enforcement will encourage greater compliance with antitrust norms while avoiding litigation that is wasteful and could discourage socially beneficial conduct.*

Throughout the four roundtables, it was widely acknowledged that private antitrust enforcement can be an important complement to public enforcement that can improve the effectiveness of a competition regime. Participants pointed out that private enforcement could strengthen deterrence and compliance, for example by increasing the likelihood that anticompetitive conduct will be detected and will not be profitable. Private enforcement also can contribute to the development of better competition culture and greater awareness of competition laws. In addition, by ensuring that victims of anti-competitive conduct receive compensation, private enforcement can connect competition laws with consumers, a goal which has become a priority for many competition authorities.

However, virtually all participants also agreed that private enforcement can have risks and impose unnecessary costs on society, in particular when poorly designed substantive rules and/or inadequate procedural rules result in excessive litigation and discourage pro-competitive conduct. Reforms should therefore not simply lead to more litigation across the board, but should aim to

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<sup>3</sup> Of course, many issues re-emerged throughout the roundtable discussions and therefore are covered in more than one chapter. For example, policy considerations were also central to the discussions on indirect purchaser standing, assessment of damages, and class actions; the relationship between public and private enforcement was addressed in the initial roundtable, the roundtable on evidence, as well as in the last roundtable which focused on the effects of private enforcement on leniency programs.

encourage private enforcement in circumstances in which society benefits from greater compliance with competition laws.

The recognition of potential benefits and risks of private enforcement and the need to find a proper balance explains why many countries in Europe and elsewhere seek to strengthen private antitrust enforcement, while critics of the U.S. system may be concerned about excesses that the system has created. The discussions identified several conditions that can help to strengthen the benefits and minimize risks and costs of private litigation, including the identification of clear policy goals for private enforcement; a recognition of the risks and social costs of both under-deterrence and over-deterrence; the development of clear and sound substantive competition law norms; and the strengthening of private enforcement primarily in areas where rules were unambiguous and anticompetitive conduct could be clearly identified.

- (2) *It is a widely held view that private antitrust enforcement, like public enforcement, should in the first place aim to increase deterrence and compliance with competition laws.*

Participants frequently emphasized the importance of identifying policy goals of reforms that should encourage more private enforcement. Many concurred that rules concerning private litigation should in the first place be designed to increase deterrence and better compliance with competition rules. Accordingly, public and private antitrust enforcement should be viewed as complements that serve the same goal of deterring anticompetitive conduct that harms consumer welfare; each should be encouraged in areas where it was more efficient than the other enforcement system to accomplish that goal. It was difficult to determine the combined amount of resources, and the respective proportions, that should be dedicated to private and public enforcement. The concept of "optimal deterrence" suggested that each country should seek a mix of private and public enforcement that minimizes the costs of under-deterrence and over-deterrence.

Another view holds, however, that optimal deterrence should be a concern primarily for public enforcement. Private enforcement should focus primarily on the compensation of victims and when deterrence was insufficient, fines in public enforcement should be increased. There was nevertheless agreement that differences between these two policy goals can be overstated and that they were not mutually exclusive.

- (3) *Substantive competition law rules and procedural rules are interdependent. When creating procedures to encourage more private enforcement, the relationship between enforcement rules and substantive norms should be carefully considered.*

Many participants emphasized the interdependence between substantive competition law norms and procedures to enforce them. Professor Epstein, for example, emphasized that it would be a mistake to encourage private enforcement without regard to the underlying substantive rules. He pointed out that if substantive antitrust rules were unwise, better procedures would not help; more litigation would only compound errors. Encouraging more private enforcement would have overall benefits only when substantive rules were sound. Along the same lines, many participants recognized that private enforcement would work best if substantive rules are clear and well defined.

The interdependence between substantive norms and private enforcement also means that private litigation is not uniformly desirable across all areas of antitrust law. Many participants opined that private enforcement was most effective in areas with clear standards of liability and a general consensus on what constitutes unlawful conduct. Private enforcement was therefore most

desirable, and should be encouraged, in the area of hard core cartels. A number of reasons were cited for this view: clear substantive rules prohibited naked price fixing, near unanimous support existed for strict prohibitions of hard core cartel conduct, the recognition that sanctions in public enforcement most often were below what would be considered an "optimal level of deterrence," no risk of strategic competitors suits as plaintiffs typically were customers of cartel participants, and little concern about over-deterrence.

Conversely, many thought that private enforcement was much more problematic in single firm conduct cases because in this area of the law the distinction between pro-competitive conduct and competitive restraints was much more difficult to draw; substantive rules of liability were less clear; there was a much greater risk of strategic litigation, in particular litigation by competitors; and concerns existed about over-deterrence that would discourage innovative, procompetitive conduct. Many suggested that this could be an area where a competition authority's greater or perhaps exclusive role in developing antitrust doctrine was more desirable.

However, there were noteworthy exceptions to the views described above. In particular, Germany explained that private litigation occurred primarily in abuse of dominance cases, whereas private actions for damages in cartel cases had not been possible until recent reforms of the Cartel Act.

- (4) *Competition policy and competition law enforcement, including private enforcement, should be viewed as an integrated policy system in which a number of factors contribute to the goals of deterrence and compensation.*

Several speakers highlighted during the discussion that the effectiveness of private litigation in strengthening the goals of deterrence and compensation depended on a number of factors which formed an "organic" competition policy system. In particular Professor Gavil noted that substantive competition rules, evidentiary rules, and procedural rules, including rules for the compensation of attorneys, would work together as parts of a broader mix to create deterrence and ensure compensation. He emphasized that these factors were interdependent; and changing one without taking account of the others would be difficult and could be ineffective.

This more systemic approach to private enforcement was also advocated by a number of other participants. For example, when describing the European discussion on private enforcement, the European Commission first explained that the debate about more private enforcement followed reforms of the public enforcement system in Europe which had created the opportunity to consider the system of competition law enforcement as a whole. The Commission emphasized that effective reforms of private enforcement had to consider several interdependent areas, such as access of plaintiffs to courts, including rules on collective or representative actions; measures to reduce the risk of litigation; facilitating proof of damages, which included rules concerning access to damages; and other incentives such as the use of multipliers in assessing damage awards.

There was agreement among participants that private settlements are an important element of private litigation that should be taken into account to assess the effectiveness of private enforcement in terms of deterrence and compensation. Several speakers recognized that mechanisms ideally should be in place to monitor settlements in competition cases. This could provide a better picture about the effectiveness of private antitrust enforcement than statistics about damages awards in court cases.

- (5) *As private antitrust litigation increases, competition authorities no longer have a monopoly over the development of competition law and economics, and the setting of enforcement priorities. Courts can contribute to the development of better substantive rules; but there is also a risk that the outcomes of private cases will deviate from what is generally accepted as sound competition policy. Institutional measures can be taken to achieve greater consistency between public and private enforcement.*

The discussions revealed that increased private antitrust enforcement has potential benefits and risks for the development of sound antitrust policy. Several speakers recognized that more private litigation, and a greater number of court decisions, can benefit the development of sound antitrust policy. For example, the European Commission reasoned that one expected benefit of more private litigation in Europe would be a greater court involvement in the development of competition law and policy. Australia also emphasized that in its experience private litigation had enabled courts to contribute to the development of antitrust doctrine and antitrust economics.

But as the control of competition authorities over the development of antitrust policy and doctrine diminishes with increased private enforcement, tensions and undesirable outcomes are more likely. The United States illustrated this concern by describing how the notion of "agreement" developed in U.S. case law. The Supreme Court had initially developed a narrow interpretation of the concept of "agreement" in a case where the plaintiffs' theory of a predatory pricing collusion sounded highly implausible and the Court wanted to avoid finding the defendants liable. But since then this restrictive approach had migrated into other cases where it was less justified, including naked horizontal price fixing cases. In these cases a narrow reading of the notion of "agreement" could lead to questionable decisions and under-deterrence.

The discussion addressed various measures that can contribute to greater consistency between private and public enforcement and a more uniform set of policy goals. These include efforts by competition authorities to develop clear substantive norms; participation of competition authorities in private litigation as *amicus curiae*; and procedural rules that either allowed or obliged courts to seek the opinion of the competition authority before deciding on an infringement of competition laws.

### ***Evidence: Gathering of Evidence and Expert Witnesses***

The roundtable on evidence focused on two main areas: better use of economic experts in private litigation, and the role of competition authorities as a source of evidence used in private litigation.

- (6) *The growing importance of competition economics across all jurisdictions increases the role of economic experts in private litigation, whether they serve as court appointed experts or experts for the parties. Rules that encourage economic experts retained by the opposing parties to meet early in the process and identify items on which they agree can help the court to better manage a trial.*

Two basic approaches emerged concerning the role of economic experts in private litigation. In some countries, an expert witness is appointed by the court and is expected to give the court independent advice concerning competition economics. In other jurisdictions, economic experts are retained by parties and testify as expert witnesses. A system with court appointed economic experts appears to work so long as all sides are willing to accept the expert's opinion as an objective, unbiased economic analysis of the case before the court. As Professor Gavil pointed out, as private litigation relies increasingly on sophisticated economic analysis, it becomes more likely that parties would challenge a court appointed expert's opinion which is unfavorable to

their position. One could envisage a mixed system where a court-appointed expert assists the court in evaluating economic evidence presented by the parties' economic experts.

A number of jurisdictions described procedures to encourage economic experts retained by the parties to meet during the early stages of a case in order to identify areas on which both sides can agree. Although this was a relatively new idea, there is some experience suggesting that this approach could improve the management of a trial as the court can earlier identify issues on which the parties disagree and focus on them during the trial.

- (7) *As plaintiffs in private actions for damages frequently will have insufficient evidence to support their claims, rules that facilitate their access to evidence in the defendant's possession can be an important component of a well-functioning private enforcement system. However, rules allowing for discovery must be carefully designed to avoid excessive costs and abusive litigation strategies. In addition, active case management by courts appears critical to limit the risk that parties abuse the discovery process.*

It was generally acknowledged that a well-functioning private enforcement system may require rules that facilitate a plaintiff's access to evidence in the defendant's possession. The perception is that in many European countries restrictive rules concerning discovery of documents discourage potential plaintiffs from bringing cases for damages in competition matters. Some countries, such as Norway, reported that they are experimenting with rules that allow some form of discovery in order to provide more support for plaintiffs. At the same time, participants recognized that excessive discovery requests for documents in the other party's possession can impose enormous burden on parties and the litigation system. In particular the business community emphasized these concerns. The United States explained that excessive discovery requests could interfere with the goal of ensuring a just, speedy and inexpensive determination of every action. Recent changes to discovery rules were designed to limit the risk of excessive and unduly burdensome discovery requests.

Several contributions emphasized the important role of judges in the discovery process. Active judicial supervision and intervention can discourage abusive discovery requests. It was also mentioned that the creation of a specialized court in competition matters may contribute to more efficient case management, including the management of discovery requests. The example mentioned during the discussion was the creation of the Competition Appeal Tribunal in the United Kingdom. The United Kingdom pointed out that as the use of pre-trial discovery had significantly increased in the UK, the CAT's experience in handling discovery procedures in competition cases also becomes increasingly important.

### ***Standing and the Assessment of Damages***

The next roundtable focused on two areas, including questions of standing (and the related question of passing-on defence), and the assessment of damages. Many of the general policies were taken up again, such as questions related to the goals of private enforcement and to the concepts of optimal deterrence.

- (8) *As violations of competition laws may harm different groups of market participants, including direct and indirect customers, a private enforcement regime must decide which groups should be allowed to bring actions for damages. Although this issue has received enormous attention in the public debate and academic literature, no consensus exists on the most appropriate rules on standing. There is also very little empirical evidence available that could illuminate the debate. Some believe that the goal of optimal deterrence can be served most effectively when only direct*

*purchasers are allowed to sue for damages or at least are given a preferred role in private enforcement; others believe that actions by indirect purchasers can be an important component of an effective enforcement regime and should not be restricted.*

As a violation of competition laws can harm a range of market participants, a competition law regime must decide who among customers, competitors and other market participants should be entitled to sue for damages. The Committee discussed this complex question primarily within the framework of “indirect purchaser action” and “passing on defence,” focusing on harm to different groups of customers downstream from an unlawful cartel. It also heard about other doctrines that can address the issue of standing, such as the antitrust injury doctrine.

The discussion on indirect purchasers standing and passing on defence recognized that a number of factors should determine whether indirect customers should be allowed to sue for damages and whether a passing on defence should be allowed in direct purchaser suits, including optimal deterrence, effective compensation, and efficient administration of justice. Reconciling these factors could involve difficult trade-offs and balancing. And, as Professor Gavil pointed out, there was very little empirical evidence on some of the critical questions. The expert speakers disagreed on the desirability of indirect purchaser actions: Professors Epstein and Page argued that it would be preferable to exclude indirect purchaser actions in order to avoid multiple trials and the potential of multiple damage awards, and to more effectively achieve the goal of optimal deterrence. Professor Gavil, on the other hand, argued that deterrence would be increased if indirect purchaser actions were generally allowed. He focused primarily on empirical evidence suggesting that direct purchasers might sometimes have no incentive to sue (because they passed on higher prices) or were more concerned about their ongoing business relationships with suppliers than about their right to seek damages; in addition, he emphasized that there had not been a single documented case in the United States in the past 30 years where multiple damages had been awarded to several groups of plaintiffs that could sue in federal and state courts.

The discussion revealed that in most jurisdictions outside the United States the issues of indirect purchaser standing and passing on defence had not yet been formally resolved. It appeared that in most countries in light of general principles of law, indirect purchasers likely would be able to bring an action for damages although they might in practice find it difficult to prove their case; in addition, defendants most likely would be allowed to raise a passing on defence as otherwise there was a risk that the direct purchasers would be unjustly enriched. One of the few countries that had already addressed these issues was Germany which explained that for pragmatic reasons it had created a system favoring direct purchaser actions, as newly adopted rules effectively prevented a passing on defence in most cases. Germany further explained that it had not adopted specific rules supporting indirect purchaser actions as these actions were not considered an effective component of a private enforcement regime.

An interesting additional aspect emerged during the discussion on class actions. Mr. Houston reported that Canada has seen several class actions following public cartel cases in which plaintiffs had successfully obtained settlements. He pointed out, however, that the issue of indirect purchaser standing has not yet been completely resolved in Canada. This experience suggests that this area of the law could perhaps be gradually developed as private litigation expands, and that it may not be necessary to determine an optimal solution upfront.

The discussion also highlighted that an enforcement regime could consider additional doctrines that limit the group of private plaintiffs that were allowed to bring an action for damages. For example, Professor Page pointed out that the antitrust injury doctrine could play an important role in ensuring that private incentives to sue for damages are aligned with the goals of competition

policy. The antitrust injury doctrine focused on the question of whether, in light of the purpose and intention of a competition law, a plaintiff had suffered the type of harm that the competition laws intended to prevent. It could, for example, be an effective mechanism to exclude undesirable competitor suits in single firm conduct cases.

- (9) *If an enforcement regime allows indirect purchasers to sue for damages, rules should be in place to coordinate multiple law suits; in addition, indirect purchaser suits typically will be meaningful only if rules exist that make it possible to aggregate a large number of individual claims.*

There appeared to be agreement among participants that if multiple groups of plaintiffs are allowed to bring actions for damages, rules should be in place for the consolidation and coordination of actions. In particular Professor Gavil's contribution made this point, although he also explained in light of the U.S. experience that the market place could to some extent help to overcome the problem of parallel actions in multiple venues. For example, defendants frequently would refuse to settle with direct purchasers (in federal court), unless they could settle with indirect purchasers (who would sue in state courts) as well. These mechanisms appeared to be relatively effective in coordinating potentially competing claims by different plaintiff groups in private settlements. There had been no case where a courts had to decide how to allocate a damage award between indirect and direct purchasers. But these "market-based" mechanisms could not eliminate the need of sound procedural rules which facilitated the consolidation or coordination of multiple actions.

The discussion also recognized that most indirect purchasers would not be in a position to sue for damages unless there was some mechanism in place to aggregate a large number of relatively small claims in some form of class action or collective action. As was pointed out in the discussion on class actions, without consolidation of small claims, the amounts that could be recovered would be too small to justify the risk of litigation. The most pro-indirect purchaser rules will not work and remain ineffective without consolidation mechanism for a large number of small claims; additional measures may be required as well, such as rules and practices concerning evidentiary standards as regards the amount of damages plaintiffs suffered as a result of unlawful conduct. This issue can be seen as a good illustration of the notion of an "organic" competition policy system in which several components must work together to determine levels of deterrence and compensation.

- (10) *The theory of optimal deterrence suggests that damage awards in competition cases should reflect the net harm caused to consumers plus social cost, with a multiplier in the case of concealed offenses such as cartels to reflect the likelihood that the offence would be detected. The multiplier could either be a fixed multiplier, such as treble damage awards in the United States, or other mechanisms to ensure that damage awards exceed pure compensation, such as the award of pre-judgment interest or exemplary damages that can be awarded in the discretion of the court. Although concerns are frequently raised in the public debate about "excessive damage awards" in competition cases, there is no empirical evidence that damage awards, even in combination with public fines, have reached a level where they would be considered an optimal deterrent.*

The Committee heard from Professor Page that the theory of optimal deterrence suggests that damage awards should reflect the net harm unlawful conduct has inflicted on consumers as well as social costs. In addition, it supports the use of multipliers for damage awards especially in the case of concealable defenses. Without them, and when damage awards are limited to actual losses, there would be an incentive to engage in unlawful conduct so long as firms can expect that not all instances of unlawful conduct will be detected. Public enforcement and private

enforcement should jointly contribute to an adequate multiplier which may not be assured by either public enforcement or private enforcement alone. Thus, the fact that public fines already have been imposed on defendants cannot eliminate the need for private actions for damages to ensure optimal levels of deterrence. Available evidence suggests that even public fines and private damage awards combined regularly do not reach a level at which they would be considered an optimal deterrent.

A frequently expressed view of U.S. antitrust litigation is that treble damage awards, combined with the possibility of suits of multiple groups of plaintiffs suits against a single cartel could frequently lead to excessive damage awards that were not justified under a theory of compensation or as a deterrent. This view was expressed occasionally during the discussion, for example when Professor Epstein broadly asserted that the U.S. system of private litigation regularly resulted in excessive damages and over deterrence. In a later discussion, Professor Gavil cast serious doubt on this hypothesis. He explained that a more detailed empirical examination of damage awards suggested that concerns of multiple damage awards were in reality unjustified as there was not a single reported case in which multiple damages had been awarded.

Several participants, in particular from European countries, expressed concern that damage multipliers are of a punitive nature and inconsistent with the principles of restitution and compensation. Some countries such as Germany even consider multiple damage awards contrary to their *ordre public*. A different view, however, holds that multipliers should be viewed as a necessary device to incentivize private plaintiffs to go to court, and not as a punitive damage award. In that view, multiple damage awards would be consistent with a private litigation system focusing on restitution and compensation. The discussion also demonstrated that the debate about multiple damages should not be limited to U.S.-style treble damages. Other devices that could lead to damage awards exceeding pure compensation include the award of pre-judgment interest, exemplary damages in the discretion of the court, and special rules concerning litigation costs.

The discussion touched only briefly on methods for the measurement of damages, which had been taken up by the Committee elsewhere. There was a general recognition that the measurement of damages resulting from unlawful conduct can be a difficult task in adversarial proceedings. Some countries such as Germany explained that it preferred simpler and more workable rules that would allow courts to estimate an equitable amount of damages. Frequently it would be too difficult to apply economic criteria to the assessment of damages. Other countries opined, however, that while the use of economic criteria can be difficult, it would be indispensable in the framework of an economics based competition regime.

### ***Class Actions and Collective Actions***

The last roundtable discussion focused first on the question of class actions and other mechanism to aggregate large numbers of small claims for damages. The discussion focused in particular on elements that a private enforcement should adopt to encourage actions on behalf of a large number of plaintiffs with small claims, and on measures that should be in place to prevent abuses of such a system.

- (11) *Class actions, collective actions, or other forms of actions that allow the aggregation of a large number of small claims for damages can be an important element in a competition regime that seeks to effectively deter anticompetitive conduct. They can be a useful form of deterrence in particular with respect to hard core cartels. Although to date very few countries outside the United States and Canada have much experience with class actions/collective actions in*

*competition cases, many members and observers are interested in developing rules and incentives to establish them as part of their enforcement regimes.*

During the discussion of class actions and collective/representative actions, participants appeared to agree that a system that allows the combination of a large number of small claims for damages in competition cases can fill a void in an enforcement regime and substantially contribute to more effective deterrence, in particular in hard core cartel cases. As one participant pointed out, without such a system recovery of damages would be limited to plaintiffs that are wealthy and have sufficiently large claims to justify litigation for damages; class/collective actions could be the only effective mechanism to ensure that consumers with small claims can be compensated as well.

To date the experience with class actions is largely limited to the United States and Canada and the Committee's discussion focused on lesson that can be learned from these two jurisdictions. In a few other member countries such as the United Kingdom and Germany, the first actions in competition cases aggregating a large number of claims are working their ways through the court system, and class actions also have been brought in Australia. In addition, there is a great interest in this topic in several other member and observer countries where rules and incentives to facilitate this type of actions in competition cases are being considered.

- (12) *A system that allows actions with an aggregation of claims has features that are distinct from other forms of private litigation: the focus shifts from clients to lawyers, from damages to attorney's fees, and from litigation to settlements. Specific measures can be considered to ensure that such a system is successful and effective. These include, for example, proper incentives for counsel to litigate on behalf of a large class of plaintiffs as well as a series of measures to ensure that the interests of the class members are protected, such as active court supervision, rules against frivolous suits, and procedures to assure fairness to the class when damage awards are distributed.*

When discussing the conditions that should accompany a class action system, experts focused on a number of issues. For example, the discussion highlighted the importance of rules for attorney compensation. In the United States, it was considered necessary that rules provided the necessary incentives for counsel to litigate, including contingency fees and rules that allow counsel to advance the cost of litigation. The U.S. experience appears to be replicated in the more recent Canadian system of class actions where plaintiff attorneys play a similar active role in class actions. Not all countries, however, would find a system of contingency fees appropriate, and other incentives to initiate class/collective actions and advance the potentially significant litigation costs in competition cases have to be considered.

The Committee focused also on principal/agent issues that might emerge in class actions as interests of counsel might diverge from those of the represented class. Participants agreed that the risk of a conflict of interests existed predominantly in indirect purchaser suits where the plaintiff class tends to be particularly large and direct involvement and supervision by members of the class was less likely than in cases where the class consisted of fewer, direct purchasers who tended to be more involved in litigation. Several speakers such as Professor Hyman, however, emphasized that in practice there were fewer problems in class actions than it sometimes appeared. Mr. Montage emphasized that any conflicts were most likely to arise about the distribution of a damage award or settlement, whereas the interests were aligned during earlier parts of the litigation.

All contributors agreed that active court supervision of plaintiff counsel was essential to a sound class action system. In addition, appointing a lead plaintiff who can more directly and effectively supervise the actions of class counsel may be a helpful element in class actions. These measures should ensure that a litigation strategy was in the best interest of the class, and that the distribution of awards between the class and class counsel was fair to the class. The discussion also mentioned the need for rules against frivolous law suits by class action counsel, which could include court imposed sanctions or rules that would allow a court to exclude counsel who had brought frivolous suits in earlier cases from representing a class.

Ensuring fair participation in the represented class was considered an important element of a successful class action regime. The Canadian experience suggests that an opt-out system was more successful in creating an inclusive class than an opt-in system in which only those plaintiffs participate in a class that have actively decided to do so. In addition, participants highlighted that a good notice procedure was important to ensure that the class was inclusive and that members of the class were aware of major developments in the litigation.

- (13) *As individual damage claims of class members can be small, other mechanisms to distribute damage awards in class actions/collective actions may have to be considered. These might in certain cases include coupon settlements, even though this form of compensating plaintiffs should not generally be favored in competition cases. A cy pres approach may be an alternative where the court decides to give the award to a charitable organization or some other public interest organization, rather than individual plaintiffs.*

The discussion revealed that most speakers did not favor the use of coupon settlements in class actions, where members of the class receive a coupon which entitles them to services of goods by the defendant rather than a cash award. Speakers agreed that there was a high risk that coupon settlements could be abused and that they could favor defendants and/or class counsel to the detriment of class members. For example, attorney fees might be assessed based on an unrealistic estimate of the value of coupons and/or the coupons might provide for goods or services that are more in the defendant's interest than the interest of the class members. However, speakers also suggested that there can be cases where coupon settlements can be a potentially valuable remedy, for example when the total damage award is rather low or when the defendant has a credible claim that it cannot afford cash payments. An alternative to coupon settlements can be the distribution of a damage award under a cy pres approach where the court decides that the award should go to a charitable organization or support some other public interest purpose. Under this approach, however, individual members of the class do not receive any compensation.

### ***The Interface between Public Enforcement and Private Enforcement***

When discussing the difficult issues that arise at the interface between Public and private enforcement, the Committee roundtables focused in particular on whether competition authorities should provide evidence on record with the authority to courts in order to assist in private litigation; and whether private actions for damages could undermine the effectiveness of leniency programs.

- (14) *Competition authorities can facilitate private actions by making evidence in their possession available to courts for use in private litigation. However, any assistance to courts and private plaintiffs must be carefully weighed against the risk that the sharing of evidence could interfere with the competition authority's investigation. Because of these concerns, some competition authorities will as a matter of policy resist all attempts by private plaintiffs to obtain documents from them.*

There was consensus that competition authorities should seek to protect information provided in leniency applications from discovery requests in connection with private actions for damages, including private lawsuits in other jurisdictions. In other respects, however, competition authorities differed in their approach when courts requested documents in the authority's possession that could be used as evidence in a private trial. Some jurisdictions will as a matter of principle oppose requests by private parties or courts for documents in the possession of the antitrust agency to avoid any risk of interference with its own investigative process. This includes, for example, the United States, which explained that it would use the law enforcement investigatory privilege to prevent disclosure of documents in its possession; courts typically upheld the government's position.

Other competition authorities explained that they would in principle favor cooperation with courts, and would under certain circumstances make documents in their files available if a court requested them in connection with a private antitrust action, subject to conflicts with confidentiality rules or the risk that handing over documents might interfere with an ongoing investigation. Potential conflicts could be minimized if the competition authority and court are willing to cooperate and find a workable solution for the sharing of documents, or if courts and private plaintiffs can gain access to documents only after an authority's investigation has been concluded.

The different approaches could be explained in part by differences in the rules governing pre-trial discovery. Assisting private plaintiffs in their actions for damages, for example by providing them access to evidence on file with the competition authority, could be more justified in systems without pre-trial discovery that private parties can use to obtain evidence. Conversely, a refusal to support private parties may be more justified where the procedural rules give private parties a greater role in discovering documents.

- (15) *Concerns exist in particular about the interaction between private actions for damages and leniency programs. A number of policies can be considered to minimize the risk that the threat of private litigation could undermine incentives to apply for leniency. This includes, for example, limiting a leniency applicant's liability in private actions for damages. But limiting exposure to private damages, if it is in fact necessary to incentivize leniency applications, also reduces the deterrent effects of private enforcement. There is no consensus about how to best resolve this trade-off.*

Virtually all participants emphasized that private actions for damages should not create a disincentive for firms to apply for leniency, thus undermining the effectiveness of leniency programs. But there was considerable discussion about how far a competition regime should go in limiting a leniency applicant's exposure to civil liability. Several speakers pointed out that limiting a leniency applicant's exposure to private damages claims involves a trade-off: While such a policy increases the incentives to seek leniency, it also lowers the deterrent effects that the exposure to civil liability can have.

The discussion about recent reforms in the United States highlighted that trade-off. The United States explained that one should assume that recent legislative reforms, which reduced the exposure of leniency applicants to damage claims from treble damages to single damages, should increase incentives to apply for leniency, even though there was no empirical evidence to support this assumption. While several speakers supported these reforms, others appeared skeptical. Professor Gavil, for example, questioned whether de-trebling of civil damages had indeed been justified. He highlighted in particular the risk of decreased deterrence and that it was unclear which of the two factors would dominate. Professor Page, while acknowledging that limiting civil liability would strengthen incentives under leniency programs, opined that such measures would be necessary only if multiple damage awards were a real possibility.

In addition, there was considerable discussion about whether and to what extent the exposure to civil damages would indeed influence a firm's decision to seek immunity. Several countries pointed out that factors other than civil liability might drive a decision whether or not to apply for seek leniency. In addition, a recent study in Germany suggested that the concern about civil liability was not the decisive factor when a firm decided whether to seek leniency, as the benefits of leniency appeared to outweigh such concerns. Others questioned more broadly the need to protect leniency applicants from civil liability, pointing out that similar benefits were not available to defendants in other areas of white collar crimes.

## LES ACTIONS JUDICIAIRES PRIVEES EN DROIT DE LA CONCURRENCE

*par le Secrétariat\**

Entre le mois d'octobre 2004 et juin 2006, le Comité de la concurrence de l'OCDE a tenu une série de quatre tables rondes consacrées aux actions privées en droit de la concurrence. Les discussions ont été axées sur les principes généraux et les politiques générales ainsi que sur certains aspects spécifiques, liés notamment aux actions privées en dommages-intérêts. Le présent volume comprend le compte rendu de ces tables-rondes, les contributions des pays membres, des observateurs et du BIAC, ainsi que les résumés des débats et les documents de travail rédigés par les experts.<sup>1</sup>

L'intérêt du Comité pour les actions privées d'application de la législation de la concurrence s'est révélé très opportun compte tenu du débat en cours actuellement en Europe à propos des actions privées en dommages-intérêts dans les affaires de concurrence et des réformes nécessaires pour encourager les actions judiciaires privées. Les thèmes à examiner ont été choisis dans une large mesure à la lumière du rapport de 2004 sur les actions privées dans les États membres de l'UE<sup>2</sup>, rédigé à la demande de la Commission européenne.

On verra que les discussions du Comité, qui ne visaient pourtant pas à analyser de façon exhaustive tous les aspects liés aux actions privées en droit de la concurrence, ont donné lieu à l'expression d'un large éventail de vues et d'opinions à ce sujet, en particulier de la part des gouvernements et des autorités de la concurrence. Il convient de noter que les débats ont dépassé la comparaison habituelle entre les pratiques judiciaires de l'Europe et des États-Unis, grâce aux contributions d'autres pays ayant acquis une expérience fructueuse dans le domaine des actions privées en droit de la concurrence, notamment l'Australie ou le Canada. Dans une certaine mesure, l'expérience de ces pays pourrait être plus directement pertinente pour les pays cherchant à enrichir et à renforcer leur arsenal de mesures privées que celle du système américain, nettement plus développé.

Les discussions ont également bénéficié des précieuses contributions de plusieurs intervenants experts issus des milieux de la recherche, des autorités judiciaires et de la pratique privée. Citons parmi ces intervenants (par ordre alphabétique) MM. Michael Baron, Christopher Bellamy, Richard Epstein, David Hyman, Andrew Gavil, Donald Houston, Laddie Montague et William Page. Ces experts couvrent un large éventail de positions, depuis une vision globalement sceptique à l'égard des actions judiciaires privées dans le domaine de la concurrence, jusqu'à une attitude favorable à ces actions dans le cadre d'un régime de concurrence bien conçu.

La section ci-après fait la synthèse des quatre tables rondes en mettant en exergue certains des thèmes principaux abordés lors des débats. Elle tire quelques conclusions générales, mais ne doit pas être

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<sup>1</sup> Aucune contribution de membres ou d'observateurs n'a été transmise pour la première table ronde et le Secrétariat n'a préparé aucun document de référence pour les tables rondes.

<sup>2</sup> Ashurst, *Study on the conditions of claims for damages in case of infringement of EC competition rules*, étude comparative demandée par la Direction de la concurrence de la Commission européenne (2004).

interprétée en ce sens que le Comité aurait fixé à l'occasion de ces tables rondes un ensemble de bonnes pratiques en matière d'application de la législation de la concurrence par la voie privée. Les échanges ont de fait plutôt confirmé que la mise au point de règles visant la mise en application optimale de la législation de la concurrence, dans le but de maximiser l'effet dissuasif tout en évitant les coûts et les obstacles excessifs, restait une mission ardue pour chaque pays. Des expérimentations dans les différentes régions et un ajustement des règles adoptées initialement semblent inévitables à court terme. Au fur et à mesure que les pays seront de plus en plus nombreux à mettre au point des solutions bien conçues dans le cadre de leur procédure civile et de leur système juridictionnel, ils pourront accumuler suffisamment d'expérience et de savoir-faire pour déterminer, dans le domaine des actions judiciaires privées en droit de la concurrence, un ensemble de bonnes pratiques ayant fait leurs preuves ailleurs.

Après cette section faisant la synthèse des tables rondes, les sections suivantes ont pour fil directeur le déroulement des débats. La section II comprend le compte rendu de la première table ronde sur les principes généraux et les politiques générales concernant les actions privées en droit de la concurrence. La section III couvre la seconde table ronde, dont les débats portaient sur la question des preuves, y compris la divulgation de documents et les témoignages d'experts. La section IV est centrée sur la qualité pour agir de l'acheteur indirect et sur la défense par l'argument de la répercussion en aval, ainsi que sur l'évaluation du préjudice. Enfin, la section V rend compte de la dernière table ronde, consacrée aux procédures collectives ainsi qu'aux relations entre les actions publiques et privées en droit de la concurrence<sup>3</sup>.

## Synthèse

### *Politiques générales et principes généraux*

La première table ronde a été l'occasion d'examiner un large éventail de principes et de politiques concernant les actions judiciaires privées en droit de la concurrence ; les participants se sont interrogés sur l'opportunité de ces actions de manière générale, les objectifs qu'elles doivent poursuivre et l'interdépendance entre les actions privées et publiques. Nombre de ces questions ont été abordées de nouveau dans les discussions ultérieures.

- (1) *Les actions privées d'application de la législation de la concurrence peuvent largement améliorer le fonctionnement d'un régime de concurrence. Cependant, développer les actions privées dans ce domaine n'est pas toujours profitable. Les réformes doivent avoir pour principal objectif de trouver le bon dosage, pour que les actions privées d'application du droit de la concurrence incitent à une plus grande conformité avec les normes de ce droit tout en évitant des procès excessifs et susceptibles de décourager les comportements bénéfiques pour la collectivité.*

Lors des quatre tables rondes, les participants ont largement reconnu que les actions privées en droit de la concurrence pouvaient constituer un complément précieux aux actions publiques et améliorer l'efficacité d'un régime de concurrence, soulignant qu'elles pouvaient renforcer la dissuasion et la mise en conformité du fait que la détection des pratiques anticoncurrentielles et l'absence de rentabilité de ces comportements seront plus probables. Les actions privées peuvent également contribuer à une meilleure culture de la concurrence et à une prise de conscience

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<sup>3</sup> Naturellement, de nombreuses questions déjà traitées sont réapparues lors des différentes tables rondes et sont donc couvertes par plusieurs sections. Par exemple, les considérations de politique générale ont joué également un rôle central dans les débats sur la qualité pour agir de l'acheteur indirect, sur l'évaluation des dommages-intérêts et sur les actions collectives. De même, la relation entre les voies d'action publiques et privées a été abordée lors de la première table ronde, mais aussi au cours de celle sur les preuves ainsi que lors de la dernière, consacrée aux effets des actions judiciaires privées sur les mesures de clémence.

accrue des lois dans ce domaine. En outre, en visant l'attribution de dommages-intérêts aux victimes des comportements anticoncurrentiels, les procédures privées peuvent créer un lien entre la législation et les consommateurs – objectif aujourd'hui prioritaire pour de nombreuses autorités de la concurrence.

Cependant, la quasi-totalité des participants sont également convenus que les actions judiciaires privées comportent des risques et peuvent créer des coûts inutiles pour la société, notamment lorsque des règles de fond mal conçues et/ou des règles de procédure inadaptées se traduisent par un contentieux excessif et découragent les comportements proconcurrentiels. Les réformes ne devraient donc pas simplement entraîner une inflation globale des procédures, mais viser à encourager les actions privées dans les cas où une plus stricte observation de la législation de la concurrence est bénéfique pour la société.

La reconnaissance des avantages et des risques potentiels liés aux actions judiciaires privées et la nécessité de trouver le bon équilibre expliquent pourquoi de nombreux pays d'Europe et d'ailleurs cherchent à renforcer les actions privées, alors qu'on peut reprocher au système américain certains excès. Les débats ont fait ressortir plusieurs conditions pouvant contribuer à renforcer les avantages et à minimiser les risques et les coûts des actions privées, telles que la fixation d'objectifs clairs de politique générale pour ces actions, une prise de conscience des risques et des coûts d'une dissuasion insuffisante, mais aussi excessive, la mise en place de normes de fond claires et solides de droit de la concurrence et le renforcement des actions privées, principalement dans les domaines où la réglementation ne souffre d'aucune ambiguïté et où les comportements anticoncurrentiels peuvent être aisément identifiés.

- (2) *Il est généralement considéré qu'en droit de la concurrence les actions privées doivent, tout comme les actions publiques, viser en tout premier lieu un effet dissuasif accru et une meilleure observation des lois.*

Les participants ont souligné à de nombreuses reprises qu'il importe de fixer pour les réformes des objectifs de nature à encourager les actions judiciaires privées. Nombre d'intervenants ont indiqué que les règles concernant ces actions doivent avant tout être conçues de manière à renforcer la dissuasion et à mieux faire respecter les principes de la concurrence. En conséquence, les actions publiques et privées pour le respect des lois doivent être considérées comme deux moyens complémentaires d'atteindre un même but, à savoir décourager les comportements anticoncurrentiels qui portent atteinte au bien-être des consommateurs. Chacun de ces deux types de mesures doit être favorisé de préférence lorsqu'il est plus efficace pour faire respecter la loi. Il est difficile d'évaluer les ressources totales à mettre en œuvre ainsi que la part respective que doit revenir aux actions publiques et privées. Selon le concept de « dissuasion optimale », chaque pays devrait rechercher un équilibre entre ces deux catégories, de façon à minimiser les coûts d'une dissuasion insuffisante ou excessive.

Mais selon un autre point de vue, la dissuasion optimale devrait surtout constituer une priorité pour les poursuites publiques. Les actions privées doivent plutôt concerner en premier lieu l'indemnisation des victimes et, en cas de dissuasion insuffisante, les amendes imposées via les poursuites publiques doivent être revues à la hausse. Il a néanmoins été admis que les divergences entre ces deux objectifs pouvaient être surestimées et que ceux-ci ne s'excluaient pas mutuellement.

- (3) *Les règles de fond et de procédure du droit de la concurrence sont interdépendantes et leurs interrelations mutuelles doivent être soigneusement prises en compte lors de l'élaboration de procédures visant à encourager les actions judiciaires privées.*

De nombreux participants ont mis en avant l'interdépendance entre les règles de fond de la législation de la concurrence et les procédures destinées à les faire appliquer. Par exemple, M. Epstein a souligné que ce serait une erreur d'encourager les actions privées sans tenir compte des règles de fond sous-jacentes, en précisant que si ces dernières n'étaient pas judicieuses, une amélioration des procédures ne serait d'aucun secours et une augmentation du nombre de procès ne ferait qu'aggraver les erreurs. Il n'est justifié d'encourager les actions privées que lorsque les règles de fond sont fiables. Dans la même veine, de nombreux intervenants ont admis que les actions judiciaires privées sont les plus efficaces lorsque les règles de fond sont claires et bien définies.

Cette interdépendance des règles de fond et des actions judiciaires privées signifie également que les procédures privées ne sont pas uniformément souhaitables dans tous les domaines du droit de la concurrence. De nombreux participants ont reconnu que les actions privées étaient plus efficaces dans les domaines où les normes de responsabilité étaient clairement établies et où il existait un consensus sur la définition du comportement contraire à la loi. De ce fait, les actions judiciaires privées sont les plus souhaitables – et doivent être favorisées – dans le domaine des ententes injustifiables. Plusieurs raisons ont été citées à cet égard : des règles de fond claires interdisent les ententes pures et simples sur la fixation des prix, la condamnation des ententes injustifiables est quasi unanime, les sanctions résultant des poursuites judiciaires publiques sont souvent considérées comme inférieures au « niveau de dissuasion optimal », il n'existe pas de risque de poursuites stratégiques de la part des concurrents puisque les demandeurs sont généralement des clients des membres de l'entente et l'éventualité d'une dissuasion excessive n'est guère préoccupante.

À l'inverse, de nombreux participants ont estimé que les actions judiciaires privées étaient nettement plus problématiques dans les situations mettant en cause le comportement d'une seule entreprise, la distinction entre le comportement pro-concurrentiel et les restrictions à la concurrence étant nettement plus difficile à établir dans ce cas, avec des règles de responsabilité moins claires, un risque fortement accru de poursuites stratégiques, notamment de la part de concurrents, et une possibilité de dissuasion excessive décourageant les comportements innovateurs et proconcurrentiels. De nombreux intervenants ont indiqué que, dans ce domaine, la mise en place des principes de concurrence devait relever davantage, voire exclusivement, des autorités de la concurrence.

On note toutefois quelques exceptions notables aux points de vue présentés ci-dessus. L'Allemagne a notamment fait valoir que les actions privées avaient lieu essentiellement dans les cas d'abus de position dominante, alors qu'elles n'étaient pas possibles pour l'obtention de dommages-intérêts en cas d'entente jusqu'à la réforme récente de sa loi sur les ententes.

- (4) *La politique de la concurrence et les actions judiciaires, y compris privées, relevant du droit de la concurrence devraient être considérées comme un système intégré dans lequel plusieurs facteurs contribueraient à atteindre les objectifs de dissuasion et d'indemnisation.*

Plusieurs intervenants ont mis en avant le fait que l'efficacité d'une action privée lorsqu'il s'agit de renforcer les objectifs de dissuasion et d'indemnisation dépendait d'un ensemble de facteurs formant un système de concurrence « organique ». M. Gavil a notamment souligné que les règles de fond de la concurrence, les règles de preuve et les règles de procédure, y compris celles

concernant la rémunération des avocats, interagissaient dans un ensemble plus large sous l'angle de la dissuasion et de l'indemnisation. M. Gavil a précisé que ces facteurs étaient interdépendants et que modifier l'un sans tenir compte des autres serait difficile et improductif.

Plusieurs autres participants ont également recommandé cette approche plus systémique des actions judiciaires privées. Par exemple, présentant les discussions à ce propos au sein de l'UE, la Commission européenne a commencé par expliquer que le débat sur un développement des actions privées faisait suite à des réformes du système de poursuites publiques en Europe qui ont été l'occasion d'envisager le système d'application de la législation de la concurrence dans son ensemble. La Commission a souligné que des réformes efficaces concernant les actions privées devaient prendre en compte plusieurs éléments interdépendants, tels que l'accès des justiciables aux tribunaux (y compris la réglementation des procédures collectives), les mesures permettant de réduire le risque de poursuites, les règles facilitant la preuve du préjudice (y compris celles concernant l'ouverture du droit d'être indemnisé) et d'autres incitations telles que l'utilisation de coefficients multiplicateurs pour le calcul des dommages-intérêts.

Les participants sont convenus que les règlements à l'amiable privés jouaient un rôle important dans le contentieux privé et qu'ils devaient être pris en compte pour évaluer l'efficacité des actions judiciaires privées, en termes de dissuasion et de d'indemnisation. Plusieurs intervenants ont admis qu'il devrait y avoir idéalement des mécanismes de suivi des règlements amiables dans les affaires de concurrence ; on pourrait ainsi y voir plus clair dans l'efficacité des actions privées qu'avec les statistiques sur les dommages-intérêts attribués par les tribunaux.

- (5) *Avec le développement des actions privées en droit de la concurrence, les autorités de la concurrence n'ont plus le monopole de l'évolution du droit et de l'économie de la concurrence, ni de l'établissement des priorités en matière de respect de la loi. Les tribunaux peuvent contribuer à l'instauration de règles de fond plus solides, mais on court également le risque que les décisions rendues dans les instances privées ne s'éloignent de ce qui serait généralement considéré comme une politique saine de la concurrence. L'adoption de mesures institutionnelles permettrait d'améliorer la cohérence entre les actions judiciaires privées et publiques.*

Les discussions ont fait ressortir les avantages et les risques potentiels d'un développement des actions judiciaires privées pour la mise en place d'une saine politique de la concurrence, à laquelle peut contribuer, du point de vue de plusieurs intervenants, l'augmentation du nombre des actions privées et des décisions de justice. La Commission européenne a ainsi fait valoir que l'un des avantages attendus du développement des actions privées en Europe serait une implication accrue des tribunaux dans la formulation du droit et de la politique de la concurrence. De même, l'Australie a indiqué que, selon son expérience, les actions privées avaient permis aux tribunaux de participer à l'élaboration des principes et des fondements économiques de la réglementation antitrust.

Cependant, sachant que le contrôle des autorités de concurrence sur le développement de la politique de la concurrence s'affaiblit parallèlement à la multiplication des actions privées, des tensions et des conséquences indésirables deviennent plus probables. Les États-Unis ont illustré ce problème en décrivant comment la notion d'« accord » avait évolué dans la jurisprudence américaine. Elle avait tout d'abord été interprétée de manière restrictive par la Cour suprême, dans une affaire où la théorie d'entente abusive sur les prix avancée par le demandeur semblait extrêmement improbable et où la Cour ne souhaitait pas conclure à la responsabilité du défendeur. Mais depuis lors, cette approche restrictive s'est étendue à d'autres cas, moins justifiés, y compris de fixation horizontale des prix. Dans ces cas, une interprétation étroite de la notion d'« accord » peut aboutir à des décisions contestables et à une dissuasion insuffisante.

Les débats ont été l'occasion d'évoquer diverses mesures susceptibles de contribuer à une meilleure cohérence entre les actions judiciaires publiques et privées et à la définition d'un ensemble plus homogène d'objectifs. Citons les efforts déployés par les autorités de la concurrence pour mettre au point des règles de fond claires, la participation des autorités de la concurrence aux actions privées en tant qu'*amicus curiae* et les règles de procédure autorisant ou obligeant les tribunaux à demander l'avis de l'autorité de concurrence avant de statuer sur une violation de la législation de la concurrence.

***Preuve : recueil des preuves et témoignages d'experts***

La table ronde sur la preuve s'est concentrée sur deux domaines clés en matière d'actions privées : une meilleure utilisation de l'expertise économique et le rôle des autorités de la concurrence comme source de preuve.

- (6) *L'importance croissante des aspects économiques de la concurrence dans tous les pays a renforcé le rôle des experts économistes dans les actions civiles, comme experts désignés par les tribunaux ou experts des parties. Les règles encourageant les experts économistes désignés par les parties à se rencontrer en début d'instance et à déterminer leurs points d'accord peuvent aider le tribunal à mieux gérer le procès.*

Deux approches de base se sont fait jour concernant le rôle des experts économistes dans les procédures privées. Dans certains pays, un témoin expert est désigné par le tribunal et doit fournir à ce dernier un avis indépendant sur les aspects économiques de la concurrence. Dans d'autres pays, les experts économistes sont désignés par les parties et témoignent en qualité d'experts. Le système de l'expert désigné par le tribunal semble fonctionner tant que toutes les parties sont prêtes à accepter son avis comme une analyse économique objective et impartiale de l'affaire dont est saisi le tribunal. Or, ainsi que l'a souligné M. Gavil, comme les actions privées reposent de plus en plus sur une analyse économique approfondie, il est de plus en plus probable que les parties remettent en question l'avis de l'expert désigné par le tribunal dans le cas où cet avis serait contraire à leurs intérêts. Il serait donc envisageable de mettre en place un système hybride dans lequel un expert désigné par le tribunal conseillerait ce dernier en évaluant les preuves économiques présentées par les experts des parties.

Plusieurs pays ont décrit des procédures encourageant les experts économistes désignés par les parties à se rencontrer au début du procès, afin d'identifier les points sur lesquels les parties peuvent éventuellement trouver un terrain d'entente. Bien que cette idée soit relativement nouvelle, l'expérience montre qu'une telle approche pourrait améliorer l'organisation du procès, le tribunal pouvant repérer plus rapidement les points de désaccord entre les parties et se concentrer sur eux pendant le procès.

- (7) *Étant donné que le demandeur, dans une action privée en dommages-intérêts, dispose rarement de preuves suffisantes pour étayer ses prétentions, des règles lui permettant d'avoir plus facilement accès aux preuves détenues par le défendeur peuvent jouer un grand rôle dans un système efficace d'application de la loi. Cependant, les règles de divulgation des preuves doivent être soigneusement conçues afin d'éviter les coûts excessifs et les procédures abusives. En outre, une gestion active des affaires par les tribunaux semble essentielle pour limiter le risque que les parties n'abusent des mécanismes de divulgation des preuves.*

Les participants ont généralement admis qu'un système efficace d'action judiciaire privée pouvait exiger des règles facilitant l'accès du demandeur aux preuves détenues par le défendeur. Il semblerait que, dans de nombreux pays européens, les règles restrictives concernant la

production de preuves découragent les victimes d'agir en dommages-intérêts dans les affaires de concurrence. Certains pays, comme la Norvège, indiquent qu'ils font actuellement l'expérience de règles autorisant certaines formes de divulgation des preuves dans le but de venir en aide aux demandeurs. Dans le même temps, les participants ont admis que des demandes excessives de production de preuves détenues par la partie adverse pouvaient se révéler très contraignantes pour les parties comme pour le système judiciaire, cette réserve étant exprimée en particulier par les entreprises. Les États-Unis ont expliqué que des demandes excessives de communication de preuves pouvaient aller à l'encontre du règlement équitable, rapide et peu coûteux souhaitable pour toutes les affaires judiciaires. La refonte récente des règles de divulgation des preuves obéit au souci de limiter le risque de demandes excessives et inutilement contraignantes.

Plusieurs participants ont mis en avant le rôle important du juge dans la divulgation des preuves. Une surveillance et une intervention judiciaires actives peuvent décourager les demandes abusives de communication de pièces. On a également noté que la création d'un tribunal spécialisé dans les affaires de concurrence pouvait contribuer à une gestion plus efficace des litiges, y compris en ce qui concerne les demandes de divulgation de preuves. L'exemple cité pendant la discussion concernait la création du *Competition Appeal Tribunal* au Royaume-Uni, les autorités de ce pays soulignant que, parallèlement au recours croissant à la communication de pièces avant le procès au Royaume-Uni, l'expérience de ce tribunal en matière de traitement des procédures de divulgation des preuves dans les affaires de concurrence était elle aussi de plus en plus importante.

### ***Qualité pour agir et évaluation du préjudice***

La table ronde suivante s'est concentrée sur deux autres aspects, à savoir la qualité pour agir (et la question connexe du moyen de défense tiré de la répercussion en aval) et l'évaluation du préjudice. Nombre de politiques générales ont été de nouveau abordées à cette occasion, notamment sous l'angle des objectifs des actions judiciaires privées et du concept de dissuasion optimale.

- (8) *Comme la violation des lois sur la concurrence peut affecter différentes catégories de participants au marché, notamment les clients directs ou indirects, un régime d'action judiciaire privée doit décider quels seront les groupes qui pourront agir en dommages-intérêts. Bien que cette question ait suscité une attention considérable dans le débat public et dans la doctrine, il n'existe aucun consensus quant aux règles qui seraient les plus appropriées en ce qui concerne la qualité pour agir. Par ailleurs, peu d'éléments empiriques sont susceptibles d'éclairer le débat. Certains estiment que l'objectif de dissuasion optimale peut être atteint plus efficacement lorsque seuls les acheteurs directs peuvent intenter une action en dommages-intérêts, ou se voient au moins reconnaître une place privilégiée dans les actions judiciaires privées. D'autres pensent que les actions en justice intentées par les acheteurs indirects peuvent jouer un grand rôle dans un régime d'application efficace de la loi et qu'aucune restriction ne devrait être imposée à cet égard.*

L'inobservation de la législation de la concurrence pouvant affecter un large éventail de participants au marché, le droit de la concurrence doit décider qui, des clients, concurrents et autres participants au marché, peut agir en dommages-intérêts. Le Comité a débattu de cette question complexe principalement dans le cadre de « l'action de l'acheteur indirect » et « du « moyen de défense tiré de la répercussion en aval » en se concentrant sur le préjudice causé aux différentes catégories de clients par une entente illicite. Il a également porté son attention sur d'autres principes pouvant servir à préciser la qualité pour agir, tels que ceux régissant le préjudice au sens de la législation de la concurrence.

Lors du débat sur la qualité pour agir de l'acheteur indirect et sur le moyen de défense tiré de la répercussion en aval, les participants ont reconnu qu'une série de facteurs devaient déterminer si l'acheteur indirect doit être autorisé à intenter une action en dommages-intérêts et si le moyen de défense considéré peut être admis dans les actions intentées par l'acheteur direct, en tenant compte de la dissuasion optimale, d'une juste indemnisation et d'une administration efficace de la justice. Concilier tous ces facteurs peut nécessiter des compromis et des équilibres délicats. En outre, comme l'a fait ressortir M. Gavil, certaines questions critiques manquent cruellement d'éléments empiriques. Aucun accord ne s'est dégagé entre les experts participants à propos de l'opportunité d'une action de la part de l'acheteur indirect : MM. Epstein et Page ont fait valoir qu'il serait préférable d'exclure de telles actions pour deux raisons : éviter la multiplication des procès et le risque de cumul de dommages-intérêts, et poursuivre plus efficacement l'objectif de dissuasion optimale. À l'inverse, M. Gavil estime que la dissuasion serait plus forte si l'acheteur indirect était généralement autorisé à agir. Cet expert s'est concentré essentiellement sur les éléments empiriques montrant que les clients directs n'avaient parfois aucun intérêt à intenter une action (puisque'ils ont répercuté le surcoût) ou qu'ils se souciaient davantage du maintien de leurs relations commerciales avec leurs fournisseurs que de leur droit à indemnisation. M. Gavil a ajouté que, sur les 30 dernières années, on ne trouvait aux États-Unis absolument aucun cas d'octroi de dommages-intérêts multiples à plusieurs groupes de demandeurs pouvant agir devant les juridictions des États ou de l'État fédéral.

Les débats ont montré que, dans la plupart des pays autres que les États-Unis, la question de l'acheteur indirect et celle du moyen de défense tiré de la répercussion en aval n'avaient pas encore été résolues officiellement. Il apparaît que, dans la majorité des pays, sur la base des principes généraux du droit, les acheteurs indirects seraient sans doute habilités à intenter une action en dommages-intérêts, même s'ils peuvent rencontrer des difficultés pour démontrer le bien-fondé de leurs prétentions, et que les défendeurs seraient en outre sans doute enclins à invoquer la répercussion du surcoût en aval, car sinon il y a risque d'enrichissement sans cause de l'acheteur direct. L'Allemagne est l'un des rares pays à s'être déjà attelé à ces questions ; elle a expliqué avoir mis en place, dans un souci de pragmatisme, un système favorable à l'action en justice de l'acheteur direct, une réglementation récente empêchant dans la plupart des cas d'invoquer la répercussion en aval. L'Allemagne a poursuivi en précisant qu'elle n'avait pas adopté de règles spécifiques en faveur des actions intentées par les clients indirects, car ces dernières ne sont pas considérées comme une composante efficace d'un régime d'action judiciaire privée.

Un autre aspect intéressant est ressorti des discussions sur les procédures collectives. M. Houston a indiqué que plusieurs actions collectives avaient couronnées de succès au Canada dans le cadre d'affaires mettant en cause des ententes publiques. M. Houston a toutefois souligné que la question de la qualité pour agir de l'acheteur indirect n'avait pas été pleinement résolue au Canada. Cette expérience montre que ce domaine du droit pourrait sans doute se développer progressivement avec la multiplication des actions privées et qu'il n'est peut-être pas nécessaire de rechercher d'emblée une solution optimale.

Les débats ont également mis en avant le fait qu'un régime d'application de la loi pouvait prendre en considération d'autres principes limitant le groupe de demandeurs privés autorisés à intenter une action en dommages-intérêts. M. Page a notamment signalé que les règles concernant le préjudice en droit de la concurrence pouvaient jouer un grand rôle pour faire en sorte que les incitations des entités privées à agir en dommages-intérêts correspondent aux objectifs de la politique de concurrence. Ce régime du préjudice en droit de la concurrence se concentre sur la question de savoir si, au regard de la finalité de la législation de la concurrence, le demandeur a subi le type de préjudice que cette dernière est justement censée empêcher. Cela pourrait par

exemple constituer un mécanisme efficace pour exclure les procès indésirables de concurrents dans le cas d'actions visant les pratiques d'une seule entreprise.

- (9) *Un régime d'application de la loi permettant aux acheteurs indirects d'intenter une action en dommages-intérêts exige des règles de coordination en cas de multiplicité d'actions. En outre, les actions intentées par les acheteurs indirects n'auront généralement de sens que s'il existe des règles de jonction.*

Les participants ont été d'accord sur le fait que l'existence de règles de jonction et de coordination des actions était souhaitable en cas de multiplicité d'actions en dommages-intérêts. M. Gavil a tout particulièrement mis l'accent sur ce point, même s'il a également expliqué, à la lumière de l'expérience américaine, que le marché pouvait, dans une certaine mesure, contribuer à pallier le problème des actions parallèles devant plusieurs juridictions. Par exemple, les défendeurs refusent fréquemment un arrangement avec les acheteurs directs (devant un tribunal fédéral) s'ils ne peuvent pas transiger également avec les acheteurs indirects (devant le tribunal d'un État). Ces mécanismes semblent relativement efficaces pour la coordination des demandes potentiellement concurrentes de différents groupes de plaignants aux fins d'une transaction privée. Jamais les tribunaux n'ont eu à décider de la répartition de dommages-intérêts entre des acheteurs directs et indirects, mais ces mécanismes « fondés sur le marché » ne peuvent pas supprimer la nécessité d'établir des règles de procédure claires facilitant la jonction ou la coordination d'actions multiples.

Il est également ressorti des discussions que la plupart des acheteurs indirects ne sont pas en mesure d'agir en dommages-intérêts en l'absence d'un mécanisme de jonction, sous la forme d'une action collective, d'un grand nombre d'actions mettant chacune en jeu des sommes relativement faibles. Comme on l'a vu dans la discussion sur les procédures collectives, l'indemnisation pouvant être obtenue en l'absence de jonction ne serait pas suffisante pour justifier le risque d'un procès. Les règles les plus favorables aux acheteurs indirects ne fonctionneront pas et resteront inefficaces sans mécanisme de jonction ; des mesures supplémentaires peuvent se révéler nécessaires également, par exemple des règles et pratiques concernant les normes de preuve du montant du préjudice subi en raison du comportement illicite reproché. Ce point illustre bien la notion de système « organique » de politique de la concurrence, dans lequel plusieurs composantes doivent interagir pour déterminer les niveaux de dissuasion et d'indemnisation.

- (10) *La théorie de la dissuasion optimale montre que les dommages-intérêts attribués dans les affaires de concurrence doivent refléter le préjudice net causé au consommateur, plus le coût social, avec un coefficient multiplicateur dans le cas de dissimulation (lorsqu'il y a entente, par exemple), afin de prendre en compte la probabilité de détection de l'infraction. Le coefficient multiplicateur pourrait être fixe, comme par exemple le triplement des dommages-intérêts aux États-Unis, ou d'autres mécanismes permettraient de garantir que les dommages-intérêts soient supérieurs à la seule indemnisation, comme l'octroi d'intérêts avant jugement ou l'attribution de dommages-intérêts exemplaires à la discrétion du tribunal. Bien que le risque d'allocation excessive de dommages-intérêts soit fréquemment mis en avant dans les débats publics sur les affaires de concurrence, aucun élément empirique n'indique que les indemnisations accordées, même combinées aux amendes publiques, aient atteint un niveau susceptible de constituer une dissuasion optimale.*

M. Page a indiqué devant le Comité que la théorie de la dissuasion optimale devait refléter le préjudice net causé par le comportement illicite aux consommateurs, ainsi que son coût social. En outre, il se prononce en faveur de l'emploi de coefficients multiplicateurs pour l'attribution des

dommages-intérêts, tout spécialement en cas de dissimulation. Sans ces outils, et lorsque les indemnités sont limitées au préjudice effectif, il y a incitation à adopter des comportements illicites puisque les entreprises tablent sur la non-détection d'une partie d'entre eux. Les actions judiciaires privées et publiques devraient concourir à la formation d'un coefficient multiplicateur approprié, que ne pourraient garantir séparément ni les unes, ni les autres. Ainsi, le fait que des amendes aient déjà été infligés en conséquence d'une action publique ne saurait supprimer la nécessité d'actions privées en dommages-intérêts, et ce afin d'optimiser la dissuasion. Les données disponibles montrent que même les amendes publiques et l'attribution de dommages-intérêts aux justiciables privés n'atteignent généralement pas au total le niveau considéré comme correspondant à une dissuasion optimale.

Selon une opinion fréquemment formulée à propos des procédures antitrust aux États-Unis, les dommages-intérêts triples, combinés au risque de procès par plusieurs groupes de plaignants contre une même entente, pourrait souvent donner lieu à une indemnisation excessive, non justifiée par la théorie de la réparation ou comme élément de dissuasion. Ce point de vue est ressorti à quelques reprises durant les débats, notamment lorsque M. Epstein a globalement déclaré que le système judiciaire privé américain engendrait régulièrement l'attribution de dommages-intérêts exagérés et avait un caractère surdissuasif. Au cours d'une discussion ultérieure, M. Gavil a exprimé de sérieux doutes quant à cette hypothèse, expliquant que si l'on examinait plus en détail les dommages-intérêts effectifs, ces préoccupations concernant les dommages-intérêts affectés d'un coefficient multiplicateur étaient en réalité infondées et qu'aucun cas de ce type n'avait jamais été enregistré.

Plusieurs participants, en particulier des pays européens, ont exprimé leurs craintes que les multiplicateurs de dommages-intérêts ne soient de nature punitive et contraires aux principes de réparation et d'indemnisation. Dans certains pays, en particulier l'Allemagne, l'attribution de dommages-intérêts multiples est même contraire à l'ordre public. Mais on peut aussi faire valoir que les multiplicateurs doivent être considérés comme un moyen nécessaire d'inciter les plaignants privés à saisir les tribunaux, et pas comme l'attribution de dommages-intérêts punitifs. Selon ce point de vue, l'attribution de dommages-intérêts multiples serait cohérente avec un système judiciaire privé centré sur la réparation et sur l'indemnisation. Les discussions ont également illustré le fait que le débat sur les dommages-intérêts multiples ne devait pas se limiter au triplement des dommages-intérêts aux États-Unis : on peut citer parmi les autres mécanismes allant au-delà de la seule réparation l'octroi d'intérêts avant jugement, l'attribution de dommages-intérêts exemplaires à la discrétion du tribunal ou les règles spéciales concernant les frais de justice.

Les méthodes d'évaluation du préjudice, abordées par le Comité à une autre occasion, n'ont été évoquées que brièvement. Les participants ont généralement admis que l'évaluation du préjudice causé par un comportement illicite pouvait s'avérer délicate dans le cadre d'une procédure contradictoire. Certains pays comme l'Allemagne ont expliqué qu'ils préféreraient des règles plus simples et plus pratiques qui permettent aux tribunaux de fixer des dommages-intérêts équitables. Il est en effet souvent très difficile d'appliquer des critères économiques à l'évaluation du préjudice. D'autres pays ont indiqué, cependant, que même si l'emploi de critères économiques était malaisé, il était indispensable dans le cadre d'un régime de concurrence reposant sur des bases économiques.

### *Actions collectives*

La dernière table ronde était consacrée à la question des procédures collectives et des autres moyens de regrouper un grand nombre d'actions en dommages-intérêts mettant en jeu des montants

relativement faibles. La discussion a été centrée en particulier sur les caractéristiques à retenir pour les actions privées en vue d'encourager le regroupement des actions, ainsi que sur les mesures à mettre en place pour éviter les abus d'un tel système.

- (11) *Les actions collectives et autres formes d'action permettant le regroupement d'un grand nombre d'actions en dommages-intérêts portant sur des montants relativement faibles peuvent jouer un grand rôle dans un régime de concurrence cherchant à décourager efficacement les comportements anticoncurrentiels. Elles peuvent constituer une forme de dissuasion utile, en particulier en ce qui concerne les ententes injustifiables. Bien qu'à ce jour très peu de pays en-dehors des États-Unis et du Canada aient beaucoup d'expérience en matière d'actions collectives dans les affaires de concurrence, un grand nombre de membres et d'observateurs s'intéressent à la mise au point de règles et d'incitations pour leurs régimes d'application de la loi.*

Au cours de la discussion concernant les actions collectives, les participants ont été d'accord sur le fait qu'un système permettant de joindre un grand nombre d'actions mettant en jeu des sommes relativement faibles dans les affaires de concurrence pouvait combler une lacune dans un régime d'application de la loi et contribuer de manière substantielle à une dissuasion accrue, en particulier en cas d'entente injustifiable. Comme l'a souligné un participant, sans un tel système, la réparation du préjudice serait limitée aux plaignants disposant de moyens financiers adéquats et dont les prétentions seraient suffisamment importantes pour justifier une action en dommages-intérêts ; les procédures collectives peuvent être le seul mécanisme efficace garantissant que les petits litiges donnent lieu eux aussi à indemnisation.

À ce jour, les actions collectives concernent essentiellement les États-Unis et le Canada, et la discussion au Comité s'est focalisée sur les enseignements à tirer de l'expérience de ces deux pays. Dans quelques autres pays membres, tels que le Royaume-Uni ou l'Allemagne, les premières actions concernant des affaires de concurrence qui regroupent un grand nombre de demandeurs sont en cours devant les tribunaux, et plusieurs actions collectives ont également été intentées en Australie. En outre, plusieurs autres membres et pays observateurs ont manifesté un grand intérêt pour les actions collectives et envisagent la mise en place de règles et d'incitations pour faciliter ce type de procédure dans les affaires de concurrence.

- (12) *Un système autorisant le regroupement des actions présente des caractéristiques distinctes des autres formes d'action privée : l'attention se concentre plutôt sur les avocats et sur leurs honoraires que sur les clients et leur préjudice, et sur la recherche d'un règlement amiable plutôt que sur le procès. Des mesures spécifiques peuvent être envisagées pour garantir la réussite et l'efficacité d'un tel système, notamment des incitations adaptées pour faire en sorte que les avocats prennent en charge un grand nombre de demandeurs ou encore une série de précautions assurant que les intérêts des participants à la procédure collective sont bien protégés, notamment une surveillance active de la part du tribunal, des règles interdisant les actions en justice abusives et des procédures garantissant une répartition équitable des dommages-intérêts entre les membres du groupe de plaignants.*

Dans le débat sur les conditions qui doivent accompagner un système d'action collective, les experts se sont attachés à quelques questions en particulier. La discussion a, par exemple, mis en avant l'importance des règles de rémunération des avocats. Dans le cas des États-Unis, il a été jugé nécessaire que ces règles prévoient des incitations encourageant les avocats à défendre l'affaire devant les tribunaux, y compris des honoraires proportionnels à l'indemnisation obtenue et la possibilité pour l'avocat d'avancer les frais de justice. L'expérience des États-Unis semble s'être répétée dans le cadre plus récent des procédures collectives au Canada, où les avocats de la

partie requérante jouent un rôle tout aussi actif. Cependant, le système des honoraires proportionnels n'est pas reconnu dans tous les pays et il faut envisager d'autres incitations à tenter une action collective et à avancer les frais de justice, qui peuvent être élevés dans les affaires de concurrence.

Le Comité s'est également intéressé à la relation mandant/mandataire susceptible de jouer dans les procédures collectives, les intérêts de l'avocat pouvant diverger de ceux des plaignants qu'il représente. Les participants ont admis que le risque de conflit d'intérêts concernait avant tout les procès intentés par les acheteurs indirects, lorsque la partie requérante tend à prendre des proportions particulièrement importantes, et que la participation directe et la supervision de la part des membres sont moins probables que dans le cas de poursuites engagées par des groupes plus limités d'acheteurs directs, généralement plus impliqués dans la procédure. Plusieurs intervenants, dont M. Hyman, ont toutefois mis l'accent sur le fait qu'en pratique les procédures collectives créaient moins de problèmes qu'on pouvait parfois l'imaginer. M. Montague a souligné que des conflits étaient plus susceptibles de survenir au stade de la répartition des dommages-intérêts ou du règlement amiable, alors que l'intérêt de tous était le même aux stades antérieurs.

Tous les participants ont admis qu'une surveillance active des avocats des plaignants par le tribunal était indispensable à une procédure collective efficace. De plus, la nomination d'un représentant officiel de la partie requérante, supervisant de manière plus directe et plus efficace les initiatives de l'avocat de l'action collective, pouvait jouer un rôle positif dans ce type d'affaires. De telles mesures visent à garantir que la procédure soit conduite dans l'intérêt des personnes représentées et que la répartition des dommages-intérêts entre elles et leurs avocats ne les lèse pas. On a également abordé la nécessité de règles concernant les procédures abusives intentées par les avocats dans le cadre d'une action collective, prenant éventuellement la forme de sanctions prononcées par le tribunal ou de dispositions permettant au tribunal d'exclure un avocat qui aurait intenté précédemment de telles procédures abusives dans le cadre d'une action collective.

Garantir une participation équitable pour le groupe de plaignants représentés a été considéré comme important pour le succès d'un système d'action collective. L'expérience canadienne montre que l'option de non-participation donne des résultats plus inclusifs que l'option de participation choisie, avec laquelle seuls les plaignants ayant expressément donné leur consentement se joignent à une procédure collective. En outre, on a mis en avant le fait qu'un mécanisme efficace d'avis est nécessaire pour que le collectif soit aussi représentatif que possible et que ses membres soient tenus au fait des principales évolutions du procès.

- (13) *Étant donné que les montants demandés individuellement par les participants à une action collective peuvent être faibles, il convient de rechercher d'autres mécanismes de répartition des dommages-intérêts dans de telles affaires. Dans certains cas, il pourra s'agir notamment d'un règlement amiable sous forme d'attribution de bons d'achat aux plaignants, même si cette forme d'indemnisation n'est pas en général à préconiser dans les affaires de concurrence. Le recours à la doctrine cy-près peut être une autre solution, par laquelle le tribunal décide d'allouer les dommages-intérêts non pas aux plaignants, mais à une organisation caritative ou à un autre groupement d'intérêt général.*

Il est ressorti des débats que la majorité des participants n'étaient pas favorables aux règlements amiables sous forme d'attribution de bons d'achat, en vertu desquels les membres des procédures collectives reçoivent des bons de réduction sur les produits du défendeur et pas une indemnité en numéraire, car cette pratique présente de très grands risques d'abus et peut favoriser les

défendeurs et/ou l'avocat de la partie requérante au détriment des plaignants. Par exemple, les honoraires des avocats peuvent être évalués sur la base d'une estimation irréaliste de la valeur des biens et/ou les biens peuvent concerner des biens et services présentant davantage d'intérêt pour le défendeur que pour les plaignants. Les participants ont cependant également indiqué que ces règlements amiables sous la forme de bons d'achat pouvaient parfois s'avérer judicieux, notamment lorsque l'indemnité totale était relativement faible ou lorsque le défendeur pouvait légitimement faire valoir qu'il n'avait pas les moyens d'accorder les réparations en numéraire. L'attribution des dommages-intérêts selon la doctrine cy-près constitue une autre solution, le tribunal décidant d'allouer les dommages-intérêts à une organisation caritative ou au profit d'une autre cause d'intérêt public. Mais, selon cette méthode, les parties à l'action collective ne perçoivent aucune réparation.

### *Interaction entre les mesures privées et publiques d'application de la loi*

Dans l'examen des difficultés qui surviennent à la jonction des actions judiciaires publiques et privées, les tables rondes du Comité se sont notamment demandé si les autorités de la concurrence en particulier devaient fournir au tribunal les preuves qui seraient en leur possession afin d'appuyer les actions privées, et si ces actions pouvaient nuire à l'efficacité des programmes de clémence.

- (14) *Les autorités de la concurrence peuvent faciliter les actions privées en communiquant aux tribunaux les preuves en leur possession à l'occasion de telles affaires. Cependant, toute assistance aux tribunaux et aux demandeurs privés doit être soigneusement mise en balance avec le risque que la divulgation de ces preuves n'interfère avec les enquêtes de l'autorité de la concurrence. Pour ces raisons, certaines autorités de la concurrence préfèrent par principe rejeter toutes les demandes que peuvent leur adresser les parties requérantes privées pour obtenir la production de documents de leur part.*

Il y a eu accord sur le fait que les autorités de la concurrence devaient chercher à protéger les informations fournies dans les demandes de clémence contre les demandes de divulgation liées à des actions privées en dommages-intérêts, y compris celles intentées dans d'autres juridictions. Mais, sur les autres points, les autorités de la concurrence ont des attitudes divergentes lorsque les tribunaux leur demandent de produire des documents détenus par elles comme éléments de preuve dans une instance judiciaire privée. Par principe, certains pays s'opposent aux requêtes des demandeurs privés ou des tribunaux en vue de la production de documents détenus par l'autorité de la concurrence, afin d'éviter tout risque d'interférence avec l'enquête de cette dernière. Citons le cas des États-Unis, qui ont expliqué qu'ils appliquaient le privilège d'investigation pour empêcher la divulgation de documents détenus par l'autorité de la concurrence ; les tribunaux confirment généralement la position de l'exécutif.

D'autres autorités de la concurrence ont indiqué qu'en principe elles favorisent la coopération avec les tribunaux et mettent à disposition, dans certaines circonstances, les documents en leur possession si un tribunal le leur demande dans le cadre d'une action privée relevant du droit de la concurrence, sous réserve de conflits avec les règles de confidentialité ou du risque que la communication de tels documents puisse interférer avec une enquête en cours. Les conflits potentiels peuvent être minimisés si l'autorité de concurrence et le tribunal manifestent la volonté de coopérer et de trouver une solution réaliste de communication des documents, ou si les tribunaux et les demandeurs privés peuvent avoir accès aux documents seulement après la clôture de l'enquête de l'autorité de la concurrence.

Ces divergences de vue pourraient s'expliquer en partie par les différentes règles qui régissent la divulgation de preuves avant le procès. Aider les plaignants dans leur action en dommages-

intérêts, par exemple en leur donnant accès aux preuves recueillies par l'autorité de concurrence, pourrait être plus judicieux dans les systèmes qui ne connaissent pas cette divulgation préalable au procès dont peuvent tirer parti les plaignants pour recueillir des preuves. À l'inverse, le rejet de demandes de ce type pourrait se justifier davantage lorsque les règles de procédure confèrent aux parties privées au procès un plus grand rôle en matière de communication de documents.

- (15) *Des problèmes se posent en particulier pour ce qui est de l'interaction entre les instances privées en dommages-intérêts et les mesures de clémence. Plusieurs mécanismes peuvent être considérés comme minimisant le risque que la menace d'actions privées en justice limite l'incitation à formuler une demande de clémence. Citons ainsi, entre autres, la limitation de responsabilité du demandeur de clémence dans les actions privées en dommages-intérêts. Cependant, cette limitation des dommages-intérêts pouvant résulter d'une action privée affaiblit également les effets dissuasifs de ce type d'action. Il n'y a aucun consensus sur le meilleur compromis possible.*

La quasi-totalité des participants ont souligné que les actions privées en dommages-intérêts ne devaient pas dissuader les entreprises de formuler une demande de clémence, ce qui réduirait l'efficacité des mesures de clémence. La question de savoir jusqu'à quel point un régime de concurrence devait aller dans la limitation de la responsabilité civile des demandeurs de clémence a cependant été très largement débattue. Plusieurs intervenants ont souligné que la limitation des dommages-intérêts pouvant être encourus par ces demandeurs en cas d'action privée supposait un compromis : une telle politique renforce l'incitation à demander une mesure de clémence, mais elle réduit également les effets dissuasifs que peut avoir le risque de responsabilité civile.

Un débat concernant les réformes récemment mises en œuvre aux États-Unis a illustré ce compromis. Les autorités américaines ont expliqué qu'il fallait partir du principe que les réformes législatives récentes réduisant les dommages-intérêts encourus par les demandeurs de clémence en les ramenant à des dommages-intérêts simples, au lieu de triples, devraient inciter davantage à une demande de clémence, même si aucun élément tangible ne va en ce sens. Alors que plusieurs intervenants se sont montrés favorables à ces réformes, d'autres sont restés plus sceptiques. M. Gavil s'est notamment demandé si l'abandon du triplement des dommages-intérêts civils était vraiment justifié, mettant en particulier l'accent sur le risque d'une moindre dissuasion et sur l'incertitude quant à celui des deux facteurs qui finirait par l'emporter. Tout en admettant que limiter la responsabilité dans le cadre d'une action privée renforcerait l'effet incitatif des mesures de clémence, M. Page a ajouté qu'une telle limitation de responsabilité n'est nécessaire que si les dommages-intérêts multiples représentent véritablement une possibilité.

En outre, la question de savoir si, et dans quelle mesure, les dommages-intérêts encourus dans le cadre d'actions privées influent effectivement sur la décision d'une entreprise de demander l'immunité a suscité de très nombreux commentaires. Plusieurs pays ont mis en avant le fait que des facteurs autres que la responsabilité dans le cadre d'une action privée pouvaient entrer en jeu dans cette décision. En outre, une étude réalisée récemment en Allemagne montre que les craintes d'actions privées en dommages-intérêts ne sont aucunement décisives pour les entreprises envisageant de demander une mesure de clémence, les avantages de cette dernière paraissant l'emporter sur ces craintes. D'autres participants ont plus largement remis en question la nécessité de protéger les demandeurs de clémence d'actions en responsabilité civile, en soulignant que les défendeurs ne bénéficiaient pas d'avantages similaires dans d'autres domaines de la criminalité économique.

## **CHAPTER 1**

### ***GENERAL PRINCIPLES AND POLICIES***

## THE COORDINATION OF PUBLIC AND PRIVATE ANTITRUST ACTIONS

by

*Richard A. Epstein\**

### 1. Tort and Crime: The Basic Coordination Dilemma

One of the central questions of any legal system concerns the proper form of coordination for public and private enforcement actions. This problem, which lies at the core of the enforcement of any modern antitrust or competition policy, is endemic to all social and legal settings. Thus, it is commonplace for every legal system to develop rules that protect bodily integrity and personal property against various sorts of physical assaults. In so doing, the *criminal* law claims that its prohibition against these offences serves the twin ends of deterrence and retribution. The same set of deliberate wrongs is also routinely subject to private liability under the *tort* law, whose ends are said to be deterrence and compensation. The overlapping jurisdiction of the criminal and tort law is well recognized and fully elaborated in John Locke's *Second Treatise of Government* (ch. 2 ¶ 11), which notes that the state has the power to punish and to restrain, and individuals have the right to reparations for the harm that is inflicted on them. The one action was not conceived as a bar or a limitation on the other.

As an abstract matter, this division of labour certainly makes sense, but it also brings to the fore the coordination of the two actions for which deterrence is the common thread. Simply to announce that deterrence is important is to not specify the optimal level of deterrence. The larger question is always to determine the combined amount of resources that should be spent by public and private parties in the prevention of harm, and the proportions incurred by each. As a moral matter, there is never any reason to tolerate or accept any level of criminal and tortious behaviour. As a practical matter, however, the elimination of all wrongful conduct can easily cost more than the harm that is inflicted, and the costs in question are not just financial, but translate themselves into private and social losses. Too much of a good thing turns out to be a bad thing, just as too little of a good thing turns out to also be bad. *Over* deterrence is as much a social problem as is *under* deterrence, for both lead to a suboptimal allocation of resources. It is no better to spend only \$10 to combat a \$100 expected loss than it is to spend \$100 to combat a \$10 expected loss. A strong commitment to the deterrence principle does not answer the question of how to coordinate social and private efforts at deterrence to reach the optimal level.

In dealing with this problem, there has to be some assurance that both sets of remedies will be in play, which need not be the case. In some cases of ordinary street crime, for example, private actions are brought against defendants with substantial resources, so that the deterrent effect will be real. In most cases, however, street offenders have few resources so that private actions will be ineffective, and the criminal law, which can use incarceration as a tool, becomes more desirable. There is a natural partition within the field, so the problems of coordination are effectively reduced.

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When the litigation ventures beyond ordinary street crimes into regulatory offences, that partition is no longer sustainable. In the first place, the potential offenders usually have substantial resources so that private actions against them are perfectly viable. In addition, no iron law of nature says that public bodies can only use criminal sanctions against offending actors. A full array of regulatory actions, short of criminal punishment, is also possible. These regulatory actions include cease and desist orders and fines for certain offences often with burdens of proof that are lower than the beyond the reasonable doubt standard that dominates the criminal law. The conduct charged may well involve intentional wrongdoing, but that need not be the case, for the problems of proof associated with proving deliberate wrongs may well lead to the adoption of strict liability offences. At this point, the question of how to coordinate private and public actions becomes truly critical because both forms of behaviour are in play at the same time.

To see how this plays out, assume that direct state enforcement of criminal sanctions were the only available tool, for which it was decided that the correct level of expenditure was \$X. Let us assume further that all the needed funds were allocated to the appropriate public agency. The question is what adjustment, if any, should be made once private enforcement against the very same actions is allowed. In principle, it seems as though the level of criminal enforcement should be reduced from its formerly ideal level to take into account the new resources introduced through civil enforcement. But the exact amount of any such reduction in public expenditures is difficult to determine, given that the effectiveness of the individual private actions may vary widely across individuals and across different substantive areas. There is in particular no reason to assume that the addition of private actions should leave the total resources devoted to crime protection capped at \$X. The elimination of the least efficient public activities and the introduction of the most efficient private steps could make the appropriate total budget  $\$X + \$Y$ , where something less than \$X is spent on public enforcement, and something greater than \$Y is spent on private enforcement. The point here is that the marginal cost of additional units of deterrence could go down when two lines of attack are available. If so, then it makes sense to devote additional resources to crime prevention in order to achieve the overall social objective of optimal deterrence.

The analysis takes on a somewhat different form in those cases in which the public allocation of resources is set at some level that is below that which generates optimal enforcement. Under these circumstances, it is easy to see why private enforcement is desirable, for only it can fill the void left by the weak public system. But even here there are hidden difficulties, for it could well be the case that part of the proper adjustment should come in the form of increased expenditures to public enforcement. But if the mixed system of public and private enforcement works best, which was the assumption of the previous paragraph, then the choice of the starting point should be largely immaterial to the final analysis. In all cases the desirable result is one that features the same mix of public and private enforcement that was set out in the last paragraph. Where that result is not achievable because of a state refusal to fund public enforcement to the optimal level, then the best solution is necessarily second best. There may well be a case for greater amounts of private enforcement to offset the admitted shortfall in public enforcement. But the new equilibrium will still turn out to be less efficient than one which set both public and private amounts of enforcement at the proper level.

The question that remains is whether any ideal mix is achievable. It is easy to set budgets for public enforcement through traditional state mechanisms. It is much more difficult to set any budget-like figure for private enforcement. The ordinary tort law is not constrained by the budgets that the state sets aside for routine criminal enforcement of the laws against murder or the malicious destruction of property. Nor is it clear how those budgets could be set unless the state had some independent right to veto the private actions, which is a radical departure from existing norms. It follows, therefore, that only *indirect* means to control private actions are allowed, in the form of controls over such matters as class action procedures, damage award levels, cost shifting rules and the like.

In view of these basic difficulties, it is hard to formulate an ideal policy. It has been estimated that 90 percent of enforcement activity in the United States is on the private side in comparison with only 10 percent private enforcement in the EU. It is easy to make arguments that the ratios are wrong in both systems. The United States might be better off with fewer private actions and the EU with more. But suppose that one decided that in both systems public and private actions should be set at 50 percent each. The question remains whether there is any institutional tool that prevents the overshooting of that middle mark—in either direction. It may well be that the ideal version of fine-tuning is not available in either system. If so, then the complete picture may require us to analyze the errors of both over and under enforcement, to determine both their extent and their importance. That question in turn requires a closer look at the coordination of private and public action in competition law generally.

## 2. Coordination in Competition Policy

### 2.1 *Multiple Private Actions*

In order to attack this problem, it is useful at the outset to note something about the range of responses that could be brought to the simplest of behaviours in violation of the antitrust law—the formation of cartels. On the private side, one could be content with the common law approach that treated cartels as unenforceable contracts in restraint of trade. The thought in this situation was that the cheating that takes place with unenforceable contracts will quickly drive prices down to the competitive level, especially if new entrants are encouraged to enter under the putative price umbrella that the cartel creates through its own pricing decisions. This rule of studied indifference yields an enormous savings in administrative costs. The strength of this argument depends on the force of the word “quickly.” A cohesive cartel may be able to resist cheating and in cases of many natural resources new entry is hard to come by: if all the potash in the world is mined in two or three places, the cartel could operate for a long period of time under a regime whose sole sanction is the withdrawal of contractual support. That view is supported by recent revelations of a bid-rigging scheme that reached the highest levels of the insurance industry, involving not only price-fixing but sham bids and other frauds on customers.<sup>1</sup>

In response to the durable nature of at least some cartels, it is common for legal systems to develop sanctions that allow actions by private parties who are injured by the pricing policies, often with treble damages that act as a huge spur to additional suits. Yet this then raises a serious question about the coordination of different private actions, wholly apart from any question of criminal enforcement. It is worthwhile to see how the private suits operate because they shed light on the public/private coordination issue that is the main focus here.

One of the most difficult issues in ordinary tort cases with physical injuries is the question of multiple causation, which can arise in pollution and various cumulative trauma cases, such as those involving asbestos. But the frequency and severity of multiple causation issues are still more acute in financial and business matters because the ripple effects occur much more quickly. Raise prices to one customer, and the consequences quickly spread through the economy. If A sells to B who resells to C, then the monopoly price that A charges to B will in part be recouped by C, who in turn may pass on some of that increment to D. Any system that tried to allow each individual to collect his net losses (overcharge less recoupment) runs into incredible difficulties on two fronts. First, the calculation of these net figures is hard to determine no matter how sophisticated the economic techniques available. Second, the number of potential actions is enormous because it takes a very long time before these price perturbations disappear. Hence, the “privity” rule is attractive because it allows the initial buyer to sue the wrongdoer for the full

<sup>1</sup> Monica Langley and Theo Francis, *Insurers Reel From Spitzer's Strike*, Wall Street Journal, October 18, 2004 at A1. Note that these schemes do not violate only the antitrust laws. They also involve claims for breach of contract and fraud.

amount of the loss while denying any action whatsoever to persons further down the chain. The savings in administrative costs, coupled with the improvement in deterrence, justifies a deviation from the strict principle that each person should recover for the precise extent of his or her wrong. The privity rule first took hold in cases involving regulatory overcharges and has spread its way to the antitrust law, at least in the United States, in two well known decisions. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*<sup>2</sup> held that the defendant in a price fixing case could not set off against the overcharge any recoupment that the plaintiffs had recovered from their customers. *Illinois Brick Co. v. Illinois*<sup>3</sup> then completed the picture by holding that indirect purchasers could not bring suit for their injuries. The location of all actions in the hands of the immediate purchaser vastly simplifies the entire enforcement scheme.

The situation is still more complex because there is a second way to attack the problem, which is to allow class actions by all individuals at each step in the chain of distribution. Thus, the immediate buyers could form one class against the cartel, and sub purchasers could form another, and so on down the line. Here there is little doubt that the classes themselves, dealing only with overcharges from a standard or uniform practice, meet the standards of commonality in the United States, and probably in most other countries as well. But the dual actions, which are ever more common in other areas (drug recalls now routinely involve suits for refunds in full for consumed products by both patients and their insurers), raise serious questions of coordination that are not so easily resolved. The question of setoffs for recouped losses may not be approached uniformly in the two suits, and a defendant could easily find itself in two different jurisdictions in the two separate actions, without means for the consolidation of them. That can happen with great ease in the American system when one action is brought in state court and the other in federal court. Many state courts do not follow the *Illinois Brick* rule and allow suits by indirect purchasers. The danger of double recovery is real, especially since there is no obvious power to consolidate both actions or to enjoin one, given related lawsuits operate in different halves of the federal system—a problem that could easily arise in the future within the EU.

In this context, moreover, the risk of over deterrence is much more serious than that of under deterrence because of the substantial unwillingness to allow setoffs, which are hard to calculate, on the grounds that these inject “separate” issues into class actions that could undermine the cohesiveness of the basic class in the first place. There is, in a word, today a serious question of the coordination of private actions with other private actions, even before the intervention of the state.

## 2.2 *Claim Preclusion*

These situations are further complicated by the expansion of the doctrine of claim preclusion, formerly described as collateral estoppel. The older view of mutuality was that a litigated decision on a question of fact between two parties was only binding on the two parties in some subsequent action between them. The judgment itself had no third party effects on plaintiffs laying in wait to sue, or on potential defendants faced with the risk of suit. The rule which allows for the defensive use of collateral estoppel, i.e., to block a plaintiff who has already lost, is not in general issue here. That party has a choice of forum and an ability to disengage at any time before judgment. So it is the second half, the offensive use of collateral estoppel against the defendant who lost in the first case, that is critical. In this “offensive” situation, the mutuality rule blocked most of the strategic efforts of third persons to game the system. Any suit between A and B had effects only between A and B. All third persons were left in the same position legally no matter what the outcome of the initial suit. Thus, if C had a claim that was parallel to that of A, he was neither better nor worse off depending on the outcome of the suit, save insofar as the progress of

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<sup>2</sup> 392 U.S. 481 (1968).

<sup>3</sup> 431 U.S. 720 (1977).

the initial litigation provided information, positive or negative, about the value of the suit in question. The two cases moved in parallel but separate universes.

One obvious criticism of the older mutuality approach is that it did not take advantage of an obvious efficiency. If the first suit were fully and fairly tried, its results could be imported into subsequent cases raising the same issue in order to save on litigation costs. Here there is an obvious asymmetry because no one will accept that a party will be bound by a trial in which he did not participate. The American rule treats this as a constitutional requirement under the due process clause, but similar notions are in effect everywhere else, often as part of a system of natural justice. But that same structural objection does not apply to the party who *lost* the first suit for he has had the opportunity to present the case in court. The search for judicial economy thus registers a strong plus for allowing that result to take place.

What is missing in this brief account is an analysis of the relative negatives associated with this position, all of which stem from the new incentives that are created by the expanded consequences of the initial litigation. More specifically, the change in the rules on collateral use of prior judgments does not just influence the way in which the second trial is conducted. It also influences the operation of the first trial as well. The point rests on the simple observation that *both* parties in the first litigation will take into account the possible use of an adverse judgment in the second lawsuit. The defendant who is exposed knows that he faces a second loss that is greater than the initial judgment should it go against him. One possible response is to fight harder in the first case because there is more to lose, given the risk of follow-on lawsuits. A second response is to settle the first case in order to eliminate that follow-on effect.

The two effects run in opposite directions for the opposing party in the initial litigation. The former makes it more likely that the first plaintiff will lose because the defendant will invest more resources in staving off an adverse judgment that costs him more than the plaintiff could gain. Given the asymmetrical stakes, it is as though the plaintiff is suing for \$1,000 and the defendant is defending a suit worth \$1,000,000. We know who will invest more in litigation. The second effect makes it more likely that the defendant will pay higher sums to be rid of the initial lawsuit, given that it will slow down the suits that follow. It is as though the plaintiff collects \$500 while the defendant jettisons \$500,000 in potential liability. The exact size of these counterbalancing effects may vary from case to case. If an individual plaintiff decides that the resistance is likely to be fiercer, he in turn could decide that it is not worthwhile to bring the suit at all. After all, the defendant that settles the first of many cases may avoid some of the negative effects of an adverse judgment, but he has signalled to others that he is willing to buy out future risks, which in turn could invite a second round of lawsuits with potential claim preclusion effects. Other parties, therefore, may bring suit, and prosecute slowly to see which way the earlier suits work out, and the various plaintiff parties may cooperate informally in order to move the odds.

The possibility that the first case will influence the outcome in subsequent cases is also sure to play a large role in any decision on whether to seek a class action, which makes it difficult for plaintiffs to hang back, and they will be brought into the lawsuit. It also has profound effects on the preliminary procedural skirmishes in the litigation. In the United States, it is widely perceived that certain districts are "problem" districts in which defendants face hostile judges and juries on a wide range of issues. If these initial judgments have consequences for unrelated lawsuits, the influence of these districts will be magnified in overall litigation. Note that the reverse strategy will not work because the defendant who receives a favourable judgment cannot use that judgment against a different plaintiff in another case, even if the two plaintiffs are represented by common or affiliated counsel. These collateral effects are one additional reason why the litigation over jurisdiction, venue, removal and the like are so critical to modern class litigation. *Where* a case is tried is often more important than the legal theories on which it is tried. A defendant for its part may prefer a class action format, where it becomes possible to bind the stragglers with an adverse judgment or settlement. Since some suits may take that form, there is an incentive to accede to the class action in order to effectuate a once and for all settlement, often on the basis of a nation

class, whose use would be resisted if the case were set for trial. In light of all these complications, it becomes an open question whether the ostensible administrative savings from the “offensive” use of a prior judgment against an earlier defendant is a good or bad thing. My own sense is that the strategic complications really do matter and that the older rule that confined the operations of prior judgments to the initial parties and their privies had a good deal more to commend it than was commonly supposed.

### 3. The Coordination of Public and Private Litigation

The complex issues that arise in connection with multiple private lawsuits set the stage for a brief examination of the similar issues on the integration of public and private litigation. Right off the bat, it should be understood that the interactions typically run in one direction only: there are private parties that may in some form seek to piggyback on public litigation that arises out of the same dispute. But rarely if ever is there any public litigation that follows private suits. There are two reasons for this asymmetry. First, the burdens of proof in public litigation are typically higher than those in private litigation. Hence, the favourable private judgment could not be used by the government agency for the simple reason that proof on a key issue by a preponderance of the evidence is not sufficient to settle an issue on which the government party has a higher standard of proof. There is no way in which the use of a prior judgment will result in state sanctions that do not at any time meet the requisite standard of proof.

The second reason is more institutional. The typical government usually does not wish to take the role of bringing a follow-on case. It tends to think that these actions are less important than various other cases and is reluctant to let any private decisions dictate the nature of its public enforcement agenda. And in those cases where it does think that matters of principle do get raised in private lawsuits, it can submit amicus curiae briefs on appeal to express its own view of the case. For example, in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*,<sup>4</sup> the Department of Justice intervened in a private lawsuit when it perceived that a successful plaintiff’s verdict could undermine the authority of the FCC to organize the pricing and interconnection obligations of the telecom industry. Indeed, in my view, the Department of Justice in the United States (I cannot, obviously, speak for anywhere else) might well take a more active role in urging the Supreme Court to review cases on general antitrust policy. More concretely, in the *Potash Litigation*<sup>5</sup> in the Eighth Circuit (in which I acted as the plaintiffs’ lawyer on appeal and lost in what is a consensus dreadful decision), the Department of Justice was not willing to urge the Supreme Court to reconsider a case that had profound implications for the summary judgment standard used in private antitrust actions, even though a large number of state attorney generals filed a brief in support of our petition for certiorari, which was summarily denied.<sup>6</sup>

The problem of follow-on suits, therefore, arises virtually exclusively when private actors lay in wait for the outcome of government litigation. In those cases where the government loses or settles a case, the private parties can still continue without prejudice, at least if the plaintiffs have guarded against the risk of the statute of limitations. In those cases where the government wins, the follow-on effects are easy to establish. No one questions that any litigation against the government is of major importance, so it is not possible to downplay the relevance of the prior lawsuit on the grounds that the matter was too small to command the attention of the defendant, and hence does not serve as a suitable basis for the preclusive

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<sup>4</sup> 540 U.S. 398 (2004).

<sup>5</sup> *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc.*, 203 F.3d 1028 (8th Cir. 2000) (en banc).

<sup>6</sup> One troublesome feature in the United States is that the Supreme Court seems to have washed its hands of private antitrust litigation unless and until the government signals that it has an interest in the outcome, which happened in *Trinko*. The critical issue of the proper standard for summary judgment has not been revisited in a dozen years at least, even though the lower court decisions on this critical question have gone all over the landscape.

effect. At this point, key issues on liability could be established, which could often pave the way for major treble damage actions.

The hard question is whether all this is wise, especially on the issue of deterrence. The government prosecution of cases is in some instances designed only to secure cease and desist orders of practices that are regarded as in restraint of trade or otherwise anticompetitive. These orders have the real virtue of allowing the market to progress in an orderly and incremental matter without throwing firms into massive financial disarray when standard practices that have been in effect for years have suddenly been declared illegal on grounds that could range from prosaic to exotic. The differences here really matter. To give but one example, the United States could have brought suit against Visa and Mastercard in order to remove certain clauses that required higher payments on debit cards relative to credit cards. There is no doubt that the revenue implications of these provisions were strong for the firms, so that the remedy would have some bite to it. But that is really quite different from the situation where these same theories are invoked in the context of a class action where the request for damages is in excess of \$100 billion, which results in a settlement of both cases for \$3 billion, a genuine bit of change. The same issue also arose with respect to various aspects of the Microsoft distribution of its integrated software system, which is now in litigation both in the United States, where the initial suits were brought (and settled) by the United States but remain very much alive in the EU and elsewhere. Follow-on suits for heavy damages remain, for example, in connection with media players. These cases involve the costs of exclusion, but the remedy, which contemplates stripping some desirable features from the system, has obvious costs as well. A treble damage remedy seems ill-suited for a case that involves no concealment, especially with regard to a practice that can be defended stoutly on the merits.

The question, therefore, is what should a government official do if it thinks that the cease and desist remedy is appropriate, but is reluctant in light of the novelty and complexity of the issues to seek fines, let alone treble damages. Now the current ability to use the initial determination in the follow-on private litigation could work to deter the initial suits for fear that the follow-on litigation counts as overkill. But that calculation is always clouded because nothing says that with the stakes that high, private lawsuits will exclusively, or even heavily, depend on previous litigation. Many litigants may be prepared to mount a campaign like this from scratch. But the road will surely be longer and the climb steeper. Not only will there be more work to do, but the private actions are not likely to come with the presumption of credibility that usually attaches to government suits. Hence, while the results may not change in all cases, they will surely change in some. Some fraction of cases will not be brought without the boost from the prior government suit, and some cases that are brought may well settle out more quickly and for less money.

Once there is an effort to decouple private suits from government action, the question arises whether there are sensible ways to effectuate this partition. The government could decide *not* to allow its original legal or administrative proceeding to be used in subsequent litigation brought by private plaintiffs. In effect, it is a statement that the government is perhaps more willing to bring suit now that it can limit its collateral consequences in subsequent private litigation. The private parties who are excluded have no independent right to use the prior judgment any more than they have a right to demand that the government bring the suit. Hence, if the government can take the greater remedy of refusing to prosecute altogether, it should have available the lesser remedy of limiting the consequence of a favourable judgment in order to restore the separability of parties that was characteristic of the old mutuality rule.

I confess to a certain diffidence in making this suggestion because I am far from sure that it will withstand scrutiny. The proposal here is heavily geared to the American situation, and I am not even sure whether the problem of coordinating private with public litigation exists, and if so, exists to the same extent, in various other members of the OECD. There is, for example, no occasion to follow this rule if the mutuality principle is still in play. But in those cases where the follow-on effects are allowed, or, for that matter, in jurisdictions, where some proposals are on the table to change the rules on claim preclusion,

there is still this further problem. How does one decide which cases are appropriate for the limitation, and which not? There is surely too great a danger to allow the government to make its views known on the claim preclusion issue on a case by case basis. The civics textbooks may propagate the happy tale that independent government actors invariably use their finest judgment to resolve this difficult question. But it is far more likely that immense political pressures will be brought to bear on government actors the moment that they receive any discretion of this magnitude, just as enormous pressures are brought on them to bring the suit in the first instance. It would, therefore, be most helpful if some class of cases could be identified in which the follow-on actions would not be supported.

There are two likely candidates for that result. First, I hold a deep suspicion of any and all cases that involve challenges to unilateral practices that are undertaken by any individual firm. Attempted monopolization, exclusive dealing, predation, and tie-cases are always pushing the envelope on liability because they lack any clear definition of the net social harm that it is possible to articulate in connection with cartels, where the constriction of output and the increase in price has both allocative and distributional effects. If private actions of this sort are brought at all, I would be strongly tempted to rule out any use of a favourable government judgment for private suits. Second, I think that decisions on whether to upset mergers should fall into the same category. The problem here might not be all that great because of the general reliance on pre-clearance procedures, which if followed obviate it. But in those cases where an antitrust defence is raised against the merger, I do not think that any new private actions should be allowed against the party who opposed the merger even if it were eventually allowed to go through. Similarly, if in some rare circumstances a government undoes a completed merger, it seems most unwise to complicate the issue further by allowing private parties to take advantage of that decision in a subsequent suit.

The hard question thus arises when governments have been able to establish some criminal cartel behaviour (where the pre-clearance issue just disappears) for which heavy criminal fines are levied. Do we want to allow that action to be used in any subsequent civil litigation seeking treble damages? Here I think that there is something to be said for a rule that allows the judgment in the first case to be used to establish the existence and the scope of the cartel. But there is still the question of the integration of the fines in the first action with the treble damage actions in the second. So perhaps if the rules on claim preclusion are left untouched, the rules on damages should be altered. The mechanism might be a simple credit device. The amount of the fine is set off against any treble damage award that is granted. The deterrent effects are still large, but since the risk of suit has been reduced by the government verdict, the work for the plaintiffs is less, and the reduction of damages by the award is a way to make sure that the total does not run too high.

Yet it is never quite that simple. To be sure, as a first approximation, the deterrence levels look to be close to optimal, at least if we think that the treble damages rules themselves are optimal. But once again there is always reason to be cautious that the law can perfectly achieve so lofty an objective. The civil action that is brought may be commenced before the amount of the statutory fine is assessed. In addition, some triers of fact may well conclude that the actual damages are smaller than, or of the same order as the fine, so that the private plaintiff risks coming home with nothing, and is less likely to sue precisely because there are cases in which liability would be established but damages would be denied. But all in all, the more common outcome should be that the plaintiff will have good enough information about the extent of the overcharge, for example, that this risk should be reduced to manageable proportions, even if the exact rule cannot be duplicated. As always, the question is whether the change works an improvement or not. Optimal deterrence can only be approximated. It can never be achieved.

This proposal is stated in terms of a one-for-one set off, but compromises are always possible on a matter this controversial: one-dollar setoff for each two-dollars of liability is a distinct possibility, for example. The issue here really matters because a major government enforcement action does not bring in its wake only one private suit, but typically dozens. No procedural device can deal with the vagaries of the

substantive law, of which there are many. But some effort to neutralize the effects of successive government lawsuits on the subsequent onslaught of private actions may well make sense, at least within the institutional framework of the United States. But the OECD is a big organization, with a varied membership. The choice of ideal procedural rules may not generalize easily from one member to another. Legal transplantations are always tricky, but sometimes desirable, which is why I offer these observations to an international audience

The coordination of public and private lawsuits gives rise to concerns not only for individual cases, but for institutional reasons. Huge numbers of private lawsuits in the United States are not parasitic on previous suits that have been successfully concluded by government. In many cases, the plaintiffs do not wish to wait for the government to initiate action. This is especially true in cases of recent revelations of systematic wrongdoing that are perceived as amenable to class actions. The earlier a plaintiff's lawyers are able to file a suit, the greater the likelihood that they will be able to control, or at least participate in, the conduct of the class action.

There is, however, a serious question of whether these private actions are consistent with the overall formation of antitrust actions. In those cases when the government prosecutors decide not to bring an action, they may do so for multiple reasons. One reason is that they do not have the resources to deal with a particular problem, in which case the private suit is welcome. But a second reason might be that the government officials have decided that suits of a particular class should not in general be brought, so that the absence of a lawsuit represents an implicit judgment that the conduct in question should not be challenged. That result can easily take place in connection with a variety of unilateral conduct cases, particularly those involving predations or tie-ins. Under these circumstances, the pursuit of the private action works at cross purposes with general national policy. The question is whether the government officials should be allowed any say in this matter. One possibility is that no private suit could be allowed without prior authorization from the government officials, which could be granted categorically for certain types of cases such as bid-rigging or price-fixing. But here the risk is that political influence will be brought to bear in major cases so that sensible public decisions will not be undertaken. Another possibility is that the government agency could intervene as of right in the case in order to present to the court its view that the case should not have been brought at all. That solution puts all the relevant considerations before a neutral party and may be preferable to conferring on government a veto right over private actions.

In light of these complications, it would be a mistake in my view to take the position that private actions are also welcome because they introduce a measure of competition into antitrust enforcement. The model of competition works well when multiple firms compete for the business of potential customers. In that setting, the customer can decide which party to deal with, and will typically choose that firm which offers it the most attractive combination of price, terms and quality. But government and private attorneys are not bidding for the loyalty of the firms that they sue. Their actions are always coercive and hence never welcome. In these situations allowing everyone to sue on demand has negative externalities on potential defendants, while allowing everyone to bid has only positive externalities on potential customers. Within the litigation context, it follows that to have private lawsuits enforce the competition laws runs the risk of allowing the single most aggressive law firm to dictate the direction of the law. As noted, there may be reasons to allow this, but if so, the practice counts as a guarded trade-off not an unalloyed good.

#### **4. Government to Government Interactions**

In closing, it should be noted that these issues can also arise within federal systems when two levels of government lawyers have to decide whether to bring private lawsuits.<sup>7</sup> Thus, suppose that the

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<sup>7</sup> This topic is discussed extensively in *Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy* (Richard A. Epstein & Michael Greve, eds.) (AEI 2004).

United States decides to settle out a large section 2 case, as was done in the Microsoft litigation. There is something odd, indeed perverse, about a system that allows one or two states to steer clear of the settlement and then press forward in court with a demand for some aggressive remedy, e.g., division of the firm, which was rejected by the federal prosecutors. In cases like this, my own view is that the federal government should consult with the states before making any final decision on how to proceed, but that once it reaches its judgment on structural remedies, it binds all parties. The states are, therefore, limited to bringing suits for the recovery of damages within their respective borders, if they are allowed to proceed at all. Unless this procedure is followed, the median sentiment will always have to take a back seat to the most aggressive litigating party. Defendants should be entitled to have some repose on weighty matters of this sort, and the national government, or larger unit, should be allowed to control litigation that has profound effects throughout its entire region.

The problems of coordination need not always favour the national government or larger entity. In those cases in which the operation of some cartel or illegal practice is confined to some particular state or nation within a larger collectivity, the priorities may well be reversed in that the smaller unit should take precedence in the event of a conflict between the two groups. Here, as in the reverse situation, there does not seem to be any reason to insist that one and only one government entity be allowed to bring actions. It could well be that local conspiracies influence the landscape so that the larger government entity may decide that it is important to move when the local government entity thinks its resources are better deployed elsewhere. The position here therefore only goes to the question of *priority* not to the question of *exclusivity* of suit. As in all cases of this sort, good communication and coordination of government actors at all levels is a key prerequisite to effective antitrust enforcement, which adopts sensible substantive policies on a coherent and coordinated basis.

The same principles that prove so important within a nation or a common market should influence the behaviour that takes place across separate enforcement systems. Once again the great danger against which it is necessary to guard involves serial actions against a single fork of behaviour. Here, of course, firms have to take the risk that they violate the laws of the legal sovereigns in whose territories they do business. But efforts should be made to get consistency in laws across borders, and both government and private parties should limit their enforcement efforts to transactions that are within their state borders or which substantially affect business within those borders. In addition, it is unwise to adopt the stance that allows one state to adjudicate the grievances that are suffered by the citizens of another state. The better principle by far seems to allow each sovereign to decide on the mix of public and private remedies for its own citizens. Implementing this program requires extensive communication and dialogue, as well as respect for territorial differences. But the enormity of the stakes gives good reason to strengthen cooperation and coordination of competition policies both across and within nation states and larger alliances and communities.



## SUMMARY OF DISCUSSION\*

The Chair opened the roundtable and invited Professor Epstein to give his presentation. Professor Epstein started his presentation by emphasising the interdependence between substantive antitrust rules and procedural rules. He explained that if the substantive rules were unwise in some sense, then committing private in addition to public resources to the enforcement of these rules would only compound an error. It was very difficult to see how improved procedures could improve bad substance. If the substance was sound, better procedures and additional resources from private enforcement would improve overall enforcement. Keeping a sharp procedural/substantive divide would be very difficult.

Professor Epstein then addressed the concept of optimal deterrence. It was always difficult to determine the combined amount of resources that should be spent by public and private parties to prevent harm, and the proportions incurred by each. Although as a moral matter there was never any reason to tolerate or accept any level of criminal and tortuous behaviour, as a practical matter the elimination of all wrongful conduct could easily cost more than the harm that it inflicted. The costs in question were not just financial, but included private and social losses. An enforcement system could lead to either over deterrence or under deterrence. Over deterrence was as much a social problem as under deterrence, as both could lead to a suboptimal allocation of resources. The costs of over deterrence were more difficult to observe. For example, firms might be reluctant to engage in innovative pricing practices or other innovative arrangements for fear of antitrust liability. The willingness to deviate from already approved practices would be reduced, thus diminishing innovation.

Introducing a private enforcement system on top of an already optimal public enforcement system would likely lead to over deterrence. If there were some areas where private enforcement was more efficient than public enforcement, the private side would have to be increased, and the public enforcement should be reduced to some degree. If done correctly, the level of overall compliance should be higher at lower enforcement costs. But the U.S. experience showed that once public enforcement agencies had received a large budget, it was very difficult to reduce public enforcement. Indeed, there was very little coordination between private and public enforcement in the United States.

Professor Epstein then discussed federal issues that could arise if a federal authority and antitrust authorities in states could pursue the same matter. The *Microsoft* case had illustrated the risks inherent in a federal system, when the most aggressive state could determine whether a case should still be pursued even after the federal government decided to settle. The principle of subsidiarity could be a useful tool to determine which authority was better suited to pursue a case and to avoid over deterrence.

A similar question could arise in the relationship between private and public enforcement, but there the question of who would be in a better position to sue could be much more complicated. In the United States at the federal level, the *Illinois Brick* doctrine barred indirect purchasers from bringing actions for antitrust violations; it also provided that direct purchasers seeking damages did not have to include any set-off for the higher prices they had been able to pass on to their customers. This system would limit the number of lawsuits and created a focal point for litigation, and since the off sets going downstream were ignored, the total amount of damages recovered by direct purchasers should be exactly the same as the

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\* This discussion was held in October 2004.

amount that would be obtained if all indirect purchasers would be allowed to sue for their individual damages. But *Illinois Brick* did not apply in all states. Several states allowed indirect purchaser actions, typically in the form of class actions, and *parens patriae* actions on behalf of unidentified groups of consumers. This situation raised two significant risks. First, the administrative cost of multiple suits pursuing slightly different theories was vastly higher than in a single suit situation. Unclear rules concerning the collateral use of judgments led to various kinds of strategic behaviour by plaintiffs. Second, in each of these actions everyone tended to round up estimated damages. As a result, the total damages awarded to plaintiffs could far exceed the damages awarded in a unitary action. Ideally, procedural rules should allow that all suits were combined in a single action, but in the United States the procedural rules were not so simple, especially if one party sued in a state court and another party sued in a federal court. As a result of these factors, over deterrence became a serious risk.

Professor Epstein then turned to the doctrines of mutuality and claim preclusion. Under the old rule of mutuality, a litigated decision had been binding only on the two parties of the suit. Third parties were not bound by, and could not use the initial judgment in a subsequent action. The old rule had been relaxed in the name of judicial efficiency: Under the current rule, if a party was defeated in the first action, the adverse judgment could be used against it in a follow-on action. Although the advantages of mutuality were clear, there were also considerable disadvantages even though they were more difficult to quantify. Incentive effects created complications in follow-on suits. At the time of the first action, everyone knew that the second action was in the wings. This situation created asymmetrical incentives in the first action where the defendant stood to lose much more than the plaintiff and was in a position to spend far more than the defendant. Yet the defendant knew that it could extract a settlement far in excess of the value of its case because a loss would have dynamic consequences.

These problems became more acute in the case of government actions. As the government was considered to act in the public interest, it might be easier for a government lawyer to successfully establish a case than a private plaintiff, even under a higher standard of proof. Assuming that this was the case, the first public suit set up the second private suit in a way the second suit could not have been set up on its own. There was no obvious solution to this problem. One thing to consider was whether the public body should take the position that its case should not set up follow-on private actions. In particular one could think of a complex case where the government was seeking an injunction relying on a novel theory, but considered a huge private treble damage award inappropriate in the specific case. If the government knew that private actions would inevitably follow the public case, it could consider not bringing its own suit and instead resolve its case informally. The situation could also be resolved through the coordination of damage awards. An example of this approach existed in personal injury cases in the United States, where an injured employee frequently could sue the employer as well as an unrelated third party. In this situation, the initial workers compensation action had no effect in the third party action, but when the plaintiff received compensation in the third party tort action, she had to return some of the money it had received in the case against the employer. The total amount of recovery should be equal to the award obtained in the third party action. The simpler version would be to allow the employee to first receive the workers compensation award, and then recover in the second action only the amount in excess of the award already received in the workers compensation suit. This would be a natural break against dubious actions, and would avoid difficult transfers or refunds. If applied in antitrust actions, a government imposed fine on a particular party would become a credit against the amount of damages that can be recovered in private third party actions. That would reduce the amount third parties sue for and the number of actions. This system could lead to some degree of under deterrence, but this would only offset the over deterrence under the current system.

While acknowledging that private interest can play a role when there is no public interest to take up a case, Professor Epstein also mentioned that the interaction between public and private litigation typically ran in only one direction. Private parties typically would follow public litigation that arose out of the same

dispute. But rarely, if ever, would public litigation follow a private suit. There were two reasons for that. First, the burden of proof in public litigation is typically higher than in private litigation. Hence, a favourable private judgment could not be used by the government agency. The second reason was more institutional. Typically, a government did not wish to take the role of bringing a follow-on case. It tended to think that those actions were less important than other cases and was reluctant to let any private decisions dictate the nature of its public enforcement agenda. In addition, in those cases where the government did think that matters of principle were raised in a private lawsuit, it could submit *amicus curiae* briefs to express its own view. The problem of follow-on suits arose when private actors laid in wait for the outcome of government litigation. In those cases where the government lost or settled a case, the private parties could still continue without prejudice. In those cases where the government won, the follow-on effects were easy to establish.

Professor Epstein finished his presentation by discussing the danger of "judicial creep" after legislative intervention. He hypothesised that if the legislator adopted a new program that was designed as a mild intervention to correct certain abuses or holes in a current system, the approach frequently underestimated the ingenuity of lawyers in dealing with new legislation. Somebody would try to extend the reach of new legislation. For example, when the Civil Rights Act was adopted, the statute was designed to remedy cases of overt discrimination and built in protections against cases solely built on statistics and numbers. Within seven years all these protections were gone and a large number of cases today were actions by the numbers. This had powerful implications on efforts to implement reform. Attempts to introduce small reforms may lead to much more profound changes once reforms had been put in place. Given this experience, Professor Epstein concluded that on average we might be better off without private antitrust enforcement. There was an onslaught of suits against American business based on exotic theories of harm. For Europe, it would be acceptable to have some private enforcement, but if it was an all or nothing decision, encouraging private enforcement to arrive at the current US level was undesirable.

Emil Paulis started off by underlining that Professor Epstein's view was of course coloured by the excesses of the US system. He then presented the European Commission's work related to private actions for damages, which aims at a far more moderate private enforcement system. He first mentioned the reform of the public enforcement system in Europe which had eliminated the Commission's monopoly to grant exemptions under Article 81(3). These reforms created opportunities to consider the enforcement system as a whole, including the balance between public and private enforcement. In addition, the recent *Courage/Crehan* case had emphasised that private parties could seek damages in national courts for infringements of Article 81. Following the institutional reforms which conferred greater powers on national courts to apply Article 81, the Commission had launched a comparative study of private competition cases in member states, as well as an economics report on how to quantify damages in competition cases. The picture developed by the report was one of great diversity and underdevelopment of private enforcement, with only 12 private cases for damages identified in the report. Mr. Paulis emphasized the predominance of public enforcement in Europe. An estimated 90 % of enforcement activity in the United States was private action, but in Europe the relationship between private and public enforcement was less than 1:9. In the United States, private enforcement had contributed to competition culture and awareness of competition laws.

Mr. Paulis next provided an overview of major areas covered in the report, emphasizing that the conclusions and suggestions in the report were not necessarily shared by the Commission. He highlighted the following areas:

- Access to courts: The study noted that restrictions on standing could be relaxed to facilitate claims for damages. The report also discussed the introduction of collective actions, or claims by consumer organisations or public representatives to overcome the perceived financial risk and

lack of incentives to bring damage claims. There were also suggestions for facilitating claims by indirect purchasers.

- Reducing risks: The report had noted uncertainty about jurisdiction of courts in competition cases and about certain legal concepts, such as the concept of fault and the legal basis for competition law claims. The report also addressed the question of the creation of specialised courts to improve private enforcement, as well as the use of experts before courts. In addition, guidelines on methods of calculation of damages could be considered. Other suggestions included the use of “reasonable” or “equitable” estimations of damages where quantification of damages was difficult or impossible, or using the defendant’s profits as a guide to measuring damages. Another interesting point mentioned in the report was the practice to allow courts to render first a partial judgment on the violation of competition law, and to leave the assessment of damages to a later stage.
- Facilitating proof: The study discussed both the burden and the level of proof. In addition, the report discussed problems related to obtaining of evidence, including the introduction of pre-trial discovery rules. Other measures included the power of judges to order the production of classes of documents or individual documents, and relaxing the requirements that had to be fulfilled before disclosure of documents was ordered.
- Other incentives: The report discussed the introduction of multiple damages, which in Europe should be less than treble damages. Another interesting idea was the use of defendant’s profits as a guide to measuring damages. Last, the recognition of pre-judgment interest had also been considered a potential incentive for private plaintiffs.

Mr. Paulis emphasized that strengthening private enforcement in Europe could have a number of advantages. More private action could create greater deterrence and greater compliance. Private enforcement could also contribute to the development of a stronger and better competition culture and could bring competition laws closer to consumers. With the right rules, private enforcement could be a multiplier of the effectiveness of substantive competition rules. Last, public authorities could have swings in their enforcement policies, and private enforcement could then also contribute to stronger competition enforcement. Of course, private actions before national courts should be complementary to public enforcement of EC competition law and it was necessary to coordinate the two enforcement areas.

Mr. Paulis also mentioned developments in member states related to private enforcement, including the creation of the Competition Appeal Tribunal in the UK; the possible extension of collective actions to consumer groups and other private individuals affected by an infringement of competition law in Sweden; the German debate on an amendment to the competition act to facilitate private enforcement; and a review in the Netherlands of how the conditions for private enforcement of competition law could be further improved. Mr. Paulis concluded his remarks by stating that Europe could learn from the US experience, but that Europe had to be cautious, realising also potentially negative sides such as mandatory treble damages. Other issues were rules on cost allocation which were extremely favourable to plaintiffs, contingency fees, and class action procedures. An important issue to be considered was the effect on private actions on leniency programs. Europe did not want to jeopardise its very successful leniency program with private enforcement.

Sir Christopher Bellamy first reminded the audience that there were two aspects to private litigation, including actions for damages and actions seeking some kind of injunctive relief, normally on an interim basis. The focus of the European debate had been on actions for damages. Sir Christopher briefly summarised the recent *Courage/Crehan* case, in which the Court of Justice confirmed the right of individuals to seek damages under European competition law. He pointed out that while the lower court

had awarded the plaintiff over 1 million pounds, the appeals court had reduced the award to 100,000 pounds. This illustrated that even though a right to seek damages was recognised, there was much less of a concrete idea about the measurement of damages. Sir Christopher commended the European Commission for the excellent study on private enforcement. In his view, the document, while confirming that private litigation in competition cases was rare in Europe, was nevertheless useful because it gave for the first time a good picture of the current situation. As to the difficulties identified in the report, Sir Christopher mentioned the lack of clarity in the substantive law, the uncertainty as to how to prove loss and how loss could be calculated, legal costs, delays in the judicial process, the unfamiliarity of national courts in Europe with competition cases, and a feeling that some economic issues were too difficult to litigate in a court setting. Finally, at least in some Member States the prevailing view continued to be that competition law should be enforced by the public authorities rather than through private action.

Sir Christopher Bellamy mentioned a recent UK case involving an unsuccessful predatory pricing action against a shipping conference. In the end, the claimant had to bear several millions of pounds in costs. This illustrated that at least under the European system plaintiffs had a relatively high risk in private litigation and a relatively uncertain reward. The risk/award ratio was therefore not favorable for plaintiffs, and this situation may have to be addressed in future reforms. Sir Christopher pointed out, however, that there was anecdotal evidence of a substantial number of settlements which indicated that the system worked better than the very small number of reported, successfully litigated cases suggested.

Focusing on the situation in the UK, Sir Christopher explained that four reasons to improve private enforcement had been widely recognised. First, because of the lack of competition culture there was a disconnection between competition law and the people the law intended to protect. Second, administrative enforcement was not always efficient; without private enforcement perhaps in too many cases firms considered that their conduct either would not be detected or would not result in fines. Third, administrative penalties, which were currently the main method of enforcing European competition law, were a blunt instrument since those who suffered from an infringement were not compensated. Last, in the long-run the vigilance of individuals was as important as the vigilance of public authorities. The dynamics of enforcement could be enhanced if weapons were put into the hands of those who were most directly affected by an infringement. On the other hand, promoting a competition culture included some risks, such as the creation of a litigation society and the encouragement of a compensation culture. An uninformed look at the U.S. system revealed features that seemed less attractive in Europe, including excessive document discovery, class action, contingency fees, and treble damages. The challenge was to create a framework that helped realise the benefits, but discouraged some of the disadvantages.

Sir Christopher next turned to steps taken in the UK to encourage and facilitate private enforcement. There was some general competition litigation in the High Court, and the Chancery Division had been created to strengthen the expertise among judges who were dealing with competition cases. More fundamental was the creation of the Competition Appeal Tribunal ("CAT"), a specialised jurisdiction to deal with competition cases. The CAT dealt primarily with appeals from decisions of the administrative authorities. The Enterprises Act of 2002 also conferred jurisdiction on the CAT to hear some damages actions by private parties as follow-on actions. The CAT had two particular advantages. First, although its President was a lawyer, it also comprised 20 members who were not lawyers, but mainly economists, accountants, businessmen, and academics. Cases were decided by panels of 3 which combined expertise from various disciplines. Second, the CAT as a newly designed body was able to follow more simplified and speedy procedures than the traditional court system. The first private actions under the new system were now starting to come through the court. The first case was brought by purchasers who claimed damages in connection with the vitamins cartel. An interesting element in that case was that the plaintiffs were second-line purchasers who had bought from the customers of the cartel participants. Thus, the CAT was immediately faced with *Illinois Brick* and all the related problems.

Sir Christopher also mentioned that a limited kind of class action could be brought before the Tribunal. A claimant who could establish that it was a representative of a particular class could bring an action on behalf of the class; this included representatives of consumers such as government-recognised consumer organisations. Although no consumer case had been filed, in one case a consumer organisation had intervened to represent consumer interests. It was important that consumers were eventually more aware of the litigation system and the possibility to seek damages. Another challenge in Europe was to ensure that the judiciary was familiar with competition law, including competition economics and accountancy.

The Chair briefly summarised the presentations, pointing out that Professor Epstein seemed to start from the hypothesis that public enforcement could lead to optimal deterrence and that therefore we had to be very cautious about adding another layer of enforcement as this created the risk of over deterrence. But according to Emil Paulis public enforcement cannot quite lead to optimal deterrence and that therefore it was necessary to complement public enforcement with some kind of private enforcement. Sir Christopher Bellamy had pointed out that many may be scared about the US experience in private enforcement. Finally, the Chair highlighted the lack of competition culture and an economics culture in the judiciary, particularly when judges had to assess damages.

Professor Epstein replied that if there was concern about too little public enforcement, one remedy was to increase enforcement by the public agencies, rather than to promote a dual system which raised the question of co-ordination. One possibility to consider was allowing public parties, like private parties in the UK, to recover some of their own expenses from the defendant and to keep the money in their own budget. He was not certain whether this would be a desirable solution, but one should think about it before promoting more private enforcement. Second, he agreed that there were very powerful differences between the procedural norms in the United States and elsewhere. European, Asian or Latin-American systems were all more cautious on the procedural side than the U.S. system, which meant that it would be safer to promote private litigation there without fear that the system would go into overdrive.

Another point was whether all victims should be entitled to recover. *Illinois Brick* had established that not all victims should be entitled to recover, on the grounds that one could achieve better deterrence if one was willing to give up on the goal of perfect compensation. It should be stressed, however, that the *Illinois Brick* doctrine had its origins not in antitrust cases, but in cases involving regulatory overcharges in cases with direct rate regulation. In the recent *Trinko* case, the Second Circuit had considered whether indirect purchasers were allowed to bring suit for damages. In that case, there was the question whether only AT&T would be allowed to sue Verizon for non-cooperation, or 10 million of AT&T's customers.

One had to consider carefully whether more antitrust enforcement was always going to encourage a culture of competition. He mentioned two caveats: First, suits brought by disappointed competitors could achieve exactly the opposite. There should be a greater degree of distrust about competitor suits than suits brought by consumers, but the procedural rules would not necessarily deal with that situation. Second, Professor Epstein wondered about the merits of the *Courage/Crehan* case, although he acknowledged that he did not know all facts of the case. This was not a consumer case and there was the question whether by discouraging these types of marketing arrangements by major brewers one would end up with fewer pubs and other outlets selling beer. If every disappointed lessee could bring an antitrust action, every private landlord could be exposed to antitrust actions. One would have to be careful about such an expansion of the scope of antitrust litigation, even if the right procedural rules were in place.

The Chair added that there was a widely held view that in the United States the competition culture sunk in after the great Electrical Equipment conspiracy case. This case based on private action helped to raise awareness of statutes which had been on the books for a long time. Professor Epstein replied that antitrust law was the most effective in the area of cartel enforcement and that in this area private

enforcement might be the best. He would support all private enforcement in this area if in exchange all private monopolisation/dominance cases would be eliminated.

Germany described the situation of private enforcement in competition cases. The 7<sup>th</sup> Amendment to the Cartel Act, which should be adopted shortly, would broaden the opportunities for private enforcement. These changes had been proposed for two reasons: First, in the new EU enforcement system some degree of deterrence would have to come from private enforcement. Second, under the existing German system, all the fines, which might be high enough to be an effective deterrent, were recovered by the government budget. Unlike the situation in the United States, the person who had suffered loss was not adequately compensated.

Germany emphasised that private enforcement already played an important role in abuse cases, in particular in exclusionary abuse cases. In this area, private enforcement was more prevalent than public enforcement, and Germany had a satisfactory, working system without any significant shortcomings. However, there had been no legal basis for private enforcement in cartel cases. EU law, as interpreted in the recent *Courage/Crehan* case, required Germany to create a legal basis for the private enforcement in cartel cases as well. Detailed provisions had been added to the draft 7<sup>th</sup> Amendment. First, the draft addressed passing on issues; they were based on the assumption that only the direct purchaser could effectively bring actions for damages. Second, as private actions frequently would be follow-on actions and therefore could be delayed, issues related to timing had to be addressed, such as time limits to bring actions and pre-judgment interest. Another provision in the draft should facilitate the calculation of damages. The new draft would also attempt to reduce the plaintiff's litigation risk. Last, the new draft dealt with claims of consumer organisations. In Germany, they should play only a subsidiary role, and be available only in cases where public and private enforcement had not been effective. In concluding, Germany repeated that a well-designed system of private enforcement, while it would not replace public enforcement, should play an important role in competition law enforcement.

Canada explained that it had relatively recent experience in designing a private enforcement regime, including the need to balance some of the issues and concerns mentioned by the previous speakers. The public enforcement resources in Canada were limited and not all cases could be pursued. More enforcement would be good for the level of deterrence and compliance. At the same time, however, one should avoid situations that encouraged strategic litigation and the misuse of resources. Changes that had been introduced to the private enforcement system depended on the context within which private enforcement would operate, whether private enforcement occurred in criminal matters or in different types of civil matters. In criminal matters, such as price fixing and other cartels, class actions already existed. In the case of civil matters, legislation introduced in June 2002 to permit private enforcement differentiated among different types of civil matters. The government was putting special emphasis on abuse of dominance cases which were considered the most egregious infringements in civilly reviewable matters. In those cases the focus should remain on public rather than private action. Instead, the legislation allowed civil litigation in cases such as refusal to deal, exclusive dealing, tied selling, and market restrictions. At the same time, safeguards had been introduced to address a number of concerns. For example, it was not possible to take a private action in a matter that had been before the Competition Bureau. The Tribunal had some control over which matters to look at, as private actions had to be brought with leave of the Tribunal. At the same time, the Commissioner of Competition had the right to intervene, so the Competition Bureau could advance relevant arguments. There were no damages involved in this regime. Parties could obtain only cease and desist orders and request costs. The whole matter of damages was still subject to discussion. It was too early to evaluate the situation after the new legislation entered into force in June 2002. Only nine cases had been brought to the Tribunal; those were immediately met with procedural objections by the lawyers and appealed to the Federal Court of Appeal.

The United States emphasised that it did not share many of Professor Epstein's concerns; having no private enforcement would not be better than the current system. As the previous speakers had pointed out, it was important to distinguish between different types of antitrust cases in order to properly evaluate the importance of private enforcement. It was correct that the business paid much more attention to the antitrust laws and there was a greater level of deterrence as a result of private enforcement, much more so than would exist in a system with purely public enforcement. At the same time, private enforcement meant that the agencies had to be more careful in selecting matters they recognised as legitimate cases.

Many of the concerns Professor Epstein mentioned were not applicable in cartel cases. Enforcement against cartels was the most important task for agencies because cartels imposed serious harm on society without having any redeeming value. One did not have to worry about over deterrence in these cases. The explosive growth of private litigation was mainly due to follow-on actions to public anti-cartel enforcement. This would not cause the government enforcer to be more cautious. One should be concerned, however, about the use of private enforcement for other motives, such as suits brought by competitors. These concerns did not apply in cartel cases. Several problems could be identified in the American system that other countries should carefully consider, such as treble damages and class actions. The United States explained that it was opposed to a situation where public bodies essentially pursued a bounty system to collect resources for themselves.

The United States added that as private rights of enforcement became more robust, nominal commands would become subject to enforcement by private parties rather than exclusively by the government. This would mean, for example, that prosecutorial discretion to set enforcement priorities in accordance with current understanding of good policy was diminished. In the 1960s the FTC had brought hundreds of Robinson-Patman price discrimination cases, while in the past 20 years it had brought only one. But a great deal of private enforcement under the statute continued. Second, there was a close relationship between substantive rules and the processes and sanctions by which they were enforced. Professor Epstein had suggested that there was a tendency of "upward ratchet," where Congress passed a law and the courts then expanded its application. But this was not correct in the antitrust area. Private enforcement was a good example. U.S. law provided a number of unique features to encourage private enforcement. As these features were mandatory, the only tool for judges to adjust case outcomes was changes in doctrine. The *Potash (Blomkest)* case Professor Epstein had mentioned was an excellent example. *Blomkest* was an exclusively bad decision in which numerous mistakes could be identified. Lesson number 1 from *Blomkest* was to be aware of distortions in substantive liability rules that stem from judicial efforts to push back the overreaching of private enforcement. In *Matsushita*, a private treble damage case, the Supreme Court had developed a very restrictive interpretation of the notion of "agreement." *Matsushita* involved an allegation by U.S. television makers that Japanese manufacturers had over many years engaged in price fixing in Japan and used the extra profits to subsidise the sale of their television sets at below costs in the United States. The Supreme Court found the allegations implausible; it used the concept of "agreement" to find for the defendants. Over time, the restrictive notion of "agreement," developed in a horizontal predatory pricing cartel, migrated into cases involving cartels to raise price, such as the *Blomkest* case, where it was much less justified. Lesson number 2 was that in a decentralised court system these cases could come up in different courts with the result of inconsistent outcomes. *Blomkest* was a good example of plaintiffs choosing the wrong forum for private antitrust actions as they litigated their case in the 8<sup>th</sup> Circuit which was known for being highly sceptical of antitrust law in general.

BIAC began its intervention by emphasising that the majority of the private antitrust actions involved firms that brought suits against other firms. Second, when creating a competition culture, clarity about substantive rules was an important issue. This suggested that in many jurisdictions private enforcement should initially focus on hard core cartels, as was the case in Canada and apparently recently also in the UK. Third, the introduction of various rules related to private antitrust enforcement in civil law

jurisdictions had implications in other areas of the law, such as product liability or environment liability cases. One should be aware of these possible side effects. BIAC highlighted a number of points raised in its paper: First, if private actions were being introduced there should be adequate support from the public enforcement channel. Second, it was important to have adequate safeguards against abusive litigation, such as thresholds that had to be satisfied before a case could proceed before a court, discretion for courts to adopt cost decisions against plaintiffs in appropriate circumstances, and clear rules concerning accessibility and standing. Confidentiality of materials that may be exchanged between the public enforcement agencies and courts in private enforcement was another important issue that should be taken into account. In Europe, the *Spanish Banks* case and the recent *Akzo* decision had created a situation where only the Commission could have full access to a document and see the content of a document, whereas parties could only know about the existence of a document. Double jeopardy within a jurisdiction was also a consideration. As Professor Epstein had already discussed, there was a question of how fines should be taken into account when damages were awarded to private plaintiffs. Last, the relationship between private litigation and leniency programs was important, as Emil Paulis had already mentioned.

Switzerland suggested that among the three reasons commonly used to explain why Europe had so little private enforcement, including treble damages, class action and costs or fee-shifting, the last factor was most important, even though its significance was often underestimated. In almost all European systems the losing party had to pay the entire costs, including the costs of the other party. The cost issue burdened the plaintiff more than the defendant. Economic analysis of civil procedure showed that increased risk burdened the plaintiff more than the defendant. It also showed that a plaintiff had to be convinced twice as much of its good case than a defendant in order to go to court. In other words, the plaintiff had to think that it would have about a 70 % chance to win before going to court, whereas the defendant had to be convinced only by 30 % about his victory in order to put up a defence. Thus, if one wanted to intervene to facilitate private litigation, the area of costs and fees would be a good candidate. It was probably difficult to introduce changes in the short-run, however, because they would affect not only competition law but more generally the functioning of legal systems.

Switzerland added that in, principle, private and administrative enforcement were considered equal. Civil enforcement was quite rare, however. For more than 10 years judges in civil cases were required to refer competition cases to the Commission to obtain an “amicus curiae” opinion by the Commission on the merits of the case. It was thought that the mandatory referral system would encourage parties to go to court and judges to take cases. In fact, there have been several cases in which courts adopted provisional measures, including cease and desist orders. One possible explanation was that judges were more comfortable issuing preliminary orders as they knew that they could obtain the Commission's view on the merits of the case should they be required to confirm the initial, preliminary measure and adopt a permanent decision in a case.

Italy first followed up on a point raised in Switzerland's contribution. While it was true that there were not many private cases for damages in Europe, there were numerous cases seeking interim relief. Italy, for example, had hundreds of cases on interim relief in which the courts never reached the merits of a case. Typically, in these cases the parties' contractual relationship continued after an interim order; claims for damages were most likely once the parties' contractual relationship was terminated. The 12 cases presented in the study on private damage claims underestimated the extent of private competition law enforcement in Europe. Italy added that it disagreed with the European Commission's view that Regulation 1/2003 facilitated private litigation. Regulation 1/2003 was at best neutral or even impeded private litigation. Before Regulation 1/2003, a party seeking damages could be certain that a judge would not be able to grant an exemption under article 81(3), but now that certainty no longer existed. In that sense the incentive to bring private cases decreased and did not increase.

The Chair reinforced Italy's first point about the 12 known cases in which damages were awarded. There was no unique register in Europe to have a full account of what was really happening. Even though there were certainly far fewer cases in Europe than in the United States, it was a bit dangerous to rely on the 12 cases reported in the study for the Commission since this figure was not very meaningful.

Following up on Italy's question about Regulation 1/2003, the European Commission argued that while national judges were now in a position to grant exemptions, this was a positive feature of the new Regulation. The previous system was deeply flawed as one could go before a national court and the judge could have found for the plaintiff and ordered the defendants to pay damages because he was not able to consider the positive sides of a case. The current situation was a positive development, even though Italy's statement was correct in a certain sense.

The Commission then commented on the intervention by the United States concerning the risk that agencies could lose some of their discretion in public enforcement when private enforcement increased. Taken to the logical end, this would mean that agencies would lose their monopoly in the interpretation of substantive competition rules. But it would be a positive step if more enforcers and more decision makers were involved in the development of a body of case law. Bill Kovacic himself had written an excellent essay on antitrust history where he discussed how cases coming out of private litigation contributed to the development of antitrust doctrine. It was always dangerous to look at one single case to argue how wrong private litigation can go. If the system as a whole was considered, private enforcement had provided a formidable contribution to the development of substantive antitrust rules in the United States. Of course, one had to pay attention to the development of good policy by public enforcers as well. The clearer the rules and the better they were formulated, the lesser the risk of negative effects which were also inherent in private enforcement. Overall, it was preferable to have a situation where public and private enforcement coexisted and both contributed to the development of substantive rules.

The Commission further observed that it was a little surprising to hear all the pleadings for the virtues of public enforcement from the United States. There may be excessive private litigation in the United States, but Europe was coming from a different end and was seeking to add some private enforcement to public enforcement. On balance, as Sir Christopher had suggested, one would like to achieve a solution that could bring the benefits of private enforcement while minimising the risks. The earlier debate on distinguishing between different categories of cases was also very important. In certain categories of cases, private enforcement could be extremely beneficial. As previous speakers had mentioned, there was little concern about over deterrence in the case of cartels. The Commission also warned about the European debate focusing too much on the excesses observed in the United States. In Europe it would be possible to limit certain excesses and to design a more balanced, modern system of private enforcement.

The Chair commented that over deterrence always meant that there were some costs which were wasted. Even if cartels were really bad and fighting them was really good, over enforcement was not necessarily a public good.

France added that it followed the comparison between the merits of private action and public enforcement with great interest. In addition to factors like speed and efficiency, there were other important criteria to evaluate the two systems such as legal certainty and predictability. Predictability referred not necessarily to the determination of damages, but also to substantive rules. There could be two systems, one in which a court could rule on the issue of damages only after a competition authority had adopted a decision on the infringement of competition rules; and a system which authorised a competition authority and all judges to rule on the issue of infringement. The latter system was more open but had diminished predictability. If such a system was adopted, there was a question about specialisation of judges, but also about a solution mentioned by the Swiss intervention where a judge could seek the opinion of a

competition authority on the merits of a case. This was a good example of coordination of private and public enforcement.

France added a judge's view on private enforcement. One issue discussed in France was the lack of judicial experience and expertise in economic matters. But it was important to remember that in France there was considerable judicial experience in competition matters. Decisions concerning unlawful agreements by the Conseil de la Concurrence had been appealed to the Cour d'Appel in about 50 cases, and in about 15 cases had been appealed further to the Cour de Cassation. In these cases, the courts had to apply the four criteria in Article 81(3) which required economic analysis. A second institutional reason why French judges were to some degree familiar with economic principles was that appeal judges exercised full review when decisions of the Conseil de la Concurrence were appealed. This imposed the requirement on judges to rule on the substance of cases, including its economic principles, and to review the full file assembled by the Conseil.

Third, it was worth mentioning that private enforcement in France faced a variety of problems. Many firms frequently preferred to submit complaints to the competition authorities because these institutions had investigatory powers and resources that courts lacked. Only recently had firms developed greater awareness of the possibility of litigating competition cases directly before courts. In France, as in other countries, the assessment of damages was very complex. Treble damages were not available, and the general principles of the Code Civil applied, which required full restitution both of actual losses and lost gains. But these principles required an assessment of what the results of a firm would have been in the absence of the unlawful conduct, and this was a difficult exercise. Last, France mentioned that national courts in Europe could contribute in a more differentiated manner to the application of competition law. For example, the Cour d'Appel was confronted with a case in which a plaintiff sought damages from a producer of luxury products who had established a selective distribution system. The plaintiff had been excluded from the distribution network and claimed that the entire distribution system was unlawful. The Cour d'Appel, however, found that only one clause in the distribution agreement was unlawful and upheld the distribution system for the rest. This example showed that courts could effectively intervene in competition cases in a differentiated manner.

Japan began its remarks by reminding the audience that the Japanese society was the opposite of a litigation society. Nevertheless, judicial reforms were under consideration in order to reasonably expand private litigation. One example was the gradual increase in the number of lawyers. In competition cases, private actions for damages and for injunctions were available and were used to some extent. But the experience as to how to apply private enforcement in competition cases was quite limited. In addition, there were plans to introduce the possibility of lawsuits by certain eligible consumer associations. Japan also mentioned that public enforcement alone did not create sufficient deterrence; and the proactive enforcement of the Antimonopoly Act would be most important. The JFTC therefore would obtain additional resources in the near future and was preparing the amendment of the Act for the purpose to further enhance the deterrence against violations. Thus, one could expect greater utilisation of private enforcement in the future, which would also benefit public antitrust enforcement. As private enforcement was still at its beginning and Japan could not yet provide much information in this area, it would benefit from further discussions.

Hungary highlighted an additional aspect regarding the relationship between public and private enforcement. It was true that if, in an ideal situation, public enforcement was at the optimal level, private enforcement on top of public enforcement could become excessive. On the other hand, however, one should consider that one might not be able to have perfect public enforcement without private enforcement. In Hungary, for example, the competition authority had an enforcement monopoly, at least with respect to domestic competition law. At the same time, the law emphasised the competition authority's responsibility to take care of complainants. This situation made priority setting and case selection very difficult or in

some respect impossible. In the absence of private law enforcement, the thresholds for opening a case were very low, and the competition authority had to initiate numerous cases which probably would not be the case if there was the opportunity for private enforcement. In Hungary, modifications of the competition act were being considered which would introduce private enforcement under national competition law; this in turn should facilitate priority setting for public enforcement.

Australia added an observation concerning the experience in Australia and New Zealand. Both countries had had a mixed structure of public and private enforcement for 30 years, which incorporated many of the best traditions of the British system and avoided what was frequently seen as excesses of the American system in terms of courts, the assessment of damages, costs, and the use of the legal system. Undoubtedly the system had enhanced the culture of compliance and competition. Extremely important jurisprudence had emerged from private cases and High Court cases had developed the understanding of how the law should work and of the economics in competition cases. This represented another model somewhere in-between what was being discussed today in terms of Europe and the United States. The salient features were the constraints in terms of excessive use of the system. There was a debate on improving the system. Suggestions came primarily from the private bar seeking further access to private actions.

The United States emphasised that it saw the issues pretty much in the same way as the European Commission. The critical concern was to get the dosage correct. The question of which functions the Government should exclusively perform was difficult to answer. The answer depended crucially on the area of the law. There appeared to be consensus that more private enforcement was desirable in the area of cartels. But in abuse of dominance cases there was greater hesitation. This reflected an implicit recognition that enforcement agencies did not enforce the law to the full limits in single firm conduct cases. There were cases where agencies did not bring enforcement action as a matter of discretion. With complete privatisation of enforcement, private parties could go out to the full limits of the law, including, for example, excessive pricing cases under Article 82. There were also examples of areas where the government should not be the only enforcer and shared authority was desirable. These included horizontal cases where the government was the source of the restraint. A good example was the case in the United States that broke open the practice of professions, especially the legal profession. The Federal Trade Commission and Virginia had turned down the case, but an individual challenged the practice of joint fee setting and prevailed before the Supreme Court.

Professor Epstein's concluding remarks emphasised the importance of maintaining a good ratio between private and public enforcement. He agreed that the EU had too little sensible private enforcement. If the European system was characterised by 90% public enforcement and the American system was 90% private enforcement, both systems could be changed quite dramatically and if they moved closer a 50/50% ratio. In addition, it was important to recognise that the greatest difficulty existed with enforcement when 99% of the people say "no" and one person decided to go forward. In this situation the result was not competition and experimentation in the market place, but enforcement that would always be yielding to the party most stringent with respect to her demands. The most extreme person would then possess a monopoly that nobody else could challenge. This was not to say that one could never have this complication, but one had to be aware of this risk. Last, Professor Epstein observed that cartels ought to be the most important target of private enforcement; abuse of dominance cases should be way down on the list, and mergers were simply an inappropriate target for private enforcement.

The Chair thanked Professor Epstein for his contribution to the debate. The discussion showed that there was a fair amount of agreement on many of the issues. It also had made some of the pitfalls of private enforcement more apparent.

## COMPTE RENDU DE LA DISCUSSION\*

Le Président ouvre la table ronde en demandant au professeur Epstein de présenter son exposé. Le professeur Epstein commence par souligner l'interdépendance entre les règles fondamentales du droit de la concurrence et les règles procédurales. Il explique que si les premières, d'une façon ou d'une autre, ne sont pas judicieuses, le fait d'affecter pour leur application des ressources privées en sus de ressources publiques ne ferait qu'aggraver le problème. Comment en effet une amélioration des procédures pourrait-elle améliorer une substance défectueuse ? Si, au contraire, ces règles de fond sont solides, l'amélioration des procédures et l'apport de ressources supplémentaires privées pourraient globalement améliorer leur application. Il serait en outre très difficile de maintenir une ligne de démarcation franche entre les procédures et les règles de fond.

Le professeur Epstein aborde ensuite la notion de dissuasion optimale. Il est toujours difficile de déterminer quelles sont les ressources totales que doivent affecter les parties tant privées que publiques pour prévenir tout effet dommageable, et dans quelles proportions. Bien que d'un point de vue moral rien ne permette de tolérer ni de justifier les comportements délictueux ou malhonnêtes, en pratique, les coûts liés à l'élimination de toute conduite répréhensible risquent d'être supérieurs aux torts qu'elle pourrait causer. Ces coûts ne sont pas uniquement financiers, mais comprennent également des préjudices privés et sociaux. Tout régime d'application du droit risque de conduire à une sur-dissuasion ou à une sous-dissuasion. L'une comme l'autre pose un problème d'ordre social car elles risquent d'aboutir à une allocation des ressources infra-optimale. Les coûts de la sur-dissuasion sont plus difficiles à établir. Par exemple, une entreprise hésitera à mettre en place de nouvelles pratiques tarifaires ou d'autres dispositifs novateurs afin de ne pas s'exposer au droit de la concurrence. La volonté de s'écarter de pratiques déjà approuvées risque de s'en trouver réduite, freinant ainsi l'innovation.

L'introduction d'un régime d'application du droit de la concurrence par voie d'action privée venant s'ajouter à un régime déjà optimal d'application par la puissance publique mènerait vraisemblablement à une sur-dissuasion. Si le premier s'avère plus efficace que le second, il conviendra de le renforcer, tout en réduisant dans une certaine mesure la portée du second. Si cela se fait convenablement, on aboutira globalement à une meilleure discipline et les coûts d'application s'en trouveront réduits. L'expérience des États-Unis démontre toutefois que, dès que les autorités publiques bénéficient d'un important budget, il devient extrêmement difficile de réduire les actions judiciaires de leur fait. Il n'existe d'ailleurs dans ce pays que très peu de coordination entre ces deux régimes.

Le professeur Epstein évoque ensuite plusieurs problèmes propres au système fédéral qui peuvent se manifester si les instances fédérales et les autorités de la concurrence des États venaient à lancer des procédures sur une même affaire. L'affaire *Microsoft* a déjà illustré les risques inhérents à un tel système fédéral, dans lequel un État plus 'agressif' peut décider de poursuivre une affaire même après que le gouvernement fédéral a décidé de parvenir à un règlement négocié. Le principe de subsidiarité pourrait utilement permettre de déterminer quelle autorité serait la mieux à même de mener une action en justice et d'éviter toute sur-dissuasion.

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\* Cette discussion a eu lieu en octobre 2004.

Un même problème risque de se poser quant aux relations entre ces deux régimes. Il va toutefois être beaucoup plus difficile ici de déterminer qui est le mieux placé pour engager une procédure. Aux États-Unis, au niveau fédéral, l'arrêt *Illinois Brick* interdit aux consommateurs indirects d'engager des procédures pour violation du droit de la concurrence ; il prévoit également que les consommateurs directs demandant un dédommagement n'ont pas à intégrer d'ajustements pour les prix plus élevés qu'ils ont été en mesure de répercuter sur leurs clients. Un tel régime tend à limiter le nombre de procédures tout en créant un point de convergence pour les litiges. En outre, comme on ne tient pas compte des ajustements en aval, le montant total des dommages-intérêts perçus par les consommateurs directs va être exactement égal à celui que percevrait la totalité des consommateurs indirects s'ils étaient autorisés à demander des dommages-intérêts personnels. Cependant, l'arrêt *Illinois Brick* ne s'applique pas à tous les États. Plusieurs d'entre eux autorisent en effet les recours des consommateurs indirects, généralement sous la forme d'actions collectives et d'actions *parens patriae*, au nom de groupes de consommateurs non identifiés. Cette situation comporte deux risques majeurs. D'une part, les coûts administratifs de procédures multiples portant sur des situations légèrement différentes sont considérablement plus élevés que pour une seule action. Au vu du flou des règles sur l'utilisation de la jurisprudence, les requérants ont adopté différentes stratégies. D'autre part, lors de chacune de ces procédures, toutes les parties ont tendance à arrondir le montant des préjudices subis. De ce fait, le total des dommages-intérêts accordés aux plaignants peut être largement supérieur à ceux attribués lors d'une procédure unique. Dans l'idéal, les règles procédurales doivent permettre de fusionner la totalité des procédures en une seule ; aux États-Unis, cependant, elles ne sont pas si simples, particulièrement lorsqu'une partie porte son affaire devant un tribunal d'État et une autre devant un tribunal fédéral. De ce fait, le risque de sur-dissuasion s'est aggravé.

Le professeur Epstein évoque ensuite les doctrines de la réciprocité et de la préclusion. En vertu de l'ancienne règle de réciprocité, une décision de justice n'était contraignante que pour les seules parties concernées. Les tierces parties ne se trouvaient pas liées par la décision initiale et ne pouvaient pas s'en prévaloir lors d'une procédure ultérieure. Mais cette règle a été assouplie au nom de l'efficacité judiciaire : actuellement, lorsqu'une partie est déboutée à l'occasion d'une première action, le jugement peut être utilisé à son encontre en cas de poursuite des procédures. Si les avantages de la réciprocité sont évidents, ses inconvénients le sont tout autant, bien que plus difficiles à quantifier. Les effets d'incitation viennent ainsi compliquer les procédures ultérieures, car dès la première action, tout le monde sait qu'il y en aura automatiquement une seconde. Cette situation entraîne une dissymétrie des incitations lors de la première procédure, au cours de laquelle les pertes de la partie défenderesse risquent d'être bien supérieures à celle du plaignant, dont les frais seront bien moindres. Le défendeur sait néanmoins qu'il peut obtenir une réparation dont la valeur est bien supérieure à celle du tort subi du fait que tout échec aurait des conséquences dynamiques.

Ces problèmes sont encore plus sensibles pour les actions lancées à l'initiative de la puissance publique. Les autorités étant censées agir dans le sens de l'intérêt général, leurs avocats vont sans doute pouvoir plus facilement démontrer le bien-fondé de leurs allégations qu'un avocat privé, même lorsque les normes de preuves sont plus exigeantes. Si tel est le cas, la première action menée par les pouvoirs publics en déclenche une seconde, un recours privé, qui n'aurait pu être mise en œuvre indépendamment. Il n'existe aucune solution évidente à ce problème. Il convient ainsi de savoir si l'entité publique doit adopter une position selon laquelle sa propre procédure ne saurait entraîner d'action privée ultérieure. C'est ainsi que, dans une affaire particulièrement complexe, les pouvoirs publics ont demandé une ordonnance en se basant sur une théorie inédite, jugeant toutefois inappropriée l'attribution de dommages-intérêts au triple d'un montant considérable dans cette affaire précise. Si les pouvoirs publics savent qu'une procédure privée suit automatiquement la leur, ils peuvent envisager de ne pas l'engager mais plutôt de régler l'affaire à l'amiable. On peut également résoudre ce dilemme en coordonnant les dommages-intérêts attribués. Aux États-Unis, cette approche est utilisée pour les affaires d'atteinte à la personne : ainsi, dans ce pays, il arrive souvent qu'un salarié victime d'un préjudice corporel poursuive à la fois son employeur et une tierce partie non liée. Dans un tel cas, l'affaire de dommages corporels initiale n'a aucune incidence

sur le recours contre le tiers responsable ; cependant, lorsque le requérant reçoit des dommages-intérêts dans le cadre de cette procédure, il lui faut restituer une partie de la somme reçue lors de sa procédure contre son employeur. Ainsi, le montant total de la somme recouvrée doit être égal à celui du dédommagement obtenu lors de la procédure initiale. Une variante plus simple consisterait à permettre au salarié de bénéficier d'abord de son indemnité puis, lors de la seconde procédure, de ne bénéficier que du montant en sus de celui qui lui a été déjà octroyé lors de la procédure initiale. Cela constituerait un rempart naturel contre toute procédure douteuse et permettrait d'éviter de procéder à des transferts ou des remboursements complexes. Dans le cas de l'application du droit de la concurrence, l'amende imposée par les pouvoirs publics à une partie constituerait une 'avance' sur les dommages-intérêts pouvant être recouverts lors de recours privés contre le tiers responsable. Cela permettrait de réduire le montant réclamé par les tierces parties ainsi que le nombre de procédures. Ce régime pourrait mener à une certaine sous-dissuasion, ce qui ne ferait que contrebalancer la sur-dissuasion du régime actuel.

Le professeur Epstein signale également que les interactions entre les procédures engagées par la puissance publique et les procédures privées vont généralement dans un seul sens. Les procédures privées suivent généralement les actions publiques engagées pour un même litige. Par contre, il arrive rarement, voire jamais, qu'une procédure privée soit suivie d'une action publique. Il existe deux raisons à cela. D'une part, lors de procédures publiques, la charge de la preuve est généralement plus lourde que lors d'une procédure privée. Ainsi, un organisme public ne pourra se prévaloir d'un jugement privé favorable. La seconde raison est davantage du ressort institutionnel. Généralement, les pouvoirs publics ne souhaitent pas engager de nouvelles procédures. Ils les considèrent moins importantes que d'autres affaires et ne souhaitent pas que des décisions d'ordre privé dictent la nature de leur programme d'application des lois. En outre, lorsque les procédures privées portent sur des affaires dans lesquelles les pouvoirs publics considèrent que des questions de principe sont en jeu, ils peuvent agir en tant que *amicus curiae* et y présenter des mémoires exposant leurs vues. Le problème des procédures ultérieures se pose lorsque des acteurs privés doivent attendre les résultats des procédures engagées par les pouvoirs publics. Lorsque la puissance publique est déboutée ou qu'elle accepte un règlement à l'amiable, les personnes peuvent poursuivre leur action sans que cela ne porte atteinte à leurs droits. En cas de succès des pouvoirs publics, les effets de suivi sont simples à démontrer.

Le professeur Epstein termine sa présentation en évoquant le danger d'une « intrusion judiciaire » en cas d'intervention du législateur. Il pense que si le législateur adopte un nouveau programme visant à intervenir en douceur pour corriger certains abus ou lacunes du régime actuel, il risque souvent de sous-estimer l'ingéniosité des juristes à réagir à la nouvelle législation. Il se trouvera toujours quelqu'un pour en élargir la portée. Par exemple, lorsque fut adoptée la loi des droits civiques (*Civil Rights Act*), elle était conçue pour lutter contre la discrimination ouverte et intégrait des mesures de protection contre les arguments juridiques uniquement fondés sur des chiffres et statistiques. Sept années plus tard, toutes ces dispositions étaient abrogées et un grand nombre d'actions sont désormais uniquement fondées sur des chiffres. Cela a d'importantes implications sur d'éventuels projets de réforme. Les tentatives d'introduire des réformes limitées peuvent entraîner des changements bien plus profonds une fois qu'elles ont été mises en place. Au vu de cette expérience, le professeur Epstein conclut il vaut généralement mieux se dispenser de toute application du droit de la concurrence par voie d'action privée. On a assisté à une avalanche d'actions en justice à l'encontre des entreprises américaines, fondées sur des théories plus ou moins fantaisistes. Naturellement, on pourrait admettre que l'application du droit passe dans une certaine mesure par des actions privées, mais s'il s'agit de choisir entre tout ou rien, la situation actuelle n'est absolument pas souhaitable.

Emil Paulis présente les travaux de la Commission européenne sur les actions privées en réparation de dommages. Il commence par faire état de la réforme européenne du régime d'action publique qui a supprimé le monopole de la Commission lui permettant d'octroyer des exemptions en vertu de l'article 81(3). Ces réformes ont permis d'envisager le régime d'application du droit dans son intégralité, y compris

en ce qui concerne l'équilibre entre les actions privées et les procédures engagées par les pouvoirs publics. En outre, comme l'a montré la récente décision concernant l'affaire *Courage/Crehan*, en cas de violation de l'article 81, les personnes privées peuvent effectuer une demande de dommages-intérêts devant les tribunaux nationaux. À la suite des réformes institutionnelles leur ayant conféré davantage de pouvoirs aux États quant à l'application de cet article, la Commission a lancé une étude comparative des diverses affaires de concurrence traitées par voie d'action privées au sein des États membres et rédigé un rapport économique sur les moyens de quantifier les dommages-intérêts accordés. Il en ressort une grande diversité et un véritable 'sous-développement' du régime d'action privée (seules douze affaires ont été présentées). M. Paulis souligne qu'en Europe, c'est le régime d'action publique qui prédomine. On estime qu'aux États-Unis les procédures privées représentent 90 % des actions en ce domaine alors qu'en Europe le ratio est inférieur à 1 pour 9. Outre-Atlantique, les actions privées ont contribué à une culture de la concurrence et à une meilleure connaissance du droit de la concurrence.

M. Paulis présente ensuite une vue d'ensemble des principaux domaines couverts par le rapport, tout en soulignant que ses conclusions et suggestions ne sont pas nécessairement partagées par la Commission. Il met l'accent sur les domaines suivants :

- L'accès aux tribunaux : l'étude indique que les restrictions en ce domaine pourraient être réduites afin de faciliter les demandes de dommages-intérêts. Le rapport évoque également l'introduction de recours collectifs ou de plaintes d'associations de consommateurs ou de représentants publics, afin de réduire le risque financier apparent et de surmonter le manque d'incitation à agir en ce sens. Des suggestions ont également été émises quant à la possibilité de faciliter les actions en justice des consommateurs indirects.
- La réduction des risques : le rapport souligne qu'il existe une certaine incertitude quant à la compétence des tribunaux lors d'affaires de concurrence, quant à certaines notions juridiques, telles que celle de 'faute', et quant aux fondements juridiques des demandes de dommages-intérêts au regard du droit de la concurrence. Le rapport aborde également la question de la création de tribunaux spécialisés pour améliorer le régime d'action privée ainsi que celle du recours à des experts devant les tribunaux. En outre, il conviendrait de fixer des orientations sur les méthodes de calcul des dommages-intérêts. Le rapport suggère aussi de recourir à des estimations des dommages-intérêts « raisonnables » ou « équitables » en cas de difficulté ou d'impossibilité de quantifier les dommages subis ou bien encore de se baser sur les bénéfices de la partie défenderesse pour ce faire. Un autre point intéressant soulevé dans le rapport est la pratique consistant à autoriser les tribunaux à rendre dans un premier temps un jugement partiel quant à la violation du droit de la concurrence et de traiter ultérieurement la question de l'évaluation des dommages.
- Facilitation de l'obtention de preuves : l'étude évoque à la fois la charge de la preuve et son niveau. En outre, il aborde les problèmes liés à l'obtention des éléments de preuve, y compris l'introduction de règles de production des éléments préalablement au procès. D'autres mesures envisagées concernent le pouvoir des juges d'ordonner la production de certains documents ou types de documents ainsi que la possibilité d'assouplir les exigences devant être satisfaites avant que leur divulgation ne soit ordonnée.
- Autres mesures d'incitation : le rapport traite la question de l'introduction de dommages-intérêts multiples qui, en Europe, seraient moindres que les « dommages-intérêts au triple » en vigueur aux États-Unis. Une autre idée intéressante consiste à se référer aux bénéfices de la partie défenderesse afin d'évaluer les dommages. Enfin, la reconnaissance d'intérêts antérieurs au jugement est également considérée comme une éventuelle mesure d'incitation pour les demandeurs privés.

M. Paulis souligne le fait que, en Europe, le renforcement du régime d'action privée pourrait présenter un certain nombre d'avantages. Cela permettrait en effet de renforcer la dissuasion et le respect de la loi tout en contribuant au développement et au renforcement d'une culture de la concurrence plus affirmée et en rapprochant le droit de la concurrence des préoccupations du consommateur. Encadré par des règles saines, le régime d'action privée permettrait de démultiplier l'efficacité des règles de fond du droit de la concurrence. En dernier lieu, les pouvoirs publics pourraient disposer d'une plus grande souplesse dans leur politique d'application du droit, le régime d'action privée permettant ainsi de mieux faire respecter le droit de la concurrence. Naturellement, les actions privées devant des tribunaux nationaux viennent en complément de l'application du droit de la concurrence de l'Union européenne par la puissance publique. Il semble ainsi nécessaire de mieux coordonner ces deux systèmes.

M. Paulis mentionne également diverses innovations d'États membres en matière d'application du droit par voie d'action privée : ainsi, la création d'un Tribunal d'appel de la concurrence (Royaume-Uni), l'extension possible des recours collectifs aux associations de consommateurs et autres personnes physiques affectées par une violation du droit de la concurrence (Suède), le débat en cours sur la modification du droit de la concurrence en vue de faciliter le recours aux actions privées (Allemagne) ainsi que l'étude visant à améliorer l'application du droit de la concurrence par voie d'action privée (Pays-Bas). M. Paulis conclut sa série de remarques en insistant sur la grande efficacité du régime d'action privée en vigueur aux États-Unis, régime dont l'Europe pourrait s'inspirer, tout en faisant preuve d'une certaine circonspection et en prenant en compte ses aspects négatifs, comme les dommages-intérêts au triple de nature contraignante. Les règles sur la répartition des coûts (extrêmement favorables aux demandeurs), les *quotas litis* (« contingency fees ») et les procédures de recours collectif posent aussi des problèmes. Il convient également de prendre en compte l'importante question des effets des actions privées sur les programmes de clémence. En effet, l'Europe craint que le régime d'action privée ne compromette le succès rencontré par son propre programme.

Sir Christopher Bellamy commence par rappeler à l'auditoire que les procédures privées sont de deux types : les actions en dommages-intérêts et celles visant à obtenir des mesures d'injonction (« injunctive relief »), généralement de nature provisoire. En Europe, le débat concerne essentiellement les actions privées en dommages et intérêts. Sir Christopher Bellamy présente ensuite rapidement la récente affaire *Courage/Crehan*, à l'occasion de laquelle la Cour de justice a confirmé le droit des personnes physiques à demander des dommages-intérêts en vertu du droit européen de la concurrence. Il fait remarquer que si un tribunal inférieur avait accordé au demandeur plus de 1 million GBP, la cour d'appel avait réduit ce montant à 100 000 GBP. Cela démontre que, même si le droit de demander des dommages-intérêts est effectivement reconnu, la question de l'évaluation de leur montant est bien moins claire. Sir Christopher Bellamy félicite la Commission européenne pour l'excellence de ses travaux sur le régime d'action privée. Selon lui, ce document, tout en confirmant la rareté de ce type de procédure en Europe, s'est néanmoins avéré fort utile en donnant pour la première fois un tableau satisfaisant de la situation actuelle. Sir Christopher Bellamy évoque plusieurs problèmes signalés dans le rapport : le manque de clarté de la législation de fond, l'incertitude liée aux modalités utilisées pour prouver l'existence de dommages et en calculer le montant, les frais judiciaires, la longueur des procédures, le manque de connaissances des tribunaux nationaux européens quant aux affaires de concurrence et le sentiment diffus selon lequel les questions économiques seraient trop complexes pour être débattues au sein d'un tribunal. En dernier lieu, certains États membres continuent de considérer que l'exécution du droit de la concurrence est du ressort des pouvoirs publics plutôt que des personnes privées.

Sir Christopher Bellamy évoque ensuite le récent échec subi au Royaume-Uni par les initiateurs d'une procédure pour vente à prix abusif à l'encontre d'une conférence maritime. Finalement, le demandeur a dû assumer des frais de plusieurs millions de livres. Cela démontre que dans le système européen, le plaignant qui engage une action privée fait face à un risque important pour une récompense relativement incertaine. Le ratio risque/récompense n'est donc pas favorable au demandeur ; ainsi conviendrait-il que des réformes

futures traitent cette question. Sir Christopher Bellamy précise cependant que le nombre relativement important de règlements semblerait indiquer que ce système fonctionne mieux que ne pourrait le laisser entendre le très faible nombre d'actions privées couronnées de succès.

Évoquant ensuite plus particulièrement la situation au Royaume-Uni, Sir Christopher Bellamy précise que l'on s'accorde généralement sur quatre raisons incitant à améliorer le régime d'action privée. Premièrement, faute d'une véritable culture de la concurrence, il existe un hiatus entre la législation et les personnes qu'elle vise à protéger. Deuxièmement, les pouvoirs publics ne l'appliquent pas toujours de façon efficace ; en l'absence de procédures privées, de nombreuses entreprises considèrent bien souvent que leurs comportements répréhensibles ne seront pas détectés et qu'elles ne risquent pas d'encourir de sanctions. Troisièmement, ces sanctions administratives, qui sont actuellement la principale méthode d'application du droit européen de la concurrence, ne constituent qu'un instrument peu efficace, les victimes n'étant pas dédommagées. Finalement, sur le long terme, la vigilance des particuliers est aussi importante que celle de la puissance publique. L'application du droit serait plus efficace si des outils étaient mis entre les mains de ceux qui sont les plus directement touchés par les infractions. Cependant, encourager une culture de la concurrence comporte certains risques, notamment celui de créer une « société procédurière du dédommagement permanent ». Un simple regard sur le système américain met en évidence des aspects qui paraissent moins plaisants dans un contexte européen, notamment l'extrême complexité de ses procédures de divulgation de documents, ses actions collectives, l'importance des frais judiciaires et son système de « dommages-intérêts au triple ». Ainsi le défi consistera-t-il à instaurer un régime capable de tirer le meilleur parti des avantages de ce système tout en écartant certains de ses inconvénients.

Sir Christopher aborde ensuite les mesures prises au Royaume Uni pour encourager et faciliter l'application du droit par voie d'action privée. Certaines procédures judiciaires générales portant sur le droit de la concurrence sont traitées au niveau de la Haute cour et la Division de la Chancellerie a été créée pour renforcer l'expertise des juges traitant les affaires de concurrence. La création du Tribunal d'appel pour les affaires de concurrence (Competition Appeal Tribunal, ci-après « CAT »), juridiction spécialisée dans le traitement des affaires de concurrence, a constitué une étape charnière. Le CAT traite pour l'essentiel les appels interjetés à la suite de décisions administratives. La Loi pour les entreprises de 2002 lui attribue également la compétence d'entendre les actions en dommages et intérêts engagées par les personnes privées dans le cadre de procédures ultérieures. Le CAT dispose de deux avantages particuliers. Tout d'abord, bien que son Président soit un juriste, il comprend également vingt membres issus pour la plupart d'autres branches : économistes, hommes d'affaires et chercheurs. Les affaires sont tranchées par des groupes de trois spécialistes provenant de différentes disciplines. Deuxièmement, le CAT, organe de création récente, a la capacité d'engager des procédures plus rapidement et selon des modalités plus simples que le système traditionnel. Les premiers recours privés, engagés dans le cadre du nouveau système, sont en train d'être portés devant le tribunal. La première procédure a été engagée par des acheteurs sollicitant des dommages-intérêts dans le cadre de l'affaire du cartel des vitamines. Élément intéressant, les plaignants étaient des acheteurs de deuxième niveau, qui avaient procédé à leurs achats auprès des clients des participants à l'entente. Ainsi, le CAT a immédiatement dû faire face à la problématique de l'arrêt *Illinois Brick*.

Sir Christopher mentionne également que seuls certains types d'actions collectives peuvent être traités par le Tribunal. Les requérants qui peuvent établir qu'ils représentent un groupe particulier, notamment les représentants d'associations de consommateurs reconnues par les pouvoirs publics, peuvent engager des recours au nom de ces derniers. Bien qu'aucune plainte de consommateur n'ait été déposée, une association de ce type est intervenue dans une affaire afin de représenter les intérêts du consommateur. Il apparaît important que les consommateurs prennent davantage conscience des procédures judiciaires à leur disposition et de la possibilité de demander un dédommagement. L'Europe doit relever un autre défi :

s'assurer que l'appareil judiciaire se familiarise avec le droit de la concurrence et notamment les questions économiques et comptables.

Le Président résume brièvement les exposés, soulignant que le professeur Epstein semble partir du postulat que le régime d'action publique peut conduire à une dissuasion optimale et qu'il convient donc d'envisager avec une extrême prudence l'ajout d'un deuxième système, qui induirait un risque de surdissuasion. Selon Emil Paulis en revanche, un régime d'action publique ne saurait véritablement conduire à une dissuasion optimale et il convient donc de lui adjoindre un mécanisme d'action privée. Sir Christopher Bellamy indique que l'expérience des États-Unis en la matière agit comme un repoussoir pour certains. Enfin, le Président souligne que l'appareil judiciaire ne dispose pas d'une culture satisfaisante en matière de concurrence et d'économie, en particulier en ce qui concerne l'évaluation des dommages par les juges.

Le professeur Epstein répond que s'il apparaît que l'application publique du droit est insuffisante, une solution serait de renforcer cette application par la puissance publique, plutôt que de promouvoir un système dual qui pose un problème de coordination. On pourrait notamment envisager de permettre aux personnes publiques de recevoir, comme les personnes privées au Royaume-Uni, un remboursement de la partie défenderesse pour une partie des dépenses engagées et de conserver cette somme dans leur budget. Si M. Epstein n'est pas certain qu'une telle solution soit souhaitable, il estime qu'il conviendrait de l'étudier avant de promouvoir le développement d'un régime d'action privée. Il admet ensuite qu'il existe de très importantes disparités entre les normes procédurales en vigueur aux États-Unis et ailleurs dans le monde. Sur ce plan, les systèmes européen, asiatique ou latino-américain se montrent plus prudents que le système américain. Il apparaît donc moins risqué de promouvoir un régime d'action privée dans ces régions, le système ne risquant pas d'être utilisé excessivement.

Pour le professeur Epstein, il convient aussi de se demander si toutes les victimes doivent pouvoir demander réparation. Selon l'arrêt Illinois Brick, toutes les victimes ne doivent pas y être habilitées car on peut parvenir à une meilleure dissuasion en acceptant d'abandonner l'objectif d'une compensation parfaite. Il convient de souligner toutefois que cet arrêt ne découle pas d'affaires de concurrence, mais de dossiers de tarification excessive relevant de tarifs directs. Dans la récente affaire *Trinko*, la Cour d'appel des États-Unis pour le deuxième circuit a dû déterminer si les acheteurs indirects étaient autorisés à réclamer des dommages-intérêts. Il s'agissait ici de savoir si AT&T était seule habilitée à poursuivre Verizon pour non-coopération, ou si ses 10 millions de clients le pouvaient également.

Quatrièmement, le professeur Epstein explique qu'il faut examiner attentivement si une application plus étendue du droit de la concurrence a toujours pour effet d'encourager une culture de la concurrence. Il émet ainsi deux réserves. Tout d'abord, les procédures engagées par des concurrents déçus peuvent conduire à un résultat inverse. Il convient de se montrer plus méfiant envers les actions en justice engagées par les concurrents qu'envers celles des consommateurs. Les règles procédurales ne tiennent toutefois pas nécessairement compte de ce problème. Deuxièmement, le professeur Epstein s'interroge sur le fond de la décision *Courage/Crehan*, reconnaissant toutefois qu'il n'avait pas connaissance de tous les éléments de l'affaire. Ce dossier ne concernait pas directement les consommateurs et on peut se demander si le fait de dissuader ce type d'accords de commercialisation entre brasseurs n'entraînerait pas une réduction du nombre des brasseries et autres points de vente de la bière. Si chaque exploitant de brasserie déçu pouvait former un recours au titre du droit de la concurrence, tous les propriétaires y seraient alors exposés. Il convient donc de se montrer vigilant quant à un tel élargissement de la portée des actions en concurrence, même si des procédures satisfaisantes sont en place.

Le Président ajoute que l'on estime généralement qu'aux États-Unis, la culture de concurrence s'est véritablement imposée après l'importante affaire de collusion qu'a connue le secteur de l'équipement électrique. Ce dossier, qui a pour origine un recours privé, a permis de faire mieux connaître des

dispositions législatives depuis longtemps en vigueur. Le professeur Epstein répond que c'est dans le domaine des ententes que le droit de la concurrence est le plus efficace et qu'un régime d'action privée serait le plus souhaitable. Il serait favorable à toute action privée dans ce domaine pour autant que les affaires de monopoles ou d'abus de position dominante ne soient jamais traitées par cette voie.

L'Allemagne fait un état des lieux des affaires de concurrence traitées dans le cadre de recours privés. La septième modification de la Loi sur les ententes, qui doit bientôt être adoptée, doit élargir les possibilités d'appliquer la législation par cette voie. Ces modifications ont été proposées pour deux raisons. Tout d'abord, il conviendrait, conformément au nouveau régime européen d'application du droit, que la dissuasion soit en partie assurée par ce moyen. Deuxièmement, le système allemand existant prévoit que toutes les amendes, dont le montant pourrait être suffisamment élevé pour jouer efficacement un rôle de dissuasion, soient recouvrées par le gouvernement. Contrairement aux États-Unis, la personne ayant subi une perte n'est pas indemnisée de manière adéquate.

L'Allemagne souligne que les recours privés jouent déjà un rôle important dans les affaires d'abus, en particulier d'exclusion abusive. Dans ce domaine, ils sont même plus courants que l'application par les pouvoirs publics et le régime allemand, qui ne souffre d'aucune faiblesse significative, fonctionne de manière satisfaisante. Toutefois, l'application du droit par voie d'action privée ne dispose d'aucun fondement juridique pour les affaires d'entente. Le droit européen, tel qu'il a été interprété dans la récente affaire Courage/Crehan, fait obligation à l'Allemagne d'élaborer une base juridique permettant d'étendre aux ententes les actions privées. Des dispositions détaillées ont été ajoutées au projet de septième modification. Tout d'abord, ces projets de mesures traitaient de problèmes de répercussion des surcoûts, ils partaient du postulat que seul l'acheteur direct peut effectivement engager des actions en dommages-intérêts. Deuxièmement, les actions privées constituant souvent des recours complémentaires susceptibles d'être retardés, les questions de calendrier devront être traitées, notamment concernant les délais durant lesquels elles peuvent être intentées ainsi que les intérêts courus avant le jugement. Une autre disposition du projet devrait faciliter le calcul des dommages-intérêts. La modification permettrait également de réduire le risque de litige pour le plaignant. Le projet aborde enfin les actions des associations de consommateurs. En Allemagne, elles ne sauraient avoir qu'un rôle secondaire et elles ne peuvent être engagées que lorsque l'application du droit par l'action publique ou par l'action privée n'a pas été efficace. L'Allemagne répète pour conclure qu'un système bien conçu de recours privé, s'il ne remplace pas l'action publique, doit jouer un rôle important dans l'application du droit de la concurrence.

Le Canada explique qu'il possède une expérience assez récente de l'élaboration d'un régime d'action privée et qu'il a donc dû trouver un équilibre entre certains éléments et problèmes mentionnés par les intervenants précédents. Les possibilités d'action publique sont limitées au Canada et toutes les affaires ne peuvent pas être traitées. Un élargissement de l'application du droit devrait permettre une dissuasion plus efficace et un meilleur respect de la loi. Il convient toutefois de ne pas encourager parallèlement les recours « stratégiques » ou une mauvaise utilisation des ressources. Les modifications apportées au régime d'action privée tiennent compte du contexte dans lequel il est utilisé, selon qu'il porte sur des affaires pénales ou des questions relevant du droit civil. Des actions collectives peuvent déjà être engagées pour les affaires pénales, notamment les ententes sur les prix et autres formes de cartels. La législation introduite en 2002 pour autoriser les recours privés distingue différents types d'affaires civiles. Le gouvernement a mis un accent particulier sur les cas d'abus de position dominante, considérés comme les plus graves affaires passibles de poursuites en droit civil. Dans ces dossiers, ce sont les recours des pouvoirs publics qui doivent prendre le pas sur les actions des personnes privées. La législation autorise par contre ces dernières à engager des poursuites en cas de refus de vente, de ventes exclusives ou liées et de restrictions de marché. Dans le même temps, un certain nombre de garde-fous ont été introduits. Il est par exemple impossible d'engager des actions privées pour les affaires déjà traitées par le Bureau de la concurrence. Le Tribunal contrôle dans une certaine mesure les affaires qu'il traite, les actions privées ne pouvant être engagées qu'avec son accord. Le Commissaire du Bureau de la concurrence dispose parallèlement du droit

d'intervenir, le Bureau de la concurrence ayant ainsi la possibilité d'avancer des arguments pertinents. Ce système ne prévoit pas de dommages-intérêts. Les parties peuvent uniquement obtenir des ordonnances d'interdiction et demander le remboursement des frais de justice. La question des dommages et intérêts n'a pas encore été tranchée. Il semble aujourd'hui trop tôt pour faire un point après l'introduction de la nouvelle législation de juin 2002. Seules neuf affaires ont été soumises au Tribunal. Les avocats ont immédiatement émis des objections de nature procédurale et interjeté appel devant la Cour d'appel fédérale.

Les États-Unis ne partagent pas la plupart des préoccupations du professeur Epstein ; l'absence de régime d'action privée ne constituerait nullement un progrès par rapport au système actuel. Comme les précédents intervenants l'ont souligné, il convient de distinguer entre les différents types d'affaires relevant du droit de la concurrence, de manière à bien évaluer l'importance à donner à ce régime d'action privée. Il apparaît que les entreprises accordent une bien plus grande attention au droit de la concurrence et que les actions privées permettent de renforcer considérablement la dissuasion par rapport à un régime reposant uniquement sur la puissance publique. Toutefois, dans les recours privés, les instances doivent sélectionner avec plus de prudence les affaires qu'il est à leur sens légitime de traiter.

Nombre des préoccupations évoquées par le professeur Epstein ne concernent pas les affaires d'ententes. L'application du droit à l'encontre des ententes constitue la tâche la plus importante pour les instances, les ententes représentant de graves menaces pour la société sans présenter d'avantages les compensant. La sur-dissuasion n'est pas à craindre pour ces dossiers. L'explosion du nombre d'actions privées s'explique essentiellement par des procédures engagées en sus de l'application des lois contre les ententes par les pouvoirs publics. Elle ne devrait nullement inciter les autorités publiques à davantage de prudence. Il convient en revanche de surveiller les recours privés engagés pour d'autres motifs, notamment les procédures lancées par les concurrents. Ces inquiétudes ne concernent nullement les affaires d'ententes. Plusieurs problèmes existent dans le système américain, relatifs notamment aux dommages-intérêts au triple et aux actions collectives, et les autres pays doivent les étudier avec soin. Les États-Unis s'opposent à un système qui serait utilisé essentiellement par les organismes publics pour se constituer un « trésor de guerre ».

Les États-Unis ajoutent que, les droits des personnes privées à engager des recours étant de plus en plus reconnus, les prescriptions accessoires font l'objet d'actions privées et ne sont plus uniquement le fait de la puissance publique. Cela induit par exemple une limitation du pouvoir de poursuite discrétionnaire permettant de définir, pour appliquer la législation, des priorités selon les conceptions en cours de ce qu'est une bonne politique. Dans les années 60, la Federal Trade Commission a soumis des centaines d'affaires de discrimination par les prix au titre de la loi Robinson-Patman, mais une seule au cours de vingt dernières années. En revanche, de nombreuses actions privées ont continué d'être engagées pour faire appliquer cette loi. Deuxièmement, il existe une relation étroite entre les règles de fond et les procédures et sanctions utilisées pour les appliquer. Le professeur Epstein a indiqué qu'il existe une tendance à l'irréversibilité, le Congrès adoptant des lois dont l'application est ensuite étendue par les tribunaux. Cela n'est toutefois pas vrai pour le droit de la concurrence. C'est ce qu'illustrent bien les actions privées. Le droit des États-Unis comporte un certain nombre d'éléments uniques visant à encourager ces recours. Ces éléments étant contraignants, le seul moyen dont disposent les juges pour ajuster leurs décisions est de modifier la doctrine. L'affaire *Potash (Blomkest)* évoquée par le professeur Epstein constitue un excellent exemple. L'affaire *Blomkest* a donné lieu à une décision fondamentalement mauvaise, entachée d'erreurs multiples. La première leçon à tirer ici est qu'il convient d'être conscient des distorsions de règles de responsabilité substantielle qui découlent des efforts judiciaires visant à empêcher un recours excessif aux actions privées. Dans le dossier *Matsushita*, un recours privé en dommages-intérêts au triple, la Cour Suprême a interprété de manière très restrictive la notion de « contrat ». Dans cette affaire, des fabricants de téléviseurs américains alléguaient que des fabricants japonais s'étaient depuis plusieurs années entendus sur les prix pratiqués au Japon et utilisé les profits ainsi dégagés pour vendre leurs appareils à perte aux

États-Unis. La Cour Suprême a conclu que ces allégations n'étaient pas recevables, utilisant la notion de « contrat » pour donner gain de cause aux parties défenderesses. Au fil du temps, la notion restreinte de « contrat », élaborée dans le contexte d'une entente horizontale sur des prix d'éviction, a été utilisée dans les affaires d'ententes visant à augmenter les prix, comme par exemple le dossier *Blomkest*, où elle apparaît bien moins justifiée. La deuxième leçon est que dans un système décentralisé, ces affaires peuvent être traitées par différents tribunaux, au risque de décisions incohérentes. L'affaire *Blomkest* constitue un bon exemple d'une situation où les plaignants ont choisi la mauvaise tribune pour engager des actions privées dans le cadre du droit de la concurrence. Ils ont en effet intenté un recours devant le huitième circuit, dont le scepticisme à l'encontre du droit de la concurrence était bien connu.

Le BIAC commence son intervention en soulignant que la majorité des actions privées au titre du droit de la concurrence sont engagées par des sociétés contre d'autres sociétés. Deuxièmement, il indique que la clarté des règles de fond est importante lorsqu'il s'agit de créer une culture de la concurrence. Il apparaît ainsi que, dans de nombreuses juridictions, le régime d'action privée doit tout d'abord se concentrer sur les ententes injustifiables, comme au Canada et, depuis une date plus récente, au Royaume-Uni. Troisièmement, l'introduction de diverses règles en matière d'application du droit de la concurrence par des actions privées a des incidences sur d'autres domaines du droit, notamment les litiges en responsabilité en matière de produits ou d'environnement. Il convient de tenir compte de ces effets indésirables. Le BIAC revient ensuite sur un certain nombre de points évoqués dans son étude. Tout d'abord, si les actions privées sont introduites, elles doivent bénéficier du soutien des instances publiques chargées de l'application du droit. Deuxièmement, il est important de disposer de garde-fous adéquats pour faire obstacle aux procédures abusives : seuils devant être dépassés avant qu'une affaire ne puisse être traitée par un tribunal, pouvoir discrétionnaire des tribunaux d'adopter des décisions onéreuses à l'encontre des plaignants dans certaines circonstances appropriées, existence de règles claires concernant l'accessibilité et le droit d'agir. La confidentialité des éléments susceptibles d'être échangés, lors des actions privées, entre les instances publiques compétentes et les tribunaux est une autre question importante dont il faut tenir compte. En Europe, après l'affaire des *Banques espagnoles* et la récente décision *Akzo*, seule la Commission bénéficie d'un accès complet aux documents et est habilitée à en connaître le contenu, les parties ne pouvant qu'être informées de leur existence. La question de la double incrimination au sein d'une même juridiction doit également être prise en considération. Comme le professeur Epstein l'a déjà indiqué, il faut savoir comment prendre en compte les amendes lorsque des dommages-intérêts ont été accordés à des plaignants qui sont des personnes privées. Enfin, la relation entre action privée et programmes de clémence constitue une question importante, comme Emil Paulis l'a indiqué.

Selon la Suisse, parmi les trois raisons généralement invoquées pour expliquer la place limitée des actions privées en Europe (dommages-intérêts au triple, actions collectives, transfert des honoraires ou frais), c'est la dernière qui, bien que souvent sous-estimée, apparaît la plus importante. Dans presque tous les systèmes européens, la partie n'ayant pas obtenu satisfaction doit payer l'ensemble des frais engagés, y compris ceux de l'autre partie. Ce problème pèse sur le plaignant plus que sur la partie défenderesse. Une analyse économique de la procédure civile montre que des risques croissants menacent le plaignant, plus encore que la partie défenderesse. Elle montre également qu'un plaignant doit être deux fois plus convaincu de ses chances de l'emporter que la partie défenderesse pour engager une action en justice. En d'autres termes, le plaignant doit estimer qu'il a 70 % de chances de l'emporter avant d'engager une action, alors que la partie défenderesse doit estimer ses chances à 30 % pour préparer une défense. Ainsi, pour faciliter les recours privés, il serait judicieux d'intervenir sur les frais et honoraires. Il apparaît toutefois difficile d'introduire des changements à court terme, car ils n'auraient pas seulement une incidence sur le droit de la concurrence mais également, plus généralement, sur le fonctionnement des systèmes juridiques.

La Suisse ajoute qu'en principe, un régime d'action privée et une application du droit par la voie administrative sont placées sur un pied d'égalité. Les actions privées demeurent toutefois assez rares.

Depuis plus de 10 ans, les juges en charge des affaires civiles doivent renvoyer les affaires de concurrence à la Commission afin d'obtenir son avis sur le fond en qualité d'*amicus curiae*. Ce système de renvoi obligatoire doit encourager les parties à engager des actions en justice et les juges à traiter ces affaires. Les tribunaux ont en fait adopté dans plusieurs affaires des mesures provisoires, prononçant notamment des ordonnances d'interdiction. Cela peut s'expliquer par la préférence des juges pour l'émission d'ordonnances préliminaires car ils savent qu'ils pourront obtenir l'avis de la Commission sur le fond de l'affaire s'ils doivent confirmer la mesure préliminaire et adopter une décision permanente.

L'Italie commence par revenir sur un point soulevé par la Suisse dans son intervention. S'il est vrai que les actions privées en dommages-intérêts sont rares en Europe, de nombreuses demandes de réparation provisoire sont cependant déposées. En Italie, par exemple, des centaines de réparations provisoires ont été décidées pour des affaires dont les tribunaux n'avaient jamais examiné le fond. Dans ces affaires, généralement, la relation contractuelle entre les parties se poursuit après l'ordonnance provisoire, les demandes de dommages-intérêts intervenant selon toute vraisemblance après la fin de cette relation. Les douze dossiers présentés dans l'étude consacrée aux demandes privées en matière de dommages-intérêts minorent la portée d'un régime d'action privée pour l'application du droit de la concurrence en Europe. L'Italie s'oppose en outre à l'opinion de la Commission européenne, qui estime que le Règlement 1/2003 facilite ce type de recours. Selon elle, le Règlement 1/2003 serait au mieux neutre et pourrait même freiner ces actions. Avant qu'il ne soit adopté, une partie souhaitant obtenir des dommages-intérêts était assurée que le juge ne pourrait octroyer une exemption au titre de l'article 81(3), certitude qui n'existe plus désormais. Il apparaît ainsi que les incitations à engager des actions privées ont donc perdu, et non pas gagné, en importance.

Le Président corrobore le premier point soulevé par l'Italie sur les douze affaires de dommages-intérêts. Il n'existe pas en Europe de registre permettant d'avoir une vision complète des réalités dans ce domaine. Même si ces affaires sont certainement beaucoup moins nombreuses en Europe qu'aux États-Unis, il semble assez dangereux de se fonder sur les douze qui sont été présentées dans l'étude de la Commission, ce nombre étant insuffisant pour être véritablement représentatif.

En réponse à la question de l'Italie concernant le Règlement 1/2003, la Commission européenne explique que le fait que les juges nationaux soient désormais en mesure d'octroyer des exemptions constitue un élément positif de ces nouvelles dispositions. Le système précédent était très déficient. Des actions pouvaient être engagées devant un tribunal national et le juge trancher en faveur du plaignant et contraindre les parties défenderesses à verser des dommages-intérêts du fait qu'il n'a pas été en mesure d'examiner les éléments favorables à la défense. Bien que l'affirmation de l'Italie soit en un certain sens fondée, la situation actuelle constitue une évolution positive.

La Commission commente ensuite l'intervention des États-Unis concernant le risque que les instances ne perdent une partie de leur pouvoir discrétionnaire d'application du droit lorsque les actions privées se multiplient. La conclusion logique de ce raisonnement serait que ces instances perdraient leur monopole d'interprétation des règles de fond du droit de la concurrence. Cela constituerait toutefois une évolution positive si les autorités compétentes et les décideurs étaient plus nombreux à participer à l'élaboration d'un ensemble de textes faisant jurisprudence. Bill Kovacic a rédigé un excellent essai sur l'histoire du droit de la concurrence, qui expliquait comment les actions privées contribuent à la formation d'une doctrine dans ce domaine. Il est toujours dangereux de fonder sa critique des actions privées sur seule affaire. Si l'on examine le régime dans son ensemble, il apparaît que ces procédures ont apporté une contribution exceptionnelle aux règles de fond du droit de la concurrence américain. Il convient bien sûr de veiller également à ce que les instances publiques chargées de l'application du droit s'appuient des règles satisfaisantes. Plus elles sont claires et mieux elles sont formulées, plus faibles sont les risques d'effets négatifs, inhérents également aux actions privées. Globalement, il semble préférable que les régimes d'action privée et d'action publique coexistent et contribuent à l'élaboration des règles de fond.

La Commission fait en outre observer qu'il est assez surprenant d'entendre les États-Unis vanter les vertus de l'action publique. Les États-Unis souffrent peut-être d'un excès d'actions privées, mais l'Europe a une histoire différente et cherche à compléter son régime d'action publique par des recours privés. Comme Sir Christopher l'a suggéré, il faudrait en définitive parvenir à une solution tirant avantage de l'action privée tout en minimisant les risques. Le précédent débat sur la distinction entre différentes catégories d'affaires apparaît également fondamental. Les recours privés peuvent dans certains cas être extrêmement bénéfiques. Comme les précédents intervenants l'ont indiqué, il y a peu à craindre d'une surdissuasion des ententes. La Commission met également en garde contre la trop grande importance accordée dans les débats européens aux excès observés aux États-Unis. Il semble possible de limiter en Europe certains excès et de concevoir un régime d'action privée qui soit davantage moderne et équilibré.

Selon le Président, la surdissuasion est toujours synonyme de coûts. Même s'il est vrai que les ententes sont néfastes et qu'il convient de les combattre, la surdissuasion ne participe pas nécessairement du bien-être général.

La France ajoute qu'elle a suivi avec un grand intérêt la comparaison entre les avantages des actions privées et de l'action publique. Outre des facteurs tels que la rapidité et l'efficacité, d'autres critères fondamentaux permettent d'évaluer les deux régimes, comme par exemple la certitude juridique et la prédictibilité. La prédictibilité ne réfère pas nécessairement à la détermination des dommages, mais également aux règles de fond. On pourrait envisager deux systèmes : dans le premier, un tribunal ne pourrait trancher la question des dommages qu'après que l'autorité de concurrence a décidé qu'il y avait violation des règles de concurrence ; dans le deuxième, l'autorité de la concurrence comme l'ensemble des juges peuvent statuer sur la question de la violation. Ce dernier système est plus ouvert, mais bénéficie d'une moindre prédictibilité. La question de la spécialisation des juges se poserait si elle était adoptée ; la solution évoquée par la Suisse dans son intervention, selon laquelle le juge peut solliciter l'avis d'une autorité de la concurrence sur le fond de l'affaire, serait également envisageable. Il s'agit là d'un bon exemple de coordination entre régimes d'action privée et d'action publique.

La France présente également le point de vue d'un juge sur la question des actions privées. L'absence d'expérience et d'expertise judiciaire en matière économique est une question souvent débattue dans ce pays. Il convient toutefois de rappeler que la France possède une expérience juridique considérable en matière de concurrence. Dans les affaires d'ententes illicites, environ cinquante décisions prises par le Conseil de concurrence ont été renvoyées devant la Cour d'appel, quinze d'entre elles ayant même fait l'objet de pourvois devant la Cour de cassation. Les tribunaux doivent alors appliquer les quatre critères de l'article 81(3), qui prévoit notamment une analyse économique. Une deuxième raison, de nature institutionnelle, explique pourquoi les juges français sont assez familiers des principes économiques : lorsqu'il est fait appel des décisions du Conseil de la concurrence, les juges d'appel doivent procéder à un réexamen complet du dossier. Les juges doivent donc trancher sur le fond de l'affaire, notamment les principes économiques sous-jacents, et examiner l'ensemble du dossier élaboré par le Conseil.

Troisièmement, il convient de noter que l'application du droit par voie d'action privée présente en France plusieurs problèmes. De nombreuses sociétés préfèrent soumettre leurs plaintes aux autorités de la concurrence, ces institutions possédant des pouvoirs d'investigation et des ressources dont les tribunaux de droit commun ne disposent pas. Elles n'ont que récemment pris conscience de la possibilité de former directement, pour les affaires de concurrence, un recours contentieux devant les tribunaux. En France, comme dans d'autres pays, l'évaluation des dommages est extrêmement complexe. Les dommages-intérêts au triple n'existent pas, et ce sont les principes généraux du Code civil qui s'appliquent, exigeant une restitution complète tant des pertes effectives que des manques à gagner. Ces derniers supposent toutefois d'évaluer quels auraient été les résultats de la société en l'absence de conduite illicite, un exercice difficile. Enfin, la France indique que les tribunaux nationaux européens pourraient appliquer le droit de la concurrence de manière plus différenciée. Par exemple, la Cour d'appel a traité une affaire où le plaignant demandait des dommages-

intérêts à un fabricant de produits de luxe qui avait mis en place un système de distribution sélectif. Le plaignant avait été exclu de ce circuit et arguait que le système de distribution dans son ensemble était illicite. La Cour d'appel n'a toutefois établi qu'une clause illicite existait dans le contrat de distribution et a confirmé la légalité du reste du système. Cet exemple montre que les tribunaux peuvent effectivement intervenir de manière différenciée dans les affaires de concurrence.

Le Japon commence sa série d'observations en rappelant à l'auditoire que la société japonaise est tout le contraire d'une société « procédurière ». Des réformes judiciaires sont néanmoins envisagées pour étendre dans une mesure raisonnable les recours privés, par exemple en augmentant progressivement le nombre d'avocats. Dans les affaires de concurrence, il existe la possibilité, parfois exploitée, d'engager des actions privées en dommages-intérêts et en injonction. Le Japon bénéficie toutefois d'une expérience assez limitée des moyens d'application du droit par voie d'action privée. Des projets ont en outre été élaborés pour permettre à certaines associations de consommateurs d'engager des procédures judiciaires. Le Japon indique également qu'un régime d'action publique ne permet pas une dissuasion suffisante. En outre, il semble peu probable que le JFTC obtienne des ressources supplémentaires dans un futur proche, outre celles prévues par les réformes déjà en cours d'examen par le législateur. On pourrait donc d'attendre à l'avenir à un recours aux actions privées, ce qui profiterait également à la mise en œuvre du droit de la concurrence par les autorités publiques. Les recours privés en étant encore à leurs balbutiements et le Japon n'étant pas encore en mesure de fournir beaucoup d'informations sur ce thème, de nouvelles discussions seraient utiles en la matière.

La Hongrie souligne un autre aspect de la relation entre régimes d'action privée et d'action publique. Il est vrai que si, dans une situation idéale, un régime d'action publique était optimal, le fait de disposer également de recours privés pourrait conduire à des excès. D'un autre côté, on devrait considérer que l'on ne saurait bénéficier d'un régime d'action publique parfait en l'absence d'action privées. En Hongrie par exemple, l'autorité de concurrence jouit d'un monopole pour la mise en œuvre du droit, au moins en ce qui concerne le droit de la concurrence national. Dans le même temps, le droit souligne qu'il est de sa responsabilité d'entendre les plaignants. Dans cette situation, il apparaît très difficile, voire impossible, de définir des priorités et de sélectionner les affaires à traiter. En l'absence de recours privés, les seuils fixés pour le traitement des affaires sont extrêmement bas. L'autorité de la concurrence doit donc engager de nombreuses procédures, contrairement sans doute à ce qui serait le cas s'il était possible d'engager des actions privées. Des modifications de la loi sur la concurrence sont envisagées dans ce pays. Il s'agit d'introduire les recours privés dans le droit national de la concurrence, ce qui devrait permettre de mieux définir les affaires à traiter en priorité par les instances publiques.

L'Australie fait une observation supplémentaire concernant son expérience et celle de la Nouvelle-Zélande. Les deux pays s'appuient depuis 30 ans sur un régime mixte d'action privée et d'action publique qui intègre une grande partie des meilleures traditions du système britannique et qui évite ce que l'on considère fréquemment comme les excès du système américain en ce qui concerne les tribunaux, l'évaluation des dommages, les frais de justice et l'utilisation du système juridique. Ce régime a sans aucun doute promu une culture de la concurrence et du respect de la loi. Les affaires privées ont permis l'émergence d'une très importante jurisprudence et les affaires traitées devant la Haute cour ont permis de mieux comprendre le fonctionnement du droit et les aspects économiques des affaires de concurrence. Ce modèle se situe ainsi quelque part entre ceux, débattus aujourd'hui, de l'Europe et des États-Unis. L'existence de garde-fous empêchant un usage excessif du système est particulièrement notable. Son amélioration suscite toutefois des débats. Ce sont principalement les avocats du secteur privé qui émettent des suggestions à ce sujet, car ils souhaitent bénéficier d'un meilleur accès aux recours privés.

Les États-Unis soulignent qu'ils envisagent la question de manière assez similaire à la Commission européenne. La question fondamentale est de parvenir à un bon équilibre. Il est difficile de déterminer quelles fonctions doivent être exclusivement assumées par les pouvoirs publics. La réponse à cette question

dépend fondamentalement du domaine de droit concerné. L'idée selon laquelle davantage d'actions privées sont nécessaires dans le domaine des ententes semble recueillir un consensus. Les positions sont plus hésitantes en ce qui concerne les affaires d'abus de position dominante. Il semble ainsi que l'on reconnaisse implicitement que les autorités chargées de l'application du droit n'appliquent pas pleinement le droit dans les affaires de position dominante simple. Ainsi, dans certains cas, les autorités n'ont pas engagé d'actions, usant de leur pouvoir discrétionnaire. Avec une privatisation complète de l'exécution, les personnes privées peuvent faire pleinement valoir le droit, par exemple pour les affaires de prix excessifs relevant de l'article 82. Dans certains domaines également, les pouvoirs publics ne doivent pas constituer la seule autorité compétente et il apparaît souhaitable que l'autorité soit partagée. C'est notamment le cas pour certaines affaires horizontales où les pouvoirs publics sont à l'origine de du manquement au droit. C'est par exemple le cas des États-Unis avec l'affaire au cours de laquelle ont été remises en cause les pratiques de certaines professions libérales, notamment la profession juridique. La Federal Trade Commission et l'État de Virginie ont refusé de statuer à ce sujet, mais un particulier a déposé un recours à l'encontre de la détermination conjointe d'honoraires, l'emportant devant la Cour suprême.

Dans ses remarques de conclusion, le professeur Epstein souligne toute l'importance de conserver un rapport satisfaisant entre régimes d'action civile et d'action publique. Le système européen se caractérise par une proportion de 90 % d'action publique, alors que ce rapport est exactement inverse dans le système américain. Les deux structures pourraient connaître une évolution radicale si elles se rapprochaient d'une moyenne de 50 %. Il convient en outre de reconnaître que l'application du droit pose de grandes difficultés lorsqu'un seul acteur décide de poursuivre la procédure et que 99 % des personnes s'y opposent. On aboutirait alors, non pas à plus de concurrence et d'innovation sur le marché, mais à une situation où l'application du droit profiterait toujours à la partie la plus exigeante. La personne ayant adopté la position la plus extrême jouirait ainsi d'un monopole que personne d'autre ne pourrait contester. Ce problème peut effectivement se présenter et il faut en avoir conscience. Enfin, le professeur Epstein observe que les ententes doivent constituer la principale cible des actions privées et les affaires d'abus de position dominante occuper une place bien moins importante, les fusions n'étant quant à elles simplement pas adaptées à l'action privée.

Le Président remercie le professeur Epstein pour sa contribution au débat. La discussion a montré qu'il existe sur de nombreuses questions un assez large consensus. Elle a également mis en évidence certains inconvénients des régimes d'action privée.

## CHAPTER 2

### *DISCOVERY AND GATHERING OF EVIDENCE*

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## **Discovery and Production of Evidence in Private Litigation**

### **Suggested Issues and Questions for Consideration in Written Submissions**

#### **1. Discovery of Documents**

What rights do parties have to compel the production of documents held by opposing parties and third parties before a trial? How specific must any requests be in identifying documents? What limits apply in terms of relevant time period, geographic area, and range of products subject to production?

What is the role of courts in the gathering of documentary evidence (for example, can courts order the production of documents, and/or issue "protective orders" that limit use or access to sensitive business information)?

On what grounds can the production of documents be refused (for example, on grounds of the attorney/client privilege)?

What sanctions exist if a refusal to disclose a document is not justified?

Are the procedural rules concerning production of documents in competition cases the same as those that apply to other economic disputes between private parties?

What are risks and concerns associated with discovery procedures? If such risks/concerns exist, what can be done to address them?

#### **2. Witnesses**

What is the role of expert witnesses in private litigation? Are they court appointed and/or appointed by the parties?

Is cross-examination of witnesses/expert witnesses possible? If not, how can the credibility of evidence provided by witnesses/expert witnesses be examined?

What is the role of the privilege against self-incrimination in private antitrust actions (for example, can the privilege be invoked in civil litigation; can any adverse inferences be drawn where a witness invokes the privilege against self-incrimination and refuses to testify; would the privilege apply also with respect to the risk of foreign prosecutions)?

#### **3. Competition Authorities and Gathering Evidence for Private Litigation**

What role can a competition authority play in the evidence gathering process for private litigation purposes? Can a court compel the competition authority to provide information it has on file?

What are the rules concerning private parties' access to agency files for the purpose of private litigation?

Can evidence gathering for the purpose of private litigation interfere with possible, pending, or completed public law enforcement?

## DENMARK

There is no special legislation regulating damages in cases of infringements of EC or national competition law in Denmark. Therefore, actions for these kinds of damages follow general case law concerning liability in tort and liability in contracts, and the procedural rules are identical to those used in other fields of Danish law.

Danish case law within this area has only recently started to evolve. So far, only a limited number of actions for damages in cases of infringements of competition law have been brought before the courts.

The Danish Competition Act is administered by the Competition Authority, an administrative body subordinated to the Competition Council. The Council is responsible for taking decisions in all cases of major importance based on the Competition Authority's recommendations. Decisions taken by the Competition Authority or the Competition Council can normally be appealed to the Competition Appeals Tribunal. Competition Council's decisions can only be brought before the ordinary courts after the Competition Appeals Tribunal has made its decision, upon which an appeal to the High Court is possible.

Neither the Competition Authority, nor the Competition Council is competent to decide on matters of compensation or damages.

According to the Danish Competition Act § 23, it is a criminal offence to violate §§ 6 or 11 or article 81 and 82 and undertakings doing so, intentionally or by gross negligence, are punishable by fines. Only the public prosecutor has authority to impose fines for infringements of the Danish competition act. If the defendant does not accept the fine proposed by the public prosecutor, the case goes to court.

### **1. Discovery of Documents**

The provisions concerning the courts' ability to order disclosure of documents are set forth in the Administration of Justice Act § 298-300. The procedural rules in competition cases do not differ from the procedural rules in other economic disputes between private parties.

On request from a party, the courts may order parties to the case or third parties to disclose any relevant document in their possession or custody.

Before the courts can order disclosure of documents, a number of conditions must be met. First, the party requesting the document is required to describe which fact that should be proved by the documents, and the party shall make probable that the documents can be of importance as proof for these circumstances.

Furthermore, the party requesting a document is required to specify exactly which document he wants. A party can e.g. not just ask for all correspondence, accounts of competing companies, or contracts, hoping the documents might contain some information that supports his case. It is assessed in each individual case whether the conditions are met.

If a party fails to comply with an order of disclosure, this may be taken into account by the court as evidence against him. The court does not have any further possibility to force the party to comply with its order.

As regards obtaining information from third parties, courts may fine or imprison for as long as six months third parties that fail to provide information requested by the courts, cf. the Administration of Justice Act §§ 299(2) and 178(1).

When using private litigation in Denmark, parties must present all the relevant documents and facts before the court. The court makes its decision based on the presented material only. Normally, courts therefore do not play an active role in the process of gathering evidence. As described above, courts can order disclosure of documents, but an order will be based on a request from a party.

## **2. Witnesses**

The Administration of Justice Act contains provisions which regulate the use of surveyor experts. A surveyor expert may reply to specific questions posed by the parties with the permission of the court. A surveyor inspects a matter physically and gives his expert opinion on the matter.

A survey can only be initiated at the request of the parties, but the court may call on the parties to request a survey. The court decides whether the request is to be allowed and the court appoints the surveyor.

Parties may also ask for an expert's opinion or summon expert witnesses. The Administration of Justice Act does not contain specific rules concerning expert witnesses.

It is not advisable for the parties to obtain such opinions/declarations unilaterally as their evidential value will be reduced. Furthermore, unilateral reports may be refused evidential value in some cases.

Cross-examination of witnesses and expert witnesses is possible, cf. the Administration of Justice Act §§ 302 (1).

In general, the parties' lawyers question the witnesses. However, the court may take over the examination if the lawyers' examination is improper or does not seek to evoke a clear and true explanation.

In general, anybody can be called upon to act as a witness before the court. However, according the Administration of Justice Act, there are a number of exceptions to this rule. A party is e.g. not obliged to testify, if there is a risk of self-incrimination, cf. the Administration of Justice Act, § 171 (1).

## **3. Competition Authority and gathering evidence for private litigation**

The Danish Competition Authorities does not actively participate in gathering evidence for private litigation purposes.

The Act on public Access to documents in Administrative files is not applicable to cases investigated under the Danish Competition Act. Instead, private parties' access to the Competition Authority's files is regulated in the Danish Public Administration Act.

Consequently, undertakings which are not considered to be party in a pending case cannot demand access to the Competitions Authority's file. Nevertheless, the Competition Authority always assesses whether the files contain any business secrets. If there is no sensitive information in the files the

Competition Authority will normally grant competitors that have a genuine interest in the case access to files.

When considering whether a private party can have access to the Competition Authority's files, it is not taken into consideration whether the files should be used for a private litigation.



## GERMANY

### 1. Introduction

According to Section 33 GWB (German Act against Restraints of Competition, ARC), a violation of national competition law entitles to claims for damages. Violations of European competition law entitle to claims for damages according to Section 823 (2) BGB (German Civil Code) in conjunction with Article 81, 82 EC. The ARC is currently being revised with the 7<sup>th</sup> amendment to German competition law. Under the draft 7<sup>th</sup> amendment, Section 33 ARC will be the legal basis for claims for damages arising from the infringement of both national and EC competition law. In addition, important provisions to facilitate the burden of proof will be introduced, in particular as regards the passing on defence.

However, in principle the ARC does not contain any specific procedural provisions for claims for damages in the case of cartel law infringements. Apart from a few exceptions, the establishment of facts, the burden of proof and the evaluation thereof are therefore mainly regulated according to the general civil procedural provisions laid down in the German Code of Civil Procedure (“Zivilprozessordnung”, ZPO). In Germany, civil law proceedings are dominated by the principle of party presentation (also referred to as adversary system). According to this principle, the parties are obliged to present and, where necessary, prove the facts on which the court has to decide. The burden of proof lies principally with the plaintiff. He has to submit a complete chain of evidence proving substantially all facts that justify his claim. However, there are exceptions to this general principle, in part due to judicial powers, in part due to special rights of the parties and due to an alleviation of the burden of proof.

### 2. Rules of evidence in the 7<sup>th</sup> amendment of the ARC

The 7th Amendment to the ARC contains two rules of evidence which in future will to a significant extent facilitate the production of evidence of damages by plaintiffs. According to the new Section 33 (3) sentence 3 the proportional profits gained by the company as a result of the cartel law violation can be taken into consideration when calculating the damages. Another amendment will be of particular significance with regard to the possible passing on of damages to down-stream market levels. The new regulation clarifies that the defendant needs to prove the passing on of damages to the purchaser by the plaintiff. Due to the difficulties concerning proof of evidence in most cases the passing-on-defence is therefore denied.

### 3. Discovery of Documents

#### 3.1 *Judicial powers of order*

The court can order ex officio a party to submit documents and files in its possession to which a party has referred. Of relevance is that a party has to have referred to the documents in question. In order not to come into conflict with the principle of party presentation the order to submit documents may not lead to investigation into elements of the facts of the case which were not presented. The judge’s powers to order the production of documents is therefore not comparable with the wide-reaching possibilities in U.S. pre trial discovery. If a party does not comply with the court order, no sanctions are imposed. However, refusal to do so can be taken into consideration by the court in its evaluation of the evidence to the party’s disadvantage.

The court can also oblige third parties to present documents where a party has referred to documents which are in the possession of a third party. In the case of refusal third parties are liable to the same consequences of civil disobedience as witnesses. This means, that the court may enforce its order by means of an administrative fine between five and 1.000 €, arrest between one day and six weeks or – in case of repeated disobedience imprisonment for contempt of court to an absolute maximum of six months. This does not apply, however, if the third party can invoke his right to refuse evidence or the unacceptable presentation of documents. Unacceptable presentation applies if the production of documents would involve considerable effort for the third party or would cause a massive disruption of his course of business. On rights to refuse evidence see II. 4 below.

### **3.2 *Parties' rights of application***

The parties can apply to the court to have documents produced by the opposing party. This is possible in two ways: firstly, if the opposing party has referred to the document as evidence. Secondly, the party can oblige his opponent to submit documents if the party has a substantive-legal right vis à vis the opposing party to have this document presented. An obligation to submit a document exists, among other cases, where a party is under a duty to account for profits resulting from e.g. the infringement of an intellectual property right. Sanctions are not imposed in the case of failure to submit the document in these cases either. However, any failure to do so can be considered by the court to the disadvantage of the opposing party.

The parties can also apply for the court to order a third party to submit documents. This is conditional on the party giving evidence having a material-legal right to the production of documents from the third party. In contrast to judicial powers it is therefore not sufficient that a party has referred to a document in the possession of a third party.

## **4. Witnesses**

### **4.1 *Expert witnesses appointed by the court***

Where knowledge is required to determine legally relevant facts, which is not at his disposal, the judge can appoint expert evidence. The appointment of expert evidence lies within the sole discretion of the judge. It does not require application from a party and a request from a party for expert evidence can be denied by the court. The expert is always selected by the judge unless the judge requests the parties to agree on and select one themselves. The judge supervises the expert's work and can instruct him on the form and scope of the report. Expert evidence is always submitted in the form of a written report. It is also possible for the expert to stand witness in the court as an expert witness. The parties are free to comment on the expert report or, if the expert is heard as an expert witness, to ask him questions.

### **4.2 *Expert witnesses appointed by the parties***

If a party submits an expert report, which itself, and not the court, has commissioned, this does not constitute expert evidence but merely a (substantiated) party statement.

### **4.3 *Hearing of witnesses***

The cross-examination of witnesses is very unusual in German court practice. According to the German rules governing the examination of witnesses, a witness is examined by the presiding judge who is to ensure that the witness is allowed to make his statement without interruption and in a coherent manner. Thereafter, the other members of the judicial panel as well as the parties and their lawyers are entitled to ask supplementary questions. The lawyers normally question one after the another, starting with the side

that put forward the witness as evidence. The court may exclude questions exceeding the scope of its order to take evidence.

#### **4.4 *Rights to refuse evidence***

The right to refuse evidence can be based on personal or objective reasons. A lawyer is accorded a personal right to refuse evidence on account of his lawyer-client relationship. The lawyer is subject to full professional confidentiality and therefore cannot be obliged, even in a civil law case, to provide information about his client or to reveal facts which he has learned from his client. The threat of criminal prosecution can justify a witness's right to refuse evidence for objective reasons. The duty to give evidence does not amount to the witness having to disclose his business secrets.

### **5. Competition Authorities and Gathering Evidence for Private Litigation**

Under Sec 90 ARC the Bundeskartellamt is to be informed by the courts of all legal actions arising from cartel agreements and upon request be sent all briefs, records, orders and decisions. Members of staff of the Bundeskartellamt are allowed to take an active part in the court proceedings.

In order to submit evidence the parties can also request a public authority to submit a document, either by the court proposing the submission of a document by way of official assistance or if the parties have a substantive-legal claim to the production of the document. There is currently no rule obliging the Bundeskartellamt to submit documents to private persons. There are no plans to introduce such a regulation in the 7<sup>th</sup> amendment of ARC either. However, measures will be in place in future to facilitate the production of evidence for the parties. Section 33 (4) will, according to the draft 7th amendment, state that final decisions of national competition authorities on the infringement of competition law are binding upon parties to proceedings for damages, as far as these decisions state an infringement of competition law. Furthermore, parties can be granted permission to inspect files if they have a legitimate interest in them. A legitimate interest can come into consideration, in particular, if knowledge of the files is necessary to enforce civil law claims.



## HUNGARY

### 1. Discovery of Documents

According to the Code of Civil Procedure, the court takes evidence for the purposes of determining the facts necessary to decide the case. As a general rule the facts necessary for deciding the case are to be proved as a general rule by the party in whose interest it is that the court accepts them to be true. At the filing of the claim to the court the plaintiff has to rely on the documents, which it would like to be submitted to the court.

The rule on the burden of proof in cases of claims for damages, according to the general rule on liability in damages, is as follows: the one suffering damages (the plaintiff) shall prove (i) the behaviour (active or passive) causing the damages, (ii) the damage itself (the fact that damage occurred and the level of it) and (iii) the causality between the behaviour and the damage. Further, it is up to the plaintiff to prove (iv) that the behaviour infringes the law. The rule on damages is an “exculpation system”, which means that it falls to the defendant to (v) exempt himself from liability on the ground that it was not his fault, that is to say it is for the defendant to prove that he behaved himself in the given situation as is “generally expectable”. Further, in case of acknowledgement of a debt, it is for the person who acknowledged the debt to prove that the debt does not exist, that the debt cannot be claimed in court or that the contract is not valid under the rules of the Civil Code. In such cases the burden of proof shifts to the person who made the acknowledgement. The court is entitled to accept facts to be true if they are admitted by a counter-party, if the statements of parties are identical and if a counter-party does not dispute a statement against notice by the court. Further, the court is entitled to accept facts to be true if those are known by the court as facts of public knowledge, and the same rule applies in respect of facts officially known by the court. These facts are taken into consideration even if the parties do not rely upon them, but the court shall notify the parties of these facts.

The court may order probation ex-officio only if it is allowed by law. According to the Code of Civil Procedure itself the court may:

- obtain documents in the possession of authorities, notaries and other organisations if the party cannot turn directly to these entities,
- verify the authenticity of public and private deeds,
- order probation considered necessary in marriage law cases,
- order ascertainment of paternity,

If certain documents indicated by a party are in the possession of the other party the court may only oblige the possessor to present them if under civil law the party should present or hand over those proofs anyway. Such an obligation exists especially if the document was prepared for the benefit of the other party, or it attests a legal relationship in which it is involved. The frame provided by the Code of Civil Procedure is therefore rather narrow. However in practice upon request the courts are willing to order the presentation of any document considered to be necessary and it is not examined whether the possessor would have an obligation under civil law to present or to hand it over. On the other hand there are no

effective sanctions to ensure that the requested documents would be submitted. Though the Code of Civil Procedure prohibits acting in bad faith and in this frame the court shall impose a fine on the party, who conceals a fact or circumstance about which he must have known that such fact or circumstance is relevant to deciding the case this tool is not always efficient enough. In practice unless more important interests are at stake the parties may agree to submit the requested document in order to avoid offending the court. Another solution could be to summon e.g. an official of the party who must have knowledge on the issue because the refusal to take testimony is an act sanctioned by criminal law.

If a document is in the possession of a person not party in the litigation than upon request the court summons it as a witness and orders the presentation of the document. A witness may not be heard about state, official or business secrets unless released from the obligation of secrecy.

The witness has the right of silence if

- it is the relative of any of the parties as defined by the Act,
- it would indict itself or its relative with the perpetration of a crime,
- it got known the fact as a doctor, advocate or as the practitioner of another profession subject to professional secrecy unless authorised by the relevant person,
- it participated in the preceding mediation process as a mediator or expert.

The witness, who - against proper summon - does not appear at the court or leaves without permission, or refuses to give witness testimony without giving reasons or against the order of the court shall bear the costs caused and can be fined by the court. Further, the court is entitled to order that the witness be brought before the court.

Beside the rules above there are no precise provisions on discovery. However evidently there is no rule on limiting the admissibility of evidences obtained through disclosure procedure outside Hungary, either. Since neither the Code of Civil Procedures addresses the topic, nor the published court practice has a saying on this, it is not possible to foresee how Hungarian courts will consider the admissibility of evidences, which are products of foreign discovery, taking into consideration the “free evidencing system”, however it is to be noted that there is no legal norm precluding the admissibility of such evidence.

## **2. Witnesses**

If the establishment or assessment of substantial facts or circumstances require special expertise the court does not have it invites an expert to submit its opinion. Normally only one expert is applied and more than one expert can be asked to provide opinion if questions requiring differing expertise is at stake. The expert should be selected from the list of judicial experts or expert institutions authorised by law. Other experts may be invited for important reasons however. If necessary the parties should be heard before the invitation of the expert and if possible their mutual proposal should also be taken into account.

The parties may submit opinions provided by other experts to support their arguments. The court however is free to accept or reject these arguments.

The infringement is a legal issue to be decided by the court itself, therefore no expert evidence is admissible in this respect. However in respect of EC law the expert advice of the European Commission or that of the GVH is available for the courts relating to the legal issues deriving from the case. The so called amicus curiae system are to be extended to litigations initiated under national competition law as well by a

forthcoming amendment of the Competition Act. The institution of amicus curiae differs from the general expert witnesses in the sense that the intervention of the competition authorities cannot be initiated by the court or by any of the parties.

The proceeding court shall notify both the Commission and the GVH if the application of Articles 81 and 82 of the Treaty seems to be necessary, and the authorities can submit their observation until the end of the last trial. Upon request, the court shall forward those documents of the case to the Commission and/or the GVH, which are necessary for making observations.

*Is cross-examination of witnesses/expert witnesses possible? If not, how can the credibility of evidence provided by witnesses/expert witnesses be examined?*

The hearing is led by the president of the tribunal. The president and other members of the tribunal may pose questions. The parties may solicit questions and may be permitted by the president to ask questions directly to the witness. In case of contradictions in the testimonies a face-to-face questioning of the witnesses can be ordered. If the court finds that the opinion of the expert is not convincing or contradictory it can invite another expert to submit a new opinion.

### **3. Competition Authorities and Gathering Evidence for Private Litigation**

A final decision of the GVH on an issue falling within its competence is decisive. Under the present rules the establishment of the illegality of cartel agreements and abusive behaviours is in the exclusive competence of the GVH. Once became final either due to the lack of appeal or after its judicial revision the establishment that the behaviour in question is illegal bounds the court. It is therefore considered as one of the evidences. According to the proposed amendment of the Competition Act this exclusive competence would be broken up and courts would have the power to bring their judgements without the need to await for a decision of the GVH. This is already the case when claims are based on EC law. Under the new national regime the procedure of the courts would still be based on private interests and the public enforcement of competition law remains the competence of the GVH.

Both under the present (purely national) and the planned private enforcement system a statement or decision of the GVH or a competition authority from any EU Member State can be considered as evidence. A judgement of a court of an EU Member State is *res iudicata* in Hungary if the judgement is not passed in a matter falling within the exclusive jurisdiction of Hungary and if there is no legal ground to refuse the recognition of the judgement.

As it was mentioned above the court has the possibility, either upon request or on its own initiative, to order the presentation of the documents in the possession of the GVH. It is therefore possible to use the evidences gathered during an investigation already closed or conducted parallel to the litigation.



## IRELAND

### 1. Discovery of Documents

#### 1.1 Introduction

In Ireland, discovery is not normally sought until after the defence has issued, because at that stage, the issues between the parties are clear and each side knows what it needs in respect of the other side's case. However, in theory, there is nothing to preclude an application for discovery being made at an earlier stage. Although the Rules of the Superior Courts, which govern discovery in those courts, do not make any provision for pre-trial discovery, some commentators believe that it may be possible to obtain an order for discovery before the commencement of proceedings if, for example documents were required to advance the cause of action.<sup>1</sup>

#### 1.2 Rights of parties to compel discovery

1. *Parties to the proceedings*: Each party in a civil trial has the right to seek discovery of documents from the other. Application is made by way of motion to the Court, but before such a formal application is made, the applicant must write seeking **voluntary** discovery, specifying the precise categories of documents sought and giving reasons why they are required.<sup>2</sup>
2. *Third parties*: Since 1986, parties to the action may also seek discovery against third parties, and the Court has a wide discretion to allow the application. The application may be allowed if the Court believes the third party is "likely to have had in his possession custody or power any documents which are relevant to an issue arising or likely to arise out of the cause or matter."<sup>3</sup> Such applications are quite frequently made, and are granted by the Court once it is satisfied that the documents sought are necessary and relevant, and that the order will not cause oppression or prejudice to the third party.

#### 1.3 Precision and limits of request for discovery

The initial request for voluntary discovery must state precisely the categories of documents sought, and must give reasons why they are sought. There are no limits in terms of time periods, or geographic area. The only stipulations are:

- The document must actually exist.
- It must be relevant.<sup>4</sup>

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<sup>1</sup> Cf for example, Eoin Dee, *Discovery* (Round Hall Limited, 2004)

<sup>2</sup> Order 31, rule 12(4) (1) () of the Rules of the Superior Courts ("RSC")

<sup>3</sup> Order 31, rule 29 RSC

<sup>4</sup> Order 31, rule 12(1) RSC

- It must be in the possession, custody or power of the other party.<sup>5</sup>

#### **1.4 Role of Court**

The Court's role in discovery is to decide on issues relating to relevance or privilege, and to order the production of the documents.

#### **1.5 Ground for refusal of discovery**

Documents can be refused on the grounds of legal professional privilege and executive privilege.

*Legal Professional Privilege:* In Ireland, legal professional privilege can be claimed in respect of documents generated in respect of actual or contemplated litigation. It appears from the case law that the privilege may also be claimed in respect of legal advice from a lawyer to his client, even where no litigation is in contemplation. The courts have distinguished between "legal assistance" (such as instructions from a lawyer on how to complete a legal mortgage<sup>6</sup>) which will not be privileged unless linked to the conduct of litigation, and legal advice, which is likely to be privileged because "where one seeks and obtains legal advice, there are reasons to believe that he enters the area of potential litigation. The fact that a person requires legal advice suggests the possibility of legal challenge or query concerning the effectiveness of some procedure contemplated by the client regardless of whether or not such a challenge ultimately develops."<sup>7</sup>

*Executive privilege:* This is a privilege which may be claimed by an arm of government in respect of documents which it would be against the public interest to disclose. Although there is no conclusive list of categories of public interest that might justify non-disclosure, approximately four categories have emerged to date. These are:

- National security;
- International relations;
- Proper functioning of the public service, and
- The prevention and detection of crime.

#### **1.6 Sanctions for unjustified refusal**

Failure to comply with an order for discovery<sup>8</sup> has the following consequences: Any defaulting party is liable to attachment. An order for attachment means that the defaulting person is arrested and brought before the court to explain his refusal to obey the Court's order.

If the defaulting party is the plaintiff, he is liable to have his action dismissed for want of prosecution.

If the defendant is the defaulting party, he is liable to have his defence struck out.

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<sup>5</sup> Ibid.

<sup>6</sup> *Smurfit Paribas Bank Ltd. V AAB Export Finance Ltd* [1990] 1 IR 473

<sup>7</sup> Per Finlay CJ, *Smurfit Paribas Bank Ltd. V AAB Export Finance Ltd (No 2)* [1991] 2 IR 19

<sup>8</sup> It should be noted however that an order for discovery is not an order to actually produce the documents in question. See section 7 above.

There is of course, no sanction for failure to provide voluntary discovery, precisely because it is voluntary. But the refusing party then runs the risk of an order for discovery being made against them, which will add to the ultimate costs of the action. If that party is the losing party in the full action,, they will have to bear the costs of the motion for discovery as part of the entire costs of the action (the rule in Ireland being that the losing party bears the costs.

### **1.7 Procedural Rules**

The procedural rules for discovery are the same in all cases, competition and otherwise. The rules are as follows:

1. The applicant must first make a written request for voluntary disclosure, specifying precisely the categories of documents sought and giving reasons why they are required.
2. If the request is not complied with, or not fully complied with, the applicant applies to the Court by motion on notice seeking an order of discovery. In practice, this almost always happens.
3. If the order is granted, the party against whom it is made must make an affidavit of discovery within the time specified in the court order. The affidavit is required to be in the following form:

#### AFFIDAVIT AS TO DOCUMENTS.

*[Title of action].*

I make oath and say as follows:—

1. I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto.
2. I object to produce the said documents set forth in the second part of the said first schedule hereto.
3. That [here state upon what grounds the objection is made, and verify the facts as far as may be].
4. I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto.
5. The last mentioned documents were last in my possession or power on [*state when*].
6. That [here state what has become of the last-mentioned documents, and in whose possession they now are].
7. According to the best of my knowledge, information, and belief, I have not now, and never had in my possession, custody or power, or in the possession, custody or power of my solicitors or agents, solicitor or agent, or in the possession, custody or power of any other persons, or person on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper, or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the said first and second schedules hereto.

4. When the affidavit of discovery has been delivered to the applicant for discovery, the applicant may then seek an order for production of any of the documents listed.
5. If the party from whom discovery is sought claims privilege over any of the documents, the court has power to inspect those documents in order to decide whether they are in fact privileged.

## **2. Witnesses**

### **2.1 Introduction**

Civil litigation in Ireland has seen an increase in the use, generally, of expert witnesses by parties to the extent that expert witnesses are used in even the most standard and mundane of actions<sup>9</sup>. Increasingly in competition cases, economic and industry experts are retained by the parties to an action in the course of civil litigation.

### **2.2 Expert evidence and the Law of Evidence**

As a general rule, opinion evidence is not admissible in Court. Witnesses called by the parties, must speak only to the facts and not of the inferences/ opinions they have drawn from those facts. Exceptions to the general rule on opinion evidence exist, however, and one of those exceptions is in relation to expert witnesses. The testimony of expert witnesses, while opinion evidence, is admissible and the expert witness is entitled to give evidence expressing his/her opinion in respect of matters calling for expertise<sup>10</sup>

### **2.3 Who is an 'Expert' witness**

Generally, a person is considered to be an expert by reason of their experience, training or knowledge<sup>11</sup>. Formal qualifications are not necessary. However, the Court must be satisfied that the witness is an 'expert' by reason of their training, experience or knowledge<sup>12</sup>.

A non-exhaustive list of categories of expert is provided for in the Rules of the Superior Court<sup>13</sup>. The list includes but is not limited to scientists, architects, dentists, doctors, engineers, accountants and actuaries.

### **2.4 Appointment of Expert Witnesses**

Generally, the parties in a civil action may appoint their own expert witnesses. In some instances (although this has been rarely invoked) the Courts may also appoint expert witnesses.

While no express provision is made in the Rules of the Superior Courts<sup>14</sup> for this appointment, in the High Court decision in *Competition Authority v. ILCU*<sup>15</sup>, the Court appointed a Court expert to assist the

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<sup>9</sup> Cf. Fennell, C., *The Law of Evidence*, Butterworths 2004, 169.

<sup>10</sup> *Attorney General (Ruddy) v. Kenny* (1960) 94 I.L.T. 185, 190.

<sup>11</sup> *Fn. 10, supra.*

<sup>12</sup> The lack of formal qualifications goes to the weight to be attached to the testimony – *McFadden v. Murdock* (1867) 1 I.C.R. 211 and *R. v. Silverlock* [1894] 2 QB 766.

<sup>13</sup> Order 30, rule 45(1) (inserted by the Rules of the Superior Courts (No. 6) (Disclosure of Reports and Statements) 1998 (SI No. 391 of 1998) available at <http://www.irishstatutebook.ie> or <http://www.courts.ie/rules>.

<sup>14</sup> Rules of the Superior Courts (no. 6) at <http://www.courts.ie/rules>.

<sup>15</sup> Available from the Competition Authority website at: <http://www.tca.ie>.

Court in relation to the economic expert reports of the parties to the proceedings. In its decision, the Court noted that:

“the approach of the Court was designed to be fully consistent with the recommendations contained in the final report of the Competition and Mergers Review Group published in March 2000, which favoured the used of court appointed assessors in the conduct of competition law cases”<sup>16</sup>.

The appointment, therefore, of the court expert in *Competition Authority v. ILCU* was made “pursuant to Order 36. Rule 41 of the Superior Court Rules or **alternatively under the court’s inherent jurisdiction**”<sup>17</sup>.

Following the insertion into the Rules of the Superior Court of a new Order in 2005, the Court may now appoint an assessor/expert to assist the court in the adjudication of competition proceedings. This is discussed further in Section IIG below.

## **2.5 Admissibility of Expert Evidence in Competition Cases**<sup>18</sup>

Generally, an expert may give his or her opinion upon facts which are either admitted or proved by admissible evidence<sup>19</sup>. These facts may be proved either by the expert himself or by other witnesses. If the expert has no first-hand knowledge of the facts on which his or her opinion is based, a theory may be stated upon assumed facts. If the assumed facts are not proved by admissible evidence, little or no weight will be given to the weight of the expert’s opinion. It is a matter for the judge to decide what weight (if any) will be given to the evidence of the expert witness.

In Competition Proceedings, Section 9 of the Competition Act specifically allows for the admissibility of relevant expert evidence in proceedings concerning breaches of competition law. Section 9 of the Competition Act 2002 provides as follows:

### **9. Provisions as respects expert evidence.**

- (1) In proceedings under this Act, the opinion of any witness who appears to the court to possess the appropriate qualifications or experience as respects the matter to which his or her evidence relates shall, subject to subsection (2), be admissible in evidence as regards any matter calling for expertise or special knowledge that is relevant to the proceedings and, in particular and without prejudice to the generality of the foregoing, the following matters, namely-
1. the effects that types of agreements, decisions or concerted practices may have, or that specific agreements, decisions or concerted practices have had, on competition in trade,
  2. an explanation to the court of any relevant economic principles or the application of such principles in practice, where such an explanation would be of assistance to the judge or, as the case may be, jury.

<sup>16</sup> Per Kearns J., Pages 28-29 of the Judgement.

<sup>17</sup> Emphasis added.

<sup>18</sup> In Ireland, expert evidence is admissible in respect of both civil proceedings concerning national competition law (sections 4 and 5 Competition Act, 2002 ) and European Competition law (Articles 81 and 82).

<sup>19</sup> *T. v P. (Orse T.)* [1990] 1 IR 545, 551.

- (2) Notwithstanding anything contained in subsection (1), a court may, where in its opinion the interests of justice require it to so direct in the proceedings concerned, direct that evidence of a general or specific kind referred to in the said subsection shall not be admissible in proceedings for an offence under section 6 or 7 or shall be admissible in such proceedings for specified purposes only.

In practice (though not specifically provided for in the Rules of the Superior Courts), economic expert reports have been exchanged before trial. Under a new Order in the Rules of the Superior Courts, which is discussed below, provision is made for directions by the trial judge in pre-trial hearings to direct the exchange of expert witness reports.

## **2.6 Cross-Examination of Expert Witnesses**

As in other types of civil proceedings in Ireland, cross-examination of expert witnesses in competition law cases is permissible. The rules on cross-examination can be found in Ireland's common law rules on evidence and procedure. The Rules of the Superior Courts provide that the Judge is vested with a supervisory jurisdiction in relation to cross-examination<sup>20</sup>.

## **2.7 Case Management Rules in Competition Proceedings and expert witnesses<sup>21</sup>**

In 2005, the Rules of the Superior Courts were amended by a Statutory Instrument ('S.I. 130 of 2005') inserting a new order ('Order 63B') on Competition Proceedings into the Rules of the Superior Courts. Order 63B sets out case management rules in relation to competition cases brought before the High Court.

The order provides for the creation of a Competition List in which competition proceedings and any applications in competition proceedings will be heard in a Competition list<sup>22</sup>.

The Judge in competition proceedings may at any time and from time to time set down pre-trial procedures. Initial directions, to facilitate the determination of competition proceedings *in a manner which is just, expeditious and likely to minimise the costs of competition proceedings*<sup>23</sup>, may be given by the Judge. The case management rules expressly refer to directions that may be given to expert witnesses. The Judge may direct any expert witnesses to consult with each other for the purpose of:

6. *identifying and the issues in respect of which they intend to give evidence*
7. *where possible, reaching agreement on the evidence that they intend to give in respect of those issues, and,*
8. *considering any matter which the judge may direct them to consider, and requiring that such witnesses record in a memorandum to be jointly submitted to the Registrar and deliver by them to the parties, particulars of the outcome of their consultations:*

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<sup>20</sup> Order 36 Rule 37, Rules of the Superior Courts.

<sup>21</sup> S.I. No 130 of 2005 Rules of the Superior Courts (Competition Proceedings) available at <http://www.irishstatutebook.ie> and <http://www.courts.ie/rules>.

<sup>22</sup> Ibid, S.4.

<sup>23</sup> S.5 S.I. 130 of 2005.

*Providing that any such outcome shall not be in any way binding on the parties*<sup>24</sup>.

The new case management rules also enable the Court to appoint an ‘Assessor’ or ‘Expert’ either of its own motion or an application by the parties to the competition proceedings. An assessor/expert is a person appointed to assist the Court in understanding or clarifying a matter, or evidence in relation to a matter, in respect of which that person has skill or expertise<sup>25</sup>.

### **2.8 *Privilege against self-incrimination in private antitrust actions***

The privilege against self-incrimination may be invoked in both criminal and civil litigation (including competition proceedings) in Ireland.

### **2.9 *Privilege against self-incrimination and risk of foreign prosecutions***

In Ireland, the question of the *reasonable foreseeability of the charge* or the *reality of the witnesses’ fear of incrimination* must be addressed when the privilege against self-incrimination is invoked.

In applying this approach to a situation in which the invoker of the privilege feared that their answering of questions or production of certain documents would incriminate them under foreign laws, the Court in *State (Magee) v. O’Rourke*<sup>26</sup>, considered that before a person could raise the point that they might be incriminated under foreign law, a reasonable possibility that the individual in question would be sent to the foreign country in question must exist.

## **3. The Role of the Competition Authority in Gathering or Providing Evidence for Private Litigation**

There is no express provision under Irish law allowing the Competition Authority, direct or otherwise, to assist private litigants in discovery or evidence gathering.

Access to investigative files or other information within the agency would be restricted to requests pursuant to the Freedom of Information Act 1997<sup>27</sup>, which contains several limitations. As in any case, private litigants may also seek a court order, as described above, to obtain third party discovery of evidence from the Competition Authority, though, to-date, it has not received any such order nor is it aware that any such order has been sought.

In connection with any possible or pending investigation, the Authority could be expected to assert executive privilege against discovery by third parties. The Authority would be highly concerned that any such request could very well jeopardise and hinder an investigation.

<sup>24</sup> S.6(ix) of S.I. 130 of 2005

<sup>25</sup> S.23 of S.I. 130 of 2005.

<sup>26</sup> [1971] I.R. 205.

<sup>27</sup> Available from <http://www.irishstatutebook.ie> or <http://www.bailii.org>.



## JAPAN

### 1. Introduction

#### 1.1 *Lawsuit for indemnification of damages*

Any person injured by conduct constituting a violation of the Japanese Antimonopoly Act (hereinafter referred to as “AMA”) may claim [demand] damages in accordance with Article 25 of the AMA or related provision of Civil Law.

According to the provision of Civil Law, a person shall not be liable to pay for damages without its wilfulness or negligence. However, any person or any trade association whose act has infringed in violation of the AMA shall be liable to pay for damages regardless of its wilfulness or negligence (Article 25 and 26). When a lawsuit for indemnification of damages has been filed in accordance with the Article 25 of the AMA, the court shall request the opinion of the Fair Trade Commission (hereinafter referred to as “JFTC”) with respect to the amount of damages caused by such violations (Article 84). This helps reducing the burden of proof imposed on the person injured.

#### 1.2 *Injunction*

A system was introduced when the AMA was amended in 2000 that a person, whose interests are infringed or likely to be infringed by unfair trade practices (conduct in violation of Section 8(1)(v) or Article 19) and thereby suffering or likely to suffer serious damages, may demand the suspension or prevention of such infringements from a firm or a trade association who infringes or is likely to infringe such interests.

When a suit in accordance with Article 24 of the AMA has been filed, the court can request the opinion of the JFTC with respect to the application of the AMA or the other matters necessary (Article 83-3).

### 2. Production of Documents in the procedures of lawsuit in general

Procedures of lawsuit for indemnification of damages (including both of lawsuits in accordance with Article 25 of the AMA and related provision of Civil Law) and injunction are based on the Civil Procedures Act (hereinafter referred to as “CPA”), which is a general procedural law concerning civil disputes.

#### 2.1 *Obligation for producing documents in the CPA*

Generally in the procedures of civil lawsuit, in order for a person responsible for adducing the evidence to be able to use documents under the possession of the other party or third parties, those parties have an obligation to produce such documents in accordance with Article 220 of the CPA. The other party or third parties who have those documents with them have an obligation to produce such documents in principle and they are exempted from such obligation only on certain grounds for exceptions, in accordance with Article 220 (4) of the CPA.

These exceptions include the confidential information which a lawyer has learned in the course of his/her duties, and the technological or occupational information protected by confidentiality obligation (Article 220 (4) c). Courts can conduct an in-camera examination if it is necessary to find the applicability of such exemptions (Article 223 (6) of the CPA).

## **2.2 *Order to produce documents by courts in the CPA***

In accordance with Article 221 of the CPA, a person responsible for adducing the evidence may ask the court for an order to produce documents which the other party or third parties have with them and the court shall issue the order to them (Article 223 (1) of the CPA).

Such request must be made in writing which specifies each ground for Article 220 obligation to produce documents (Article 221 (1) e).

The title and subject of the documents concerned are required to identify the documents subject to the order. When they are greatly difficult to be specified, the court may request the person who has the documents to explain matters necessary to identify them in response to the request of the person responsible for adducing the evidence (Article 222 (2)).

### **9. Result of not following the order of production of documents**

A person who did not follow the order of production of documents by courts, is subject to the following sanctions:

When it is the case of the other party, the court may regard as true the claim concerning the description of the documents concerned by the person responsible for adducing proof (Article 224 (1) of the CPA).

When it is the case of third parties, the court may impose fines of not more than 200, 000 JPY on the third parties (Article 225 (1) of the CPA).

## **3. *Collection of evidentiary materials and cooperation by the competition authority concerning private litigation related to violations of the AMA***

In terms of lessening the burden of proof imposed on the person injured when he/she claims damages, the JFTC has been producing documents necessary to demonstrate the conduct in violation and the amount of damages by the following manners;

- based on voluntary cooperation before the lawsuit is filed;
- in accordance with the AMA; and
- in accordance with the CPA.

### **3.1 *Provision of documents based on voluntary cooperation before the lawsuit is filed***

The JFTC issued its views entitled “Guideline on production of materials concerning lawsuit for damages resulting from the conduct constituting a violation of the AMA” (hereinafter referred to as “Guideline”) in 1991. Based on the Guideline, the JFTC has been providing certified copies of decisions or surcharge payment orders with respect to violations of the AMA. In FY 2004 (April 2004 to March 2005), the JFTC provided 36 copies of such decisions or orders in response to the requests of victims of bid-riggings and other violations such as local governments.

When it is the case with administrative hearing procedures presided by the JFTC, the JFTC admits an access to inspect or copy materials contained in the records of hearing procedures in accordance with Article 69 of the AMA. (Please refer to (2) above)

### **3.2 Provision of documents by the competition authority in accordance with the AMA, etc.**

As mentioned above, a person who is going to claim [demand] damages concerning the case with administrative hearing procedures, may inspect or copy materials contained in the records of hearing procedures in accordance with Article 69 of the AMA.

#### **(Reference)**

*Sec.69 of the AMA [Access to records]*

Any interested person may request to the Fair Trade Commission, after the issuance of a complaint, to peruse or copy the record of a case, or may ask the Fair Trade Commission for a certified copy of a surcharge payment order or a decision or an abridged copy thereof.

When it is the case of claim for damages in accordance with the Article 25 of the AMA, the court shall request the opinion of the Fair Trade Commission with respect to the amount of damages caused by such violations (Article 84 of the AMA). In FY 2004, the JFTC provided two opinions in response to the request of the courts.

#### **(Reference)**

*Sec.84 of the AMA [Request for the Fair Trade Commission's opinion on amount of damages]*

When a suit for indemnification of damages under the provisions of Section 25 [absolute liability] has been filed, the court shall, without delay, request the opinion of the Fair Trade Commission with respect to the amount of damages caused by such violations as provided for in the said section.

### **3.3 Provision of documents by the competition authority in accordance with the CPA**

When it is the case of claim for damages, the person injured usually requests the court to entrust the JFTC to send the document to it in accordance with Article 226 of the CPA. The JFTC, when entrusted by the court, provides materials necessary for proving for the court, to the extent consistent with its obligation of secrecy.

In addition, the plaintiff may ask the court for issuing an order of production of documents mentioned in II (2), when he/she finds that the documents provided by the JFTC through the procedure of entrustment are insufficient.



## NORWAY

This submission will focus on the access of private parties to the files of the Norwegian Competition Authority. The rules of the Norwegian Civil Litigation Act on the discovery and production of evidence in private litigation will be presented briefly. There are no particular rules for private litigation in competition cases. It is expected that a new Civil Litigation Act will be passed by the Norwegian Parliament next month (June 2005).

### **1. Access of private parties to the files of the Norwegian Competition Authority**

The Norwegian Competition Act expressly regulates the access of private parties to agency files in Section 27, second paragraph:

“Anyone with legal interest may demand access to documents with the competition authorities in cases that have been concluded regarding infringements of Section 10, Section 11, or orders pursuant to Section 12. For this right to access to include information subject to statutory required confidentiality, access must not appear unreasonable to those to whom the information pertains. Upon requests for access to information subject to confidentiality according to this provision, those for whom the confidential material pertains must be so notified and given a deadline for submitting their view on the matter. Rejections of requests for access may be appealed to the Ministry. The rules set forth in Chapter VI of the Public Administration Act apply accordingly.”

Sections 10 and 11 of the Act correspond to the prohibitions of Articles 81 and 82 of the EC Treaty. Section 12 enables the Competition Authority to order that an infringement be brought to an end.

The purpose of the provision is to assist possible private litigants in building up a case where typically damages for harm caused by infringements of competition law will be claimed. Hence only persons or undertakings with legal interest may be allowed access pursuant to the provision. “Legal interest” is a general condition for bringing a case before the courts.

Access cannot be granted until the case has been concluded. A case is to be considered as concluded when the Competition Authority has issued an administrative fine or ordered that the infringement be brought to an end. A case is also considered as closed when the Competition Authority decides not to pursue the case any further. If the case is reported to the public prosecuting authorities, the case is not considered as closed until the public prosecuting authorities have concluded their case.

The provision gives access to information beyond what follows from the Norwegian Access to Information Act. Information protected by statutory confidentiality may be disclosed if such access is not unreasonable to those protected by the relevant confidentiality provisions. The interest of third parties in gaining access to the information is to be weighed against the the interest of those protected by confidentiality in sustaining secrecy.

Since access to confidential information usually is a rather radical measure, there are certain procedural safeguards provided in the provision. The parties protected by confidentiality are to be notified of the request for access, and given a deadline for presenting possible objections to such access. Note that

appeals in these cases are tried by the Ministry, whereas appeals against rejections of access to documents for parties subject to an ongoing investigation are to be brought directly before the courts.

## **2. Rules of the Civil Litigation Act on discovery and production of evidence**

Section 250 and 251 of the Civil Litigation Act state that written documents in the possession of opposing parties or third parties is to be presented before the court if so requested. The condition is that the document in question is potential evidence in the case, and that it is possible to identify it sufficiently. There is however no obligation to produce the document if it contains information which the party cannot or may choose not to bear witness of before the court. Business secrets is one example of such information.

In the new Civil Litigation Act there will probably be an extended obligation to disclose evidence that may strengthen the factual claims of the opposing party. Opposing parties will be obliged to do so on their own initiative. There will also be an obligation to disclose important evidence in the possession of third parties if the opposing party is aware of it.

Expert witnesses can be court appointed or appointed by the parties. Cross-examination of both witnesses and expert witnesses is possible.

## UNITED STATES

In the U.S., discovery in federal civil antitrust cases is governed by the same rules that apply generally to civil cases in the federal district courts: the Federal Rules of Civil Procedure, which are approved by Congress. Depositions and discovery are covered in Rules 26-37. The scope of discovery is very broad, and judges retain wide discretion in managing the discovery process. In general,

“[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” Rule 26(b)(1).

The federal discovery rules are applied flexibly by the courts, allowing parties considerable room to negotiate the parameters of discovery to suit the needs of individual cases. Courts may limit discovery which is “unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive” and where “the burden or expense of the proposed discovery outweighs its likely benefit.” Rule 26(b)(2). The Rules were amended in recent years to put significant presumptive limits on depositions: a total of 10 per side (Rule 30(a)(2)(A)), and a seven hour time limitation per deposition (Rule 30(d)(2)). Local court rules in particular jurisdictions may contain similar limitations. Although these limits can usually be modified by agreement or court order (and presumably frequently are in complex cases), they at least force the parties to think about their discovery plan carefully and justify more expansive discovery to their opponents and the court.

“Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property ..., for inspection and other purposes; physical and mental examinations; and requests for admissions.” Rule 26(a)(5). A Party may take the deposition of any person, including both parties and non-parties, upon oral examination or upon written questions without leave of court in most circumstances. Interrogatories and requests for admission may only be served upon parties, but requests to produce documents or things or for entry upon land may also be served upon non-parties.

### 1. Duty of Disclosure

Rule 26(a)(1) imposes an affirmative duty of disclosure on parties to a civil lawsuit; generally, “a party must, without awaiting a discovery request, provide to other parties:

- the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

- a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;
- a computation of any category of damages claimed by the disclosing party,” including copies of evidentiary material on which such computation was made.

The rules also impose a duty on a party who has made a disclosure or response to a discovery request “to supplement or correct the disclosure or response to include information thereafter acquired.”

## **2. Protective Orders**

A party or a person from whom discovery is sought may seek a protective order from the appropriate judge, who “may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,” including orders limiting the type, manner, or extent of discovery, or “that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way.” Rule 26(c).

## **3. Sanctions for Failure to Cooperate in Discovery**

Rule 37 regulates failure to make disclosure or cooperate in discovery and sanctions. A party may apply to a court for an order compelling disclosure or discovery where the person from whom the disclosure or discovery is sought refuses to comply or provides an evasive or incomplete answer. Where a motion to compel is granted, the court may require the party or deponent whose conduct necessitated the motion to pay the moving party’s reasonable expenses, including attorney’s fees; if the motion is denied, the court may enter a protective order and require the moving party to pay reasonable expenses. Failure by a deponent to be sworn or to answer a question after being directed to do so by a court may be considered a contempt of that court and punished accordingly. Where a party fails to obey an order of the court regarding discovery, “the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:”

- an order that facts that were the subject of the order be taken as established in accordance with the claim of the party obtaining the order;
- an order refusing to allow the disobedient party to support or oppose designated claims or evidence, or prohibiting that party from introducing designated matters in evidence;
- an order striking pleadings, or staying further proceedings until the order is obeyed, or dismissing the action or rendering a default judgment against the disobedient party;
- in addition the court may treat the failure to obey as a contempt of court; reasonable expenses may also be assessed against the disobedient party.

Similar penalties may be imposed for failure to disclose or to amend prior responses to discovery.

## **4. Rules of Privilege**

Certain information is protected from discovery under well-established U.S. rules of privilege. Rule 501 of the Federal Rules of Evidence provides that a privilege “shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.” While a number of different privileges exist, those most commonly invoked in the antitrust

context are the attorney-client privilege, which in the U.S. generally covers both outside counsel and in-house counsel, and the work product rule, which applies to preparatory work done by attorneys or their agents. Both of these privileges are subject to an exception for communications with attorneys that were made in furtherance of an ongoing or future criminal or fraudulent act.

The privilege against self-incrimination can be invoked in any sort of proceeding in which a witness is asked a question that the witness believes will require him to incriminate himself. *Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983)(deposition). “As a general rule, a witness’s invocation of the [privilege against self-incrimination] in the course of civil litigation permits an inference that the testimony would be adverse to the witness’s interests.”<sup>1</sup> A claimed threat of foreign prosecution cannot be the basis of a self-incrimination claim unless the United States and a foreign country, working together on an international criminal problem, enact similar criminal statutes. *United States v. Balsys*, 524 U.S. 666 (1998). The degree of cooperation must be so close that the prosecution becomes a joint operation. *In re Impounded*, 178 F.3d 150 (3d Cir. 1999).

## 5. Expert Witnesses

Expert witnesses are frequently used in civil antitrust litigation. Experts may be appointed by the court, or are hired by both plaintiffs and defendants to explain complex economic issues, accounting subtleties, or substantive areas (e.g., software, technology, science). Prior to trial, a party must disclose to other parties the identity of any person who may be called as an expert witness, and

“this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.” Rule 26(a)(2)(B).

“A party may depose any person who has been identified as an expert whose opinions may be presented at trial.” Rule 26(b)(4)(A). At trial, expert witnesses are subject to cross-examination regarding their qualifications, bias, and opinions. Purely conclusory expert testimony is accorded no weight. See *SMS Sys. Maint. Servs., Inc. v. Digital Equip. Corp.*, 188 F.3d 11, 25 (1st Cir. 1999) (“Expert testimony that offers only a bare conclusion is insufficient to prove the expert’s point.”). Consequently, expert reports are often quite extensive and even more detailed than the eventual testimony. Expert reports have to include the opinions to be offered by the expert and the basis for each opinion, and the party offering the expert will have to make out a prima facie case for admissibility, establishing that the witness is indeed an expert on the relevant subject matter and that a basis exists in both fact and the discipline of the expert for every opinion.

## 6. Relationship Between Civil Litigation and Law Enforcement

The U.S. antitrust agencies gather evidence only to further their own investigations.<sup>2</sup> In theory, a court could order an agency to produce evidence to a private party for use in private litigation. In practice,

<sup>1</sup> ABA Section of Antitrust Law, *Antitrust Law Developments* (5<sup>th</sup> ed. 2002), p. 991.

<sup>2</sup> This paper does not address administrative adjudication before the Federal Trade Commission, another category of U.S. civil antitrust enforcement. The rules governing such proceedings, found at 16 C.F.R.

this is rare. The Division routinely objects to almost any third party discovery request, invoking numerous privileges (e.g., attorney-client, work product, law enforcement) that protect most evidence obtained during a criminal or civil investigation.<sup>3</sup> In *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122 (7th Cir. 1997), a private suit involving the lysine price-fixing investigation, the court upheld a law enforcement investigatory privilege and the “pretty strong presumption against lifting” it to deny plaintiffs’ request for copies of surreptitious videotapes that the DOJ had played to lawyers for outside directors of one of the criminal defendants in order to convince them of the strength of the government’s criminal case. The plaintiffs eventually obtained some evidence, far from everything they initially asked for, but long after the criminal case was concluded, after many years of litigation over privileges.

Rule 6(e) of the Federal Rules of Criminal Procedure protects the secrecy of grand jury proceedings by limiting disclosure of “matters occurring before the grand jury” to situations where a strong showing of “particularized need” has been made and “when so directed by a court preliminary to or in connection with a judicial proceeding.” The Supreme Court has held that “Parties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed.” *Douglas Oil Co. v. Petrol Shops Northwest*, 441 U.S. 211, 222 (1979). Rule 6(e) protects both testimony and documents or other evidence presented to a grand jury.

In situations where criminal proceedings and private litigation covering the same subject matter are occurring simultaneously, the Division has on occasion sought and obtained an order staying discovery in the private case when such discovery might interfere with the government’s case.

## **7. Risks and Concerns Associated with Federal Discovery Rules**

Two major complaints relating to broad discovery requests in civil antitrust cases are (1) the burden and cost associated with compliance, and (2) the burden and risk of producing confidential business information. Both of these risks are addressed by the Federal Rules. The rules limit the amount of discovery (for example limits on the number and length of depositions) allowed in typical cases while permitting the parties to agree to broader discovery in cases that require more for full development of the issues. Confidential information is protected through the use of confidentiality orders limiting access to and the use of sensitive information. Consequently, the rules limit the risks while permitting the benefits of private enforcement of the antitrust laws and, in many cases, the avoidance of a costly and risky trial through settlements prompted by parties discovering the strengths and weaknesses of their respective cases.

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Part 3, are similar in many ways to the rules used in federal district courts but are tailored to the considerations of litigating before an administrative agency.

<sup>3</sup> There are also additional confidentiality provisions in the FTC Act that complicate disclosure of information by that agency.

## EUROPEAN COMMISSION

### 1. Background

The approach to the discovery of evidence is one of the most significant points of difference between the “common law” and the “civil law” traditions of Europe.<sup>1</sup> While there are differences between the jurisdictions based on the common law tradition, pre trial discovery is the means of evidence gathering on which common law jurisdictions traditionally primarily rely. In the common law tradition discovery is, to a large extent, conducted by the parties with only minimal supervision by the courts. In contrast, under civil law systems, where again there are differences between the jurisdictions based on this tradition, the parties have only limited power to compel the production of evidence or to elicit adverse testimony from adverse or third parties and must therefore rely upon voluntary co-operation or seek intervention by the court. On the other hand the judges in civil law procedures generally play a more significant role in fact-finding than under common law.<sup>2</sup> It would also appear that judges in civil law jurisdictions are more likely to intervene in administrative and criminal as opposed to civil cases.<sup>3</sup> The executive summary of Ashurst’s Comparative report, part of its Study<sup>4</sup> on the conditions of claims for damages in case of infringement of the EC competition rules, describes the status quo and obstacles for discovery and production of evidence as follows<sup>5</sup>:

- Status quo

The power of national courts to order production of documents varies widely across the Member States. At one end of the scale are the UK, Ireland and Cyprus where wide (pre-trial) discovery exists (a discovery like procedure is also proposed in Sweden). Besides these countries, courts in Poland and Spain also have relatively wide powers, which allow parties to request categories of documents. However, in all other Member States parties must more or less specify [<sup>6</sup>] the individual documents that they wish to be disclosed.

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<sup>1</sup> Sir David Edward, *Fact-Finding: A British Perspective*, published 1993 United Kingdom Comparative Law Series Volume 14, *The Option of Litigating In Europe*, pg 43.

<sup>2</sup> J.A. Jolowicz, *Fact-Finding: A Comparative Perspective*, published United Kingdom Comparative Law Series Volume 14, *The Option of Litigating In Europe*, pg 143.

<sup>3</sup> Jolowicz (above), pg 140. Sir David Edward, (above), pg 43.

<sup>4</sup> A Study on the condition on claim for damages was undertaken by the law firm Ashurst, pursuant to a tender carried out by the Commission, to identify and analyse the obstacles to successful action for damages existing in the Member States of European Union. The study found that levels of private enforcement in Europe are currently very low. The study is available at [http://europa.eu.int/comm/competition/antitrust/others/private\\_enforcement/index\\_en.html#damages](http://europa.eu.int/comm/competition/antitrust/others/private_enforcement/index_en.html#damages)

<sup>5</sup> The subject is treated in more detail on pg 61 of the Comparative Report.

<sup>6</sup> “The level of specification required varies from one Member State to another. In some Member States the party requesting disclosure must in practice identify the document (Austria, Belgium, Czech Republic, Estonia, Finland, Greece, Hungary, Lithuania, Slovakia). In other Member States, less detail is required (France). In Germany, the judge can order a party to produce a document if it is referred to in that party’s or the other party’s pleadings. A party may also be required to produce its accounts and any document to

The limits placed on who can be ordered vary, although some more or less limited justifications exist in most states (usually professional privilege or interests of third parties). Discovery may also be refused, generally on grounds of legal privilege or in most Member States (to a greater or lesser extent) for the protection of business secrets.

- Obstacles

The clearest obstacle here is the fact that in most Member States parties are not under an obligation to produce relevant information and often will only be ordered to do so when the requesting party can identify the individual document he seeks, which in many cases will simply not be possible.<sup>7</sup>

Several of the national reporters of the Ashurst Study identified the difficulty of obtaining evidence as one of the major obstacles to damages actions due to the limited scope for ordering disclosure of documents that exists in most Member States. The Study suggests the following as possible facilitating measures:

Proposed solutions range from the introduction of discovery rules, to the power of judges to order the production of classes of documents, to a relaxation of the requirements a plaintiff has to fulfil before disclosure is ordered. Other proposals in this regard were the facilitation of access by the courts to documents held by national competition authorities and greater access to documents by experts.

Other ways of reducing the obstacles created by strict disclosure rules include removing restrictions on calling certain witnesses (e.g. company representatives) and the introduction of cross-examination, where this does not already exist.<sup>8</sup>

It is difficult to establish a clear definition of what constitutes ‘discovery’. In the common law tradition, discovery is regarded as a pre-trial procedure by which the parties to an action disclose to each other all documents in their possession or power, relating to matters at issue in the action.<sup>9</sup> This process is best seen as the ordered exchange of evidence and statements between the parties with a view to eliminate surprises and clarify what the claim is about, allowing both sides to evaluate the merits of their respective cases, and promote settlement. If the lawyers do a thorough job in discovery, they shouldn’t be surprised by any of the answers the opposing party’s witnesses give to their questions during trial. Pre-trial discovery is a procedure known to common law countries, which covers requests for evidence submitted after the filing of a claim but before the final hearing on the merits. Pre-action discovery covers the period prior to the lodging of a claim.

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which another party has a legal right of access. In Italy, the approach is case by case, and any document may be demanded if it is shown to be related to the dispute, indispensable to the case and in the possession of the other/third party. Clearly, these conditions mean that the document will have to be identified with some degree of precision. In Denmark the requesting party must specify the facts that he wishes to prove via the requested documents and the disputed fact must be of relevance for the case.” Ref. pg. 63 of the Comparative Report.

<sup>7</sup> Extract from the executive summary of the Comparative Report pg 3, see also pg 124.

<sup>8</sup> The Comparative Report pg10.

<sup>9</sup> The Comparative Report defines discovery as the “*compulsory (pre-trial) disclosure of all documents relevant to a case*”, pg 62.

It must be stressed that the purpose of this paper is to give an overview of the state of discovery in the European Community and not to give a detailed analysis of each national system. In drafting this paper extensive use has been made of the material on evidence in the Ashurst Study.

## 2. Discovery in Europe

### 2.1 *The Community Courts*

#### 2.1.1 *The Court of Justice of the European Communities*

The rules of the Court of Justice of the European Communities (ECJ) on measures of enquiry are set out in Title II, Chapter 2 of its rules of procedure.<sup>10</sup> These rules facilitate an interventionist approach by the court in the management and conduct of proceedings. They are designed to facilitate enquiry by the court as opposed to the facilitation of fact finding by the parties. In particular there is no requirement for a party to disclose to the other the existence of the documents on which he relies or which adversely affect his own case, adversely affect another party's case or support another party's case.<sup>11</sup> Article 45.1 empowers the Court, after hearing the Advocate General, to prescribe the measures of inquiry that it considers appropriate by means of an order setting out the facts to be proved. The following measures of inquiry may be adopted (before the Court decides on the measures of inquiry referred to in paragraphs 2(c), (d) and (e) the parties shall be heard):

- the personal appearance of the parties;
- a request for information and production of documents;
- oral testimony;
- the commissioning of an expert's report;
- an inspection of the place or thing in question.

The Court may also summon a witness of its own motion or on application by a party or at the request of the Advocate General.<sup>12</sup> The Court may order that an expert's report be obtained. The order appointing the expert shall define his task and set a time-limit within which he is to make his report. He shall be under the supervision of the Judge-Rapporteur, who may be present during his investigation and who shall be kept informed of his progress in carrying out his task.<sup>13</sup>

The President of the Court may, at the request of one or more parties to a dispute, order the necessary interim measures pending a decision on the substance of the case. By virtue of that jurisdiction, he may, inter alia, appoint an expert to carry out any verifications which have been requested. In April 1982, in Case 318/81 *Commission v CO.DE.MI.*<sup>14</sup> the President of the Court ordered, upon request of the Commission that a survey should be carried out by an expert to determine the state of certain building

<sup>10</sup> The Rules of Procedure of the Court of Justice of the European Communities of 19 June 1991 (OJ L 176 of 4.7.1991, p. 7, and OJ L 383 of 29.12.1992 (corrigenda)) as last amended by Amendments to the Rules of Procedure of the Court of Justice of the European Communities of 20 April 2004 (OJ L 127 of 29.4.2004).

<sup>11</sup> UK Civil Procedural Rules, Rule 31.6 (see below).

<sup>12</sup> ECJ rules of procedure Article 47.1

<sup>13</sup> ECJ rules of procedure Article 49.

<sup>14</sup> [1982] ECR 1325, paragraphs 1 to 3.

works and to determine any defects. These same powers of verification were again confirmed in the judgment of the Court of November 2002 in case C-275/00 European Community v First & Franex NV<sup>15</sup>. This case arose from interlocutory proceedings before a Belgian court between the European Community, and First NV and Franex NV in which it was sought to require the European Community to intervene in proceedings for an expert report already ordered as against the Belgian State. The two companies claimed that they had sustained damage as the result of the 'dioxin crisis' in Belgium.

### 2.1.2 *The Court of First Instance of the European Communities*

The rules of the Court of First Instance (CFI) on case management and measures of enquiry are set out in chapter 3 of its rules of procedure.<sup>16</sup> Their stated purpose is to “*ensure that cases are prepared for hearing, procedures carried out and disputes resolved under the best possible conditions*”.<sup>17</sup> Article 64.3 provides that measures of organisation of procedure may, in particular, consist of:

- putting questions to the parties;
- inviting the parties to make written or oral submissions on certain aspects of the proceedings;
- asking the parties or third parties for information or particulars;
- asking for documents or any papers relating to the case to be produced;
- summoning the parties' agents or the parties in person to meetings.

Moreover, each party may, at any stage of the procedure, propose the adoption or modification of measures of organisation of procedure. In that case, the other parties shall be heard before those measures are prescribed.<sup>18</sup> Articles 65 and 66 authorise the CFI to prescribe the following measures of inquiry after hearing the Advocate General (before deciding on the measures of inquiry referred to in paragraphs (c), (d) and (e) the parties must also be heard):

- the personal appearance of the parties;
- a request for information and production of documents;
- oral testimony;
- the commissioning of an expert's report;
- an inspection of the place or thing in question.

The Court of First Instance may summon a witness of its own motion or on application by a party or at the instance of the Advocate General.<sup>19</sup> The Court of First Instance may order that an expert's report be

<sup>15</sup> [2002] ECR , page I – 10943.

<sup>16</sup> Rules of procedure of the Court of First Instance of the European Communities of 2 May 1991 (OJ L 136 of 30 May 1991; corrigendum published in OJ L 317 of 19.11.1991, p. 34) as last amended on 21.04.2004 (OJ L 127 of 29.04.2004, p. 108).

<sup>17</sup> CFI rules of procedure, Article 64.1.

<sup>18</sup> CFI rules of procedure, Article 64.4

<sup>19</sup> CFI rules of procedure, Article 68.1

obtained. The order appointing the expert shall define his task and set a time-limit within which he is to make his report. He shall be under the supervision of the Judge-Rapporteur, who may be present during his investigation and who shall be kept informed of his progress in carrying out his task.<sup>20</sup>

## 2.2 *England*

The rules on disclosure of documents in civil proceedings are contained in Part 31 of the *Civil Procedure Rules 1998*, as amended. These are the rules of disclosure for multi-track proceedings which covers most claims over £15,000.

### 2.2.1 *Scope*

Each party is required to disclose to the other the existence of **the documents on which he relies or which adversely affect his own case**, adversely affect another party's case or support another party's case.<sup>21</sup> Depending on the complexity of the case at hand, the costs and time involved in the disclosure may be quite significant. However, the costs will not normally be recoverable. There are four types of disclosure available: (1) pre-action disclosure, (2) standard disclosure, and (3) specific disclosure.

### 2.2.2 *Types of Disclosure*

#### *(1) Pre-Action Disclosure*

A party may apply for an order for disclosure from a potential opponent **before** commencing the proceedings. This allows a party to obtain specified documents or classes of documents if he can show that the pre-action disclosure would dispose fairly of the anticipated proceedings or assist the dispute in being resolved without proceedings or save expenses.<sup>22</sup>

#### *(2) Standard Disclosure*

Disclosure is the process whereby a party to a claim is obliged to disclose to the other party the existence of all documents which are or have been in his or her control which are material to the issues and the proceedings. Initially, disclosure is given by an exchange of lists of documents. The other parties are then entitled to inspect and take copies of the documents disclosed, except any document which is privileged.<sup>23</sup>

The nature of the documents that must be disclosed under standard disclosure is set out in the Civil Procedural Rules, Part 31, Rule 31.6.:

"Standard disclosure requires a party to disclose only –

- the documents on which he relies; and
- the documents which –
  - (i) adversely affects his own case;

<sup>20</sup> CFI rules of procedure, Article 70.

<sup>21</sup> Civil Procedural Rules, Rule 31.6.

<sup>22</sup> Civil Procedural Rules, Rule 31.16.

<sup>23</sup> Civil Procedural Rules, Rule 31.

(ii) adversely affect another party's case; or

(iii) support another party's case;

- the documents which he is required to disclose by a relevant practice direction."

It is the duty of a solicitor to ensure that the client provides full disclosure as required by the rules. The duty is an active one. A person making a false disclosure statement without an honest belief in its truth may be held to be in contempt of court. After completion, the list must be exchanged so that the parties can inspect and copy each other's documents. Where the documents contain highly confidential information, inspection may be restricted to a party's legal advisers.

### *(3) Specific Disclosure*

Specific disclosure<sup>24</sup> or inspection allows the court to: (i) order the disclosure of documents or classes of documents as specified in the order; (ii) order the carrying out of a search to the extent provided for in the order; or (iii) order the disclosure of any documents located as a result of a search. This procedure can be used if a document was not disclosed under the standard disclosure on the ground that it was disproportional to do so or if a party thinks that the opponent's disclosure was inadequate.

### *(4) Third Party Disclosure*

Third party disclosure is available upon application of a party to the court. An order to disclose specific documents or classes of documents is granted, if the applicant can show that the documents are likely to support his case or adversely affect the case of another party and that disclosure is necessary in order to dispose fairly of the claim or to save costs.<sup>25</sup>

#### *2.2.3 Calling of witnesses*

In addition to documentary evidence, evidence is provided by witnesses whose witness statements must be exchanged before trial. Witnesses called at trial will be subject to cross-examination on their witness statements and any oral evidence given in Court.<sup>26</sup>

Witness summonses are issued to ensure that witnesses who are able to give relevant evidence are available in Court. Criminal sanctions for failure to appear are fines and imprisonment.

#### *2.2.4 Privilege*

Certain documents are not disclosable on the ground of privilege.<sup>27</sup> Two other classes of documents are privileged from production and inspection although they must be disclosed (i.e. included in the list of documents provided on discovery). These are documents protected on the grounds of public policy (public interest privilege) and without prejudice communications (which is to enable the parties to negotiate, without risk of their proposals being used against them if negotiations fail). However, confidential material which does not fall within one of the four categories of privilege is not normally protected from disclosure whether the document is confidential in nature or damaging to the party giving disclosure.

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<sup>24</sup> Civil Procedural Rules, Rule 31.12.

<sup>25</sup> Civil Procedural Rules, Rule 31.17.

<sup>26</sup> Civil Procedural Rules, Rule 32.

<sup>27</sup> Civil Procedural Rules, Rule 31.19.

### 2.2.5 *Sanctions*

If a party is dissatisfied with the extent of his opponent's disclosure, an order can be obtained from the court requiring a party to give further specific disclosure or conduct a further search pursuant to Rule 31.12. If an order is made, failure to comply can amount to contempt of court and may have serious consequences including the dismissal of a party's claim or judgment being entered against him. False disclosures may equally result in contempt of court pursuant to Rule 31.23.

### 2.2.6 *Competition Appeals Tribunal*

One of the key developments in United Kingdom competition law in the context of civil remedies before a Court has been the creation of the Competition Appeal Tribunal (CAT) by the Competition Act 1998. The CAT has jurisdiction to award damages following the adoption of infringement decisions by the Office of Fair Trading and/or European Commission. According to the UK National Report of the Ashurst study "[t]he President of CAT, Sir Christopher Bellamy QC has explained that the CAT procedure was deliberately modelled on the CFI procedure but without excluding the best features of the common law adversarial rules of procedure and evidence".<sup>28</sup> This implies that the CAT, like the CFI, will place greater emphasis on written procedure, play a more interventionist role, and will pay particular attention to case management.<sup>29</sup> A central feature of both the CPR and the rules of the CFI is **case management by the court**. The CAT's current Guide to Appeals under the Competition Act 1998, sets out the five main principles of the CAT Rules:

#### *Early disclosure in writing*

2.4 Each party's case must be fully set out in writing as early as possible, with supporting documents produced at the outset.

#### *Active case management*

2.5 The proceedings will be actively case managed by the appeal tribunal, the objective being to identify and concentrate on the main issues at as early a stage as possible, to avoid undue prolixity or delay, and to ensure that evidence is presented in an efficient manner.

#### *Strict timetables*

2.6 The tribunal will indicate, as early as possible, a target date by which the tribunal's decision on the appeal is to be given, together with the date for the main hearing. The main stages of the case, and the internal planning of the tribunal's work, will be geared to meeting this timetable. **In general the tribunal will aim to complete straightforward cases in less than six months.** This target will be reviewed in the light of experience.

#### *Effective fact-finding procedures*

2.7 The tribunal will pay close attention to the probative value of documentary evidence. Where there are essential evidential issues that cannot be satisfactorily resolved without cross-examination, the tribunal may permit the oral examination of witnesses. As regards expert evidence, the tribunal will expect the parties to make every effort to narrow the points at issue, and to reach agreement where possible.

<sup>28</sup> UK National Report, pg 20. See also the Article of Sir Christopher Bellamy QC, Some Reflections on Procedure in Competition Cases, published in A True European, Essays for Judge David Edward.

<sup>29</sup> See UK National Report, pgs 19-20.

*Short and structured oral hearings*

2.8 The structure of the main oral hearings of the tribunals will be planned well in advance, in consultation with the parties, with a view to avoiding lengthy oral argument. Since the written arguments of the parties will have already been set out, and since the main issues will have been identified prior to the main oral hearing, this hearing will normally be conducted within short defined time limits, in accordance with established practice in the CFI.

On the specific issue of intervention, rule 19(3) of the rules of procedure of the CAT<sup>30</sup> provides that the Tribunal may, in particular, of its own initiative:

- "put questions to the parties;
- invite the parties to make written or oral submissions on certain aspects of the proceedings;
- ask the parties or third parties for information or particulars;
- ask for documents or any papers relating to the case to be produced;
- summon the parties' representatives or the parties in person to meetings".

On the issue of case management, where it appears to the Tribunal that any proceedings would be facilitated by holding a case management conference or pre-hearing review the Tribunal may, on the request of a party or of its own initiative, give directions for such a conference or review to be held.<sup>31</sup> A February 2005 notice of a case management conference on the CAT website<sup>32</sup> states that:

The principal purpose of case management conferences is a preparatory one - to plan how the case should proceed to a full public hearing of the issues and evidence. Amongst the issues discussed are:

- The location of the proceedings
- Whether the proceedings should be consolidated or heard together with other proceedings
- Any issues regarding the confidential treatment of any part of the evidence
- The identification of the main issues in the case and the evidence which is likely to be relevant
- The timetable for the case including the timing of the full public hearing and the target date for the Tribunal's decision
- Procedural directions sought by the parties, for example for the filing of additional pleadings and the disclosure of documents
- Any other issue regarding the preparation of the proceedings which can be conveniently and fairly disposed of.

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<sup>30</sup> Competition Appeal Tribunal Rules 2003, Statutory Instrument 2003 No. 1372.

<sup>31</sup> Competition Appeal Tribunal Rules 2003, Rule 20 (1).

<sup>32</sup> <http://www.catribunal.org.uk> Notice of a case management conference of 10 February 2005, in Double Quick Supplyline Limited v Office of Fair Trading (Case: 1048/1/1/05).

Where the Tribunal gives rulings at case management conferences, the ruling is made public by placing a transcript on its website. The transcript of the case management conference of 14 January, 2005 in *Deans Foods Limited v (1) Roche Products Limited (2) F Hoffman-La Roche AG (3) Aventis SA* (Case No: 1029/5/7/04) clearly demonstrates the active role played by the CAT in case management.<sup>33</sup> In this case the Chairman of the Competition Appeal Tribunal, taking into account, inter alia, the late stage of the proceedings, the approaching trial date, the potential of the request to open up new issues requiring further disclosure, and the fact that disclosure may be of limited or no real assistance, dismissed the Claimant's application for specific disclosure and reserved costs.<sup>34</sup>

## 2.3 Ireland

In Ireland discovery is provided for in Order 31, Rule 12 of the Rules of the Supreme Courts, as amended by Statutory Instrument No 233 of 1999.

### 2.3.1 Scope

Documentary discovery ordinarily occurs following the close of formal pleadings. Discovery must be requested by one of the parties; the judge cannot order discovery ex-officio. Any party may apply to the court for an order directing any other party to any **cause or matter** to make discovery on oath of documents. The notice of such a motion shall precisely describe the categories of documents sought to be discovered. In all cases, parties seeking discovery must establish to the satisfaction of the court that the discovery is "*necessary for disposing fairly of the cause or matter or for saving costs*".<sup>35</sup> The meaning of the latter phrase was considered by Kelly LJ in *Lanigan v Chief Constable*<sup>36</sup>, in which he referred to the following statements which he considered contained useful indications of what is meant by 'necessity':

'1. [Are the statements sought] "very likely to contain material which would give substantial support to [the plaintiff's] contentions? Would he be deprived of the means of proper presentation of the case?" (Lord Fraser in *Air Canada v. Secretary of State for Trade* [1983] 2 AC 394.

'2. [Can it be said] "there [is] s likelihood that the documents would support the case of the party seeking discovery?" [Is there] something beyond speculation, some concrete ground for belief which takes the case beyond a mere 'fishing' expedition?" (Lord Wilberforce in *Air Canada*).

<sup>33</sup> <http://www.catribunal.org.uk>

<sup>34</sup> In dismissing the application, the Chairman of the Competition Appeals Tribunal, Marion Simmons QC states on page 35 of the transcript that: "*Although the claimants are presently confining the request to a small number of documents, it has the clear potential to open up new issues as to examination of the pricing of other vitamins currently outside this claim which will require further disclosure and expert evidence and possibly factual evidence. At this very late stage, when the hearing is set down for 21 February 2005 and when all parties are wanting to keep to that date, it would be disproportionate and impracticable in the time available to embark properly upon that exercise which, in any event, may prove to be an unnecessary luxury and of limited or of no real assistance. To embark upon this exercise in the arbitrary way that is submitted by the claimants would be unfair to the defendants. I therefore dismiss the application.*"

<sup>35</sup> Order 31 Rule 12 of the Rules of the Superior Courts as substituted by Statutory Instrument No. 233 of 1999 in relation to High Court proceedings. The test under Order 32 Rule 1 of the Circuit Court Rules 2001 in relation to Circuit Court proceedings is less onerous. However, in practice, requests for discovery in Circuit Court proceedings usually meet the requirements of the High Court test.

<sup>36</sup> [1991] NI 42, 52.

### 2.3.2 *Party Discovery*

The party seeking discovery is required to specify the precise category of documents in respect of which discovery is sought and must provide reasons for why each category of documents is required to be disclosed.<sup>37</sup> If the court is of the opinion that discovery is not necessary for the disposal of the case or for the sake of saving costs, then the order shall not be granted. It is also a prerequisite for a discovery order to be granted that the party seeking the order has requested in writing such discovery earlier on a voluntarily basis but which failed after a reasonable period of time due to the refusal, neglect or ignorance of the party from whom discovery was sought.

### 2.3.3 *Third Party Discovery*

Discovery from third parties is also available either by responding to a voluntary written request or, if this fails, by means of a court order. Such discovery will also only be granted if it is necessary to dispose fairly of the cause or matter or for saving costs. Additional, stricter requirements also have to be observed before a litigant can obtain an order for non-party disclosure. The onus lies on the party seeking discovery to establish that the party named is likely to have the documents in his possession, custody or power and that these documents are relevant to an issue arising or likely to arise in the matter.<sup>38</sup> Even if the applicant can establish this to the satisfaction of the court, the court still has discretion not to award third-party discovery if it considers that the person called upon to make discovery would be oppressed or prejudiced as a result and could not be adequately compensated by the applicant..

### 2.3.4 *Privilege/Business Secrets*

When a party is of the view that a document that is the subject of a discovery order is covered by legal privilege, the usual practice is to list the document as privileged and not to produce it to the party seeking discovery. The party seeking discovery can then challenge the claim of privilege. Business secrets are discoverable but it is possible to restrict the use of documents and the people who may have access.

### 2.3.5 *Sanctions*

Any party failing to comply with an order for discovery is liable to an order of attachment and, if a plaintiff, to have his action dismissed for want of prosecution or, if a defendant, to have his defence, if any, struck out.<sup>39</sup>

## 2.4 *Cyprus*

The Ashurst report indicates that Pre-trial discovery and inspection of documents is available to the parties upon application to the court, although such application may be opposed if it concerns privileged documents. Any documents not disclosed at the pre-trial stage, may not subsequently be adduced in evidence by the party who has the documents. Any party may apply for the discovery of specific documents relating to the case or apply for a “general” discovery of all documents in the possession of the other party which relate to the case. The notable exception to the rule are “privileged documents” which relate to correspondence exchanged between the party and his legal advisors

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<sup>37</sup> Statutory Instrument No 233 of 1999, amending Order 31, Rule 12 of the Rules of the Supreme Courts.

<sup>38</sup> *Allied Irish Banks v Ernst and Whinney* [1993] 1 IR 375, per Finlay C.J.

<sup>39</sup> Order 31, Rule 21 of the Rules of the Superior Courts.

There is no procedure to enforce pre-trial discovery from third parties but such parties may be called during trial either as witnesses or to produce documents at their possession. For the latter case there is a special summons (*subpoena duces decum*) requiring a person to produce a document in court.

As in Ireland, Cypriot law on discovery is limited insofar as it is dependent upon application to the court and does not provide for mandatory initial disclosures. However, it would appear to be broader than the equivalent Irish provisions as it provides for discovery of documents which relate to a case rather than the production of categories of documents.

## 2.5 Other EU Jurisdictions

The report prepared by Ashurst indicates that in all EU Member States judges have at least some power to order the disclosure of documents. Usually this is done at the request of the parties, but it can also be done *ex officio*. In all EU Member States, there is at least some scope for parties and third parties to be ordered to produce documents, although this right may be more limited vis-à-vis third parties.

### 2.5.1 France

Pre-trial<sup>40</sup>, there is a possibility for the victim of a certain practice who can show a legitimate reason, to request a judge to protect or establish the proof of a specific fact when the resolution of a future claim will depend on this specific fact<sup>41</sup>. In proceedings before the French commercial courts, the courts with principal competence to hear competition actions, the basic rule is that a party is obliged only to disclose those materials necessary to prove his case.<sup>42</sup> This is subject to the power of the “juge de la mise en état” (investigating magistrate) to order, either on his own initiative<sup>43</sup> or at the request of one of the parties,<sup>44</sup> the disclosure of material from the parties to proceedings or third parties.<sup>45</sup> The judge enjoys wide powers of investigation.<sup>46</sup> The parties may call for the application of investigative measures, but they have no power to require the judge to carry them out.<sup>47</sup> The judge must take into consideration, whether the investigation will be useful and if it will have any influence on the resolution of the case. The effect of long delay and unwarranted expenses must also be considered. In particular, the judge may order the disclosure of any type of documents<sup>48</sup> from the parties, third parties, or public bodies, call witnesses<sup>49</sup>, hear consultants<sup>50</sup>,

<sup>40</sup> “Pre-trial” is the term used on page 13 of the French national report. In a civil law context the term is likely to have been used to indicate the period prior to the filing of a claim before the court.

<sup>41</sup> Article 145 NCPC.

<sup>42</sup> Article 132 of the *Nouveau Code de Procédure Civile*.

<sup>43</sup> The basis for this would be Article 10 NCPC. Article 144 NCPC also provides that the judge may order a “mesure d’instruction”, which could include a request for production of a document, whenever “le juge ne dispose pas d’éléments suffisants pour statuer”.

<sup>44</sup> Articles 11(2), 138 (third parties) and 142 (parties) NCPC.

<sup>45</sup> If the disclosure requested is addressed to a third party, it must be issued by the court itself and not the juge-rapporteur.

<sup>46</sup> Ngwasiri, “Pre-trial Civil Proceedings in England and France: A Comparative Study” 1991 Civ. Jus. Quar. P. 297.

<sup>47</sup> *Syndicate des Habitants de Couronneries v. Société Montenay* Cass. civ. 14 nov. 1979 D. 1980-365.

<sup>48</sup> For example internal documents, accounting documents, contracts, etc.).

<sup>49</sup> Article 204 to 221 NCPC.

<sup>50</sup> Articles 249 to 262 NCPC.

appoint experts, and make personal verifications<sup>51</sup>. The legitimacy of the interest not to testify is assessed by the judge. Professional privilege (e.g. lawyer, doctor, priest) is considered to be a legitimate reason to refuse to testify.

The National French Report of the Ashurst study notes that when requesting the judge to order (to the other party or to third parties) the production of a document, it is not required for the party to name the exact document he is asking for, but must at least specify what kind of document he wants to be produced.<sup>52</sup> The French report also indicates that the appointment of an expert does not always get round problems of access to evidence given the possible reluctance of parties to provide the expert with the necessary information, and the lack of evidence gathering powers of experts..

In practice, the powers of French judges to order investigative measures are limited by the fact that they must notify the parties of the measures proposed and give them an opportunity to be present in court and to be heard directly through their *avocats* in respect of such measures. It would appear that French judges do not often exercise their powers of factual investigation in civil, as opposed to criminal cases. As stated by Joëlle Godard, “it seems probable that the *juge de la mise en état* suffers from too many cases and too little time and assistance to be able to carry out with any seriousness the tasks of factual investigation.”<sup>53</sup>

### 2.5.2 *Belgium*

Under Belgian civil law, a court will order *ex officio* or on the parties’ request disclosure of specified documents during the trial which is in their possession.<sup>54</sup> In addition, the court can, *ex officio* or upon the request of parties, request third parties to submit specified documents.<sup>55</sup> Production will only be ordered or requested if there are serious, specific and consistent indications that a party or a third person has a document containing proof of a relevant fact. If such order or request is not complied with without due cause (e.g. legal privilege), a penalty can be imposed. The judge is free to determine the amount of this penalty but it must be suitable.<sup>56</sup>

### 2.5.3 *Italy*

Italian procedural law does not provide for pre-trial discovery. The judge is able to order a party to the proceedings or a third party, on application by one of the parties or on his own motion to produce documents. It appears however that the judge’s discretion to order disclosure is rarely exercised. The requirement that documents for which production is sought must be identified has been interpreted by the courts on a case by case basis and any document may be demanded if it is shown to be related to the

<sup>51</sup> Articles 179 to 183 NCPC.

<sup>52</sup> French national report, pg 14. However, documents ordered from third parties should be “*suffisamment déterminés*” (Civ 2e, 15 Mars 1979: *Bull civ II, n 88*; *RTD civ 1979*) and the order must identify the desired documents (Com 12 Mars 1979: *Bull civ IV, n 97*). Documents can not be ordered from a party “*sans savoir au préalable de quels documents il peut s’agir et s’ils peuvent présenter quelque lien de rattachement avec un élément de preuve de la cause examinée*” (TGI Marseille, 20 Février 1979: *Gaz Pal 1974 2 544*; Reims, 6 Octobre 1981: *Gaz Pal 1982 1 Somm 181*).

<sup>53</sup> Godard, “Fact Finding: A French Perspective”, published 1993 United Kingdom Comparative Law Series Volume 14, The Option of Litigating In Europe, pg 61. See also Beardsley, “Proof of Fact in French Civil Procedure”, 1986 *Amer. Jo. Comp. Law*, p. 465.

<sup>54</sup> Article 871 of the Judicial Code.

<sup>55</sup> Article 877 of the Judicial Code.

<sup>56</sup> Article 882 of the Judicial Code.

dispute, indispensable to the case and in the possession of the other party or a third party. Although this allows for some flexibility, the document will still have to be identified with some degree of precision.<sup>57</sup>

#### 2.5.4 *The Netherlands*

Discovery as such does not exist in the Netherlands. Before the courts, parties are obliged to present truthful and complete statements.<sup>58</sup> A judge may upon request or *ex officio*, order one of the parties to make its books available for inspection<sup>59</sup>, he may also order one of the parties to submit documents relevant for the case.<sup>60</sup> However, parties are free to refuse these orders. The judge is free to decide on the consequences of such a refusal.<sup>61</sup>

#### 2.5.5 *Spain*

Under Spanish law, production is broader based. A party may request the production by other parties of original documents not in its possession which relate to issues under consideration in the proceedings or the strength of evidence to be adduced. The applicant should attach to the application for disclosure a copy of the documents, or if this is not possible, it will identify as accurately as possible the content of the requested document. It is therefore not necessary to specify which document should be produced and it is possible to apply for the disclosure of a category of documents or for example, of documents precedent, simultaneous or subsequent to a given fact or circumstance.<sup>62</sup>

A third party is only obliged to disclose a document on request of a party if the court considers that the requested document is fundamental in order to reach a judgment.

Courts will not order disclosure *ex officio* apart from in exceptional cases if evidence provided by the parties yields insufficient certainty as to the facts under consideration.<sup>63</sup>

The Spanish Law 1/2000 on civil procedure does not expressly provide for the request of documents from a party before the trial has begun. However, such a measure is explicitly provided for with respect to infringements of the rules on unfair competition, which according to the Ashurst national report can in certain circumstance cover breaches of the competition rules.

#### 2.5.6 *Germany*

In Germany, the Code of Civil Procedure does not provide for pre-trial or other discovery procedures. The power of the judge to enforce the submission of evidence, or to take evidence that has not been previously offered by one of the parties, is limited.<sup>64</sup> The judge is entitled to summon *ex officio* one of the

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<sup>57</sup> Italian National Report, pg 19-20.

<sup>58</sup> Article 21 Civil Procedure Act ("Wetboek van Burgerlijke Rechtsvordering", "CPA").

<sup>59</sup> Article 166 CPA.

<sup>60</sup> Article 22 CPA.

<sup>61</sup> Article 22 and 162 CPA.

<sup>62</sup> Comparative Report pg 63 (I-64).

<sup>63</sup> Comparative Report, pg 12.

<sup>64</sup> National Report, pg 13.

parties or a third party to disclose documents, provided this document is in their possession and reference was made to it by a party in its pleadings.<sup>65</sup>

### 2.5.7 *Poland*

There is no equivalent of discovery in Polish law. At the pre-trial stage parties to proceedings exchange pleadings specifying their claims and positions. This is informal and voluntary. Its objective is, above all, to induce the other side to fulfil claims without the necessity of having to institute court proceedings and to incur related court costs. There is an exception as regards commercial proceedings. In such proceedings the plaintiff is obliged to attach to his statement a copy of the following documents: letter before action; defendant's answer; information or documents verifying an attempt to settle the matter.

The court can order (this usually happens upon a party's request) any party to produce a certain document to the Court. There is no rule as to how detailed the request should be. It may indicate a named document as well as a type or category of documents. The requesting party, however, must justify its request by stating the relevance of the document and showing what facts are to be proved by it. A document produced to a court may then be subject to discovery by the other party.<sup>66</sup>

## 3. **Examination, cross-examination and Subpoena**

### 3.1 ***Introduction***

Examination is the questioning of a witness in court. Under common law there are three possible stages of examination. Examination in chief is the examination of a witness by a party who has called him. This first stage is normally followed by cross-examination. The Comparative Report defines cross-examination as "the questioning of a witness by a party other than the one that called him to testify".<sup>67</sup> Cross-examination is usually made with the objective of diminishing the effect of the evidence of the witness. The 3<sup>rd</sup> possible stage is re-examination, this is the further examination of the witness by the party who called him, with a view to explaining or contradicting any false impression arising from the cross-examination. A witness summons or subpoena is an "order to a person to appear in court on a certain day to give evidence with penalties for failure to appear without legitimate reason".<sup>68</sup>

### 3.2 ***Function of examination and cross-examination***

Examination will be particularly important in establishing facts where documentary evidence is not available or in establishing the truth where facts are in dispute. In the common law countries, cross-examination appears to carry particular importance in court proceedings. Cross-examination makes it possible to check the reliability and accuracy of the evidence of a witness. Arising from these advantages, the Comparative report states that "in competition cases cross examination will therefore be a useful tool in cases where there are major factual disputes (e.g. in the case of cartels) although not always."<sup>69</sup>

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<sup>65</sup> §142 of the Zivilprozessordnung.

<sup>66</sup> National Report, pg 10 and Comparative Report pg 63 (I-64).

<sup>67</sup> Study on the conditions of claims for damages In case of infringement of EC competition rules, Comparative Report, p. 66 (I-67).

<sup>68</sup> Study on the conditions of claims for damages In case of infringement of EC competition rules, Comparative Report, p. 66 (I-67).

<sup>69</sup> Study on the conditions of claims for damages In case of infringement of EC competition rules, Comparative Report, p. 67 (I-68).

Sir David Edward, a retired judge of the ECJ and who has experienced at first hand both the common law and civil law systems has stated the following:

“Having had experience of operating on both sides of the divide, I firmly believe that the process of examination and cross-examination, developed in the common law system of trial, is unrivalled as a means of getting at the truth where important facts are deliberately concealed or distorted. Those who have been trained in the common law system develop a nose for the evasion and the half-truth. If a judge has had no experience as an advocate with an interest to pursue a point on behalf of his client, he may break of his investigation at the very moment when, by pressing a bit further, he might have uncovered the truth.”<sup>70</sup>

### **3.3 Availability of cross-examination**

In most countries of the European Union some form of cross-examination is permitted.<sup>71</sup> Cross-examination by the parties is not available in four countries, Belgium, France, Italy and Luxembourg. However, even in these four countries the parties may request the judge to put questions to witnesses. In Italy these questions must be submitted in advance. The disadvantage of this system is that the parties are not afforded the same possibility to check the veracity of witness statements as are available in direct cross-examination.

It should also be noted that most of the countries that allow direct cross-examination, have also build in mechanisms to protect the witness. For example in Austria, Czech Republic, Germany, Greece, and Slovakia, the judge will first question the witness to ensure an opportunity to give a complete and coherent statement.<sup>72</sup> Also judges can dismiss questions in the cross-examination, these are normally questions which he considers to be irrelevant for the case or confusing. Another protective mechanism is the possibility of re-examination, whereby the party which asked the witness to appear before the court can ask questions after the cross-examination, with a view to explaining or contradicting any false impression arising from the cross-examination.

### **3.4 Subpoena of witnesses to appear before the court and give evidence**

It is important to mention that in several jurisdictions there are limitations on calling parties and their representatives as witnesses<sup>73</sup>. A number of countries also have restrictions on the evidence of witnesses the most important of which are set out in page 57 of the Comparative Report. These are:

- Limitations on certain categories of witness

In some Member States certain categories of witness may refuse (or are under a duty not) to testify. The two main categories are: people subject to professional secrecy and (close) relatives of the parties. Albeit with slightly different conditions attached to their applicability, such rules exist in practically all Member States.

<sup>70</sup> Sir David Edward, *Fact-Finding: A British Perspective*, published 1993 United Kingdom Comparative Law Series Volume 14, *The Option of Litigating In Europe*, pg 55.

<sup>71</sup> In the German national report it is stated, that the law does not exclude it, but it would appear that, in practice, cross-examination does not happen very often. In Lithuania cross examination is also not used in practice.

<sup>72</sup> See Comparative Report p. 67 (I-68).

<sup>73</sup> Such limitation exists in Czech Republic, Estonia, Germany, Hungary, Italy, Portugal, Slovakia, Sweden. The most significant example would be that of Luxemburg, Luxemburg national Report, p. 9.

- Exclusion or special treatment of statements by parties

In some states parties (including their representatives) may not be called as witnesses as such (Czech Republic, Estonia, Germany, Hungary, Italy, Luxembourg<sup>74</sup>, Portugal, Slovakia, Sweden (although they can be called to give a statement as a party)).

However, in most of these jurisdictions, there is some scope for parties to submit statements (Czech Republic (testimonies as parties to the proceedings), Estonia (statements can be requested or volunteered by parties), Germany (under specific circumstances, e.g. if no other evidence is accessible), Portugal, Slovakia).

- Written statements

In some jurisdictions witness statements cannot take written form (Estonia, Finland, Italy, Portugal (with some exceptions), Slovenia (such a written statement would not be considered as a "witness statement", but as another form of evidence, which is also permissible as there are no limitations concerning form of evidence), Sweden).

#### **4. Product of foreign discovery**

According to the Comparative Report of the Ashurst Report,<sup>75</sup> although not recognising discovery, some Member States may nevertheless admit evidence obtained through discovery in other countries<sup>76</sup> (Austria, Belgium, Czech Republic, Denmark, Estonia<sup>77</sup>, France, Germany, Greece, Italy (although subject to the satisfaction of the prior identification requirement and thus with reference to specific documents obtained through discovery abroad<sup>78</sup>), Luxembourg, Netherlands, Portugal, Slovenia (although there is no practice concerning this issue), Spain). There is no specific limitation in these Member States as to where (i.e. in which third country) the evidence may have been collected.

In the UK, where discovery does exist, a party to court proceedings is obliged to list for disclosure all material documents within that party's control, regardless of their location.

#### **5. Consequences for the proceedings of a refusal to disclose documentary evidence**

According to the Ashurst study, in some Member States, refusal to produce documents on request by the court can be taken into account by the judge in his evaluation of evidence. The weight to be given to restrictions on access to evidence placed by one of the parties in the way of the other appears to vary as between Member States.

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<sup>74</sup> The limitations placed on statements by directors are fairly complex. See for further details Luxembourg National report, point E(a)(iii).

<sup>75</sup> Comparative Report, pg 65 (I-66).

<sup>76</sup> Often subject to some general restriction such as that the individual's constitutional or human rights must not have been violated in the taking of the evidence (e.g. Germany, Portugal, Spain).

<sup>77</sup> However, a request to obtain documents by discovery cannot be submitted in Estonia.

<sup>78</sup> For further details, please see the Italian report, point E)(a)(iv).

In some Member States refusal to disclose appears to be taken specifically as proof of the alleged facts relating to those documents. This may be the case in Germany<sup>79</sup> and appears to be so in Latvia. To this effect, the Italian national rapporteur suggested that in event of unjustified failure to disclose evidence by the defendant, the burden of proof of the claimant as to the infringement be deemed to be discharged, subject to the claimant providing “sound and serious clues” of the infringement.<sup>80</sup>

In Portugal, where one party makes it impossible for the other to prove a fact, the burden of proof is explicitly reversed (as opposed to such conduct being a factor to be taken into account by the judge).<sup>81</sup> This is only the case where access to evidence is made impossible. It does not apply if such access is merely made more difficult.

In other Member States it appears to be the case that refusal to disclose would not in itself be sufficient to establish proof of the alleged facts but that the judge would require further persuasion on the point (for example Denmark,<sup>82</sup> France, Hungary and Italy). In such a situation, the refusal to produce documents will be taken into account by the judge in his evaluation of evidence (as appears to be the case for example in Poland<sup>83</sup>). According to the Spanish rapporteur, under Spanish law the ease of access to the relevant evidence of the party bearing the burden of proof will be taken into account by the court in determining whether that burden of proof has been discharged.<sup>84</sup>

In England, if a party is dissatisfied with the extent of his opponent’s disclosure, an order can be obtained from the court requiring a party to give further specific disclosure or conduct a further search. If an order is made, failure to comply can amount to contempt of court and may have serious consequences including the dismissal of a party’s claim or judgment being entered against him.

In Ireland, any party failing to comply with an order for discovery is liable to an order of attachment and, if a plaintiff, to have his action dismissed for want of prosecution or, if a defendant, to have his defence, if any, struck out.<sup>85</sup>

## 6. Sanctions for non disclosure

The Ashurst Comparative Report<sup>86</sup> indicates that in the majority of states, a person who refuses to produce a document following an order to do so will be subject to penalties. These are usually financial penalties (Belgium, Czech Republic, Denmark (if disclosure is demanded from a third party), Estonia, France (a defendant's refusal to disclose may result in damages being awarded and third parties may be

<sup>79</sup> This is stated in the comparative report (page 64) to be the prevailing view among experts. The German national report (page 10) states only that if one party makes it impossible for the other party to prove a fact, then the court may alleviate the burden of proof or shift it away from the obstructed party.

<sup>80</sup> Italian national report, page 48.

<sup>81</sup> Article 344 of the Portuguese Civil Code.

<sup>82</sup> Danish national report (page 7), referring to the Administration of Justice Act § 344(2) and (3). The Danish report does not refer specifically to refusal to produce evidence, but to a failure by a party to “*fulfil his obligation to give information or to follow the court’s request e.g. for further and better particulars*”. This would appear to cover failure to produce evidence when requested to do so by the court.

<sup>83</sup> See the Polish national report, page 8.

<sup>84</sup> Article 217(6) of the Spanish Civil Procedure Law of 7 January 2000 (see the Spanish national report at page 9).

<sup>85</sup> Order 31, Rule 21 of the Rules of the Superior Courts.

<sup>86</sup> Comparative Report, pg 64 (I-65).

subject to fines or periodic penalty payments), Germany (if disclosure is demanded from a third party), Hungary, Latvia, Lithuania, Poland, Portugal, Slovakia, Spain, Sweden). However, sanctions can take other forms. In Germany, third parties refusing to disclose documents can be imprisoned for up to six months in the case of repeated disobedience. In Denmark the court may commit third-parties to custody, however, not for longer than six months. In England and Ireland, a person making a false disclosure statement without an honest belief in its truth or refusing to make disclosure may be held to be in contempt of court<sup>87</sup>.

## 7. Prevention of destruction of evidence

A weakness of evidence taking in the context of private action is that the lodging of an action which is necessary to trigger discovery or production may prompt the defendant to destroy incriminating materials.

In the Czech Republic, evidence may be secured on a motion before proceedings on the case proper are initiated if there is concern that such evidence might not be available later or only obtainable with great difficulty. There is a similar provision in a number of jurisdictions, including Italy<sup>88</sup> if there is a risk that by the time proceedings have started that the witness concerned has died or the place or thing to be inspected has altered. In Spain, if there are reasonable grounds for believing that evidence may no longer be available at the time of the trial an early assessment of the evidence may be sought. If such early assessment is granted, the claimant has then to serve its claim within two months otherwise the evidence will cease to be valid. This provision is unusual as it seems to allow for measures to be taken even before the action is filed.

## 8. Protection of Business Secrets

Safeguards have been built into the rules on obtaining evidence both in jurisdictions which provide for discovery and in jurisdictions which obtain evidence primarily through production. Under English procedural law, business secrets may be prevented from disclosure by the Competition Appeals Tribunal (CAT)<sup>89</sup>. In the ordinary courts, there is no such express power, but if a party claims secrecy the court may order a controlled measure of disclosure deciding in each case what degree of disclosure is appropriate, for example, by restricting disclosure to the parties' lawyers and requiring them not to disclose to their clients.

The extent to which business secrets are protected from disclosure varies. For example, in Germany only third parties can invoke business secrets in order to refuse disclosure of documents.<sup>90</sup> In France, the grounds of refusal is limited to trade secrets or information on the structure of competitors and does not cover accounting documents, whereas in Germany the protection of business secrets extends to all technical work equipment and working methods. In some jurisdictions, under certain conditions, all or parts of the hearing can be held behind closed doors for reason of business secrets (e.g. Denmark). Finally, in a number of jurisdictions, the protection of business secrets is not explicitly referred to as a ground for refusal to disclose, e.g. Cyprus (no procedure exists regulating discovery for the protection of business secrets, Estonia, Italy (although disclosure may be refused where this may cause 'serious harm'), Malta, the Netherlands, Portugal, Slovakia and Spain.

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<sup>87</sup> Contempt of court is a common law concept pursuant to which the court has full discretion in imposing fines or even ordering imprisonment.)

<sup>88</sup> Similar provisions also exist in Lithuania, Luxembourg, and Slovenia.

<sup>89</sup> CAT rule 53.

<sup>90</sup> § 142 (2) Zivilprozessordnung.

## 9. Two projects of relevance

It should be noted that two well known projects which examined the harmonisation of civil procedural law address the issue of discovery. The most prominent of these is the **ALI/UNIDROIT**<sup>91</sup> **project** on transnational procedure, the aim of which was to produce a complete set of principles and court rules that States could adopt for handling transnational disputes outside arbitration. The Principles of Transnational Civil Procedure were approved both by UNIDROIT and ALI in Spring 2004.<sup>92</sup> The following principles are, inter-alia, relevant for discovery:

*'In the pleading phase, the parties must present in reasonable detail the relevant facts, their contentions of law, and the relief requested, and describe with sufficient specification the available evidence to be offered in support of their allegations. When a party shows good cause for inability to provide sufficient specification of relevant facts or evidence, the court should give due regard to the possibility that necessary facts and evidence will develop later in the course of the proceeding.'* (principle 11.3)

*'Upon timely request of a party, the court should order disclosure of relevant, non-privileged and reasonably identified evidence in the control or possession of another party or non-party. It is not a basis of objection to such disclosure that the material may be adverse to the party or person making the disclosure'* (principle 16.2).

*'To facilitate access to information, a lawyer for a party may conduct a voluntary interview with a potential non-party witness'* (principle 16.3).

These principles, which provide for discovery, recognise that fact pleading is the appropriate instrument for limiting fact finding and to avoid excessively broad discovery.

The second project sought to establish a **European code of civil procedure**. The Working Group for the Approximation of Civil Procedural Law was founded in 1987 under the chairmanship of Marcel Storme (University of Ghent). The working group, which consisted of leading experts from the then twelve EU Member States, was given a contract by the Commission in 1990 to draft a model law. The final report and the draft law was published in 1994.<sup>93</sup> The draft law provides for limited disclosure obligations, that is, a party would be obliged to serve on all other parties a list of the documents which is in his possession, custody or power which relate to any question in issue in the action and which have previously not been communicated to the other parties (a) where a general law of national law so requires; or (b) where the court after all the parties have been given the opportunity to be heard so orders.

A party who has served a list of documents shall communicate to or allow all other parties to inspect and to take copies of all or any of the documents listed other than those in respect of which a claim of privilege against disclosure or communication has been made. The grounds of privilege against disclosure

<sup>91</sup> The International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental organisation with its seat in Rome. Its purpose is to study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States. It has a joint working group on this issue with the American Law Institute (ALI) since 2000. These are two highly respected institutions for the harmonisation of law.

<sup>92</sup> For a history of the ALI/UNIDROIT partnership and an introduction to the basic concepts of transnational civil procedure, see Rolf Steiner, *The Principles of Transnational Civil Procedure – An Introduction to Their Basic Conceptions* [insert reference]

<sup>93</sup> M.Storme (ed.), *Rapprochement du Droit Judiciaire de l'Union européenne - Approximation of Judiciary Law in the European Union*, Dordrecht/Boston/London, 1994.

would be determined by national law. Parties would also be able to apply to the court to be relieved of the obligation to disclose on the grounds that it would cause undue harm. In addition a court, on the application of a party, would be able to order a third party to disclose or communicate any document which he has in his custody, power or possession and which relates to a question in issue in the action.

## **10. Granting access to documents held by the Commission**

### **10.1 Introduction**

Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents<sup>94</sup> defines the principles, conditions and limits governing the right of access to documents of those institutions, provided for in Article 255 EC. The Regulation is applicable in cases where natural or legal persons request access to documents on competition files of the Commission. A party actively involved in the administrative procedure before the Commission has a more extensive right to access, referred to as access to file, which is governed by the access to file notice<sup>95</sup>.

### **10.2 Regulation 1049/2001 on public access to documents**

The Regulation is addressed to all citizens of the Union and any natural or legal person residing or registered in a Member State. The aim of the regulation is to grant the widest possible access to documents, subject to the principles, conditions and limits defined in the Regulation. Article 4 of Regulation No 1049/2001, relating to the exceptions to the right of access, states:

‘1. The institutions shall refuse access to a document where disclosure would undermine the protection of:

...

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

- commercial interests of a natural or legal person, including intellectual property,
- court proceedings and legal advice,
- the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if

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<sup>94</sup> OJ 2001 L 145, p. 43

<sup>95</sup> Commission notice on the internal rules of procedure for processing requests for access to the file in cases under Articles 85 and 86 [*now 81 and 82*] of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Council Regulation (EEC) No 4064/89 (Published in the Official Journal: OJ C 23, 23/01/97, p. 3)

disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

...

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

...?

It follows that a general refusal of the release of case related documents is not possible. DG Competition has to justify its position for each refusal to grant access to documents on the basis of the relevant exceptions. The most relevant exception being that relating to "inspections".

## 11. Access to documents by national courts

The basic rule for the co-operation of the Commission with the national courts in competition matters is based on Article 10 EC and principles derived there from by the Community Courts. The issue is specifically addressed in Art. 15 (1) Regulation 1/2003 which stipulates that national courts in proceedings for the application of Art. 81 or 82 EC may request information from the Commission. The Commission's accompanying "Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC" contains a specific section on "the Commission's duty to transmit information to national courts".<sup>96</sup>

When transmitting this information the Commission is under an obligation to uphold the guarantees given to natural and legal persons by Art. 287 EC. This obliges all staff of the Commission not to disclose information covered by the obligation of professional secrecy. The concept of professional secrecy covers both confidential information and business secrets.<sup>97</sup> This does not hinder the Commission from transmitting such documents to the court, but prior to doing so it has to make sure that the confidentiality of the documents is guaranteed by the national court. If the court cannot provide such a guarantee the Commission shall refuse the transmission.<sup>98</sup> With regard to documents voluntarily obtained by the Commission in an application for leniency the Notice says that a transmission to the national courts will only be made with the prior consent of the applicant.<sup>99</sup> Article 28.2 of Regulation 1/2003 extends the same obligation of professional secrecy to officials of the Member States.

<sup>96</sup> Notice of 27 April 2004, OJ C 101/54, at p.57. See in particular paragraph 21.

<sup>97</sup> Para. 23 of the Notice and Art. 28 (2) of Regulation 1/2003.

<sup>98</sup> Paras 24 and 25 of the Notice.

<sup>99</sup> Para 26 of the Notice.

In *Zwartveld*,<sup>100</sup> which dealt with a request for judicial cooperation in a criminal proceeding for fraud, the ECJ stated that the relations between the Member States and the Community institutions are governed by a principle of sincere cooperation based on Article 5 of the EEC Treaty (now Article 10 EC). This duty of the institutions is of particular importance vis-à-vis the judicial authorities of the Member States, who are responsible for ensuring that Community law is applied and respected.<sup>101</sup>

In its later order in the same case of 6 December 1990, the court acknowledged that the Commission may justify a refusal to produce documents to a national judge where the rights of a third party could be jeopardised or where the functioning and the independence of the Community institutions would be endangered.<sup>102</sup>

In *Postbank*<sup>103</sup> the CFI repeated the principle of sincere cooperation, which requires the institutions to give active assistance to any national judicial authority in proceedings for the application of Community competition rules.<sup>104</sup> As far as the relevant documents contain business secrets or are likewise privileged this does not hinder the Commission from submitting these documents as long as the necessary precautions to protect the confidential information have been taken. Such precautions may include, in particular, informing the national court of the documents or passages of documents which contain confidential information or business secrets.<sup>105</sup> As in *Zwartveld* the court acknowledged that the Commission may justify a refusal to produce documents to a national judge where the rights of a third party or of the Communities could be jeopardised. However, it stated that this would only arise in exceptional cases.<sup>106</sup>

It is arguable further from the Court's judgment in *First & Franex*<sup>107</sup> that the Commission is obliged, pursuant to Art. 10 EC, to provide information also for national proceedings based solely on national law, thereby extending the interpretation of Article 10 in the *Zwartveld* judgement, in which the Court required the cooperation only for the application of Community law or national law implementing Community law.

Nevertheless, the hurdles for the duty to cooperate for actions based solely on national law remain quite high. The national court has to show that it (i) needs the information and (ii) the Commission is the sole source available to provide this information (this second condition being particularly relevant in those Member States with no or limited discovery procedures). Furthermore, the Commission can refuse the request for overriding policy reasons relating to the need to avoid any interference with the functioning and independence of the Community or to safeguard its interests. These are the policy reasons referred to by the Commission in paragraph 26 of its Notice on Cooperation with the National Courts as justifying its refusal to transmit to national courts information voluntarily submitted by a leniency applicant, without the consent of that applicant.<sup>108</sup>

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<sup>100</sup> Order of the Court of 13 July 1990. J. J. Zwartveld and others, Case C-2/88 [1990] ECR I-03365 and Order of the Court of 6 December 1990. J. J. Zwartveld and others. Case C-2/88 [1990] ECR I-04405.

<sup>101</sup> Para 18 of the order of 13 July. See also para 22.

<sup>102</sup> Paras 6 to 11 of the order of 6 December 1990.

<sup>103</sup> Judgment of the CFI of 18 September 1996. *Postbank NV v Commission*, Case T-353/94, [1996] ECR II-921.

<sup>104</sup> *Supra* paras 64, 65.

<sup>105</sup> *Supra* paras 89-92.

<sup>106</sup> *Supra* para 93.

<sup>107</sup> Judgment of the ECJ of 26 November 2002. *Commission v First NV and Franex NV*, Case C-275/00, [2002] ECR I-10943.

<sup>108</sup> Notice of 27 April 2004, OJ C 101/54, at p.57.

In conclusion where a national court seeks the production of information concerning the existence of the facts constituting an infringement of EC competition law, it is the duty of the Commission to hand over such information unless there is an overriding public interest. One such exception is information provided voluntarily by a leniency applicant. However it is clear that the fact that the relevant information is covered by the concept of professional secrecy is not in itself a sufficient justification for refusal to disclose, as there is a presumption that national courts will guarantee the protection of confidential information. There is however a duty on the Commission to take all necessary precautions to ensure that by transmitting documents containing confidential information or business secrets the entitlement of the undertakings concerned to the protection of that information is not undermined. Such precautions may include informing the national court of the documents or parts of documents, which contain confidential information or business secrets. It is then the responsibility of the national court to guarantee protection of the confidentiality of such information.

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## BIAC

BIAC is pleased to provide some preliminary comments on private remedies in response to the issues raised by Mr R Hewitt Pate in his letter of 15 April, 2005 for the purposes of the roundtable discussion to be held on 31 May, 2005. Whilst noting that the focus for discussion is to be "Discovery and production of evidence in private litigation", we start with some observations on the subject of private remedies generally in order to provide some context for what we are sure will prove to be an interesting and enlightening discussion.

### 1. General Observations

A threshold question is whether private enforcement actions in the anti-trust field are considered to be a good thing and, if so, whether this extends to all areas of anti-trust including mergers. BIAC crosses that threshold on the basis that everyone should agree that private parties damaged by infringements of anti-trust law should have an adequate opportunity to seek recovery. The more difficult issue is the extent to which such parties should be facilitated or even incentivised under the applicable legal framework to pursue private enforcement actions. This in turn leads to a discussion of how this might be done as a practical matter without triggering what many in business would consider to be 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. If the right balance can be found, then the resulting benefits would not be limited to better access to justice for victims of anti-competitive practices, but would also produce the public benefit of some reduction in the enforcement burden currently placed upon national competition authorities. However, there would, of course, be a corresponding additional burden on the court system which may need substantial reinforcement in certain areas. Equally, a degree of caution is required in measuring this possible public benefit. In certain types of hard core anti-competitive practice such as cartels private enforcement even with the benefit of broad discovery rules would be no real substitute for the wide investigative powers of the public authorities.

Any global approach to this issue cannot ignore the problems presented by the existing diversity of legal systems in the various national jurisdictions. In the general absence of specialised competition courts such private remedies have to be pursued before the relevant national civil courts which have jurisdiction to try the issues. This necessarily involves a comparative assessment of civil procedure rules. Whereas the public enforcement of anti-trust rules has been the subject of considerable global efforts to achieve convergence through bodies such as the OECD and the International Competition Network and has made progress based on shared objectives and a wide degree of commonality in terms of the applicable legal and economic theories, the basis for similar convergence of civil procedure and court systems globally simply does not exist. This reflects widely differing legal traditions and cultures across the world notably between the common law and the civil law systems. These are basic building blocks of national judicial structures to which there can be no quick fix solution. Even within these different traditions there are remarkable differences. Whilst the USA and England<sup>1</sup> share the common law tradition and many similarities in civil

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<sup>1</sup> Within the United Kingdom there are significant differences between the legal system applicable in England & Wales and those of Scotland, the Channel Islands, the Isle of Man and (to a lesser extent) Northern Ireland.

procedure, it is notable that in the US some 96% of anti-trust enforcement<sup>2</sup> is reportedly effected through private actions whilst in England the percentage is negligible. This high level of private litigation in the US cannot be explained away by the allegedly litigious nature of that society<sup>3</sup>. In reality it probably reflects a different tradition in which the courts have historically played a much greater role in controlling the potential excesses within a market economy rather than the various forms of governmental intervention which are more extensive in many other jurisdictions, particularly in Europe. No doubt, though, the US tradition has been greatly stimulated by the "incentives" to private litigation which exist in the US system such as class actions, treble damages, punitive damages, contingency fees, jury trials in civil cases and that plaintiffs are not liable to pay the costs of the defendant even if a claim is unsuccessful. These factors have in turn fostered the creation of a vigorous plaintiff's bar having the desire and resources to conduct litigation on a massive scale. Some commentators see the signs of similar trends developing in Europe<sup>4</sup> but as things stand this seems a relatively remote prospect. The Ashurst Report<sup>5</sup> trawled the various European jurisdictions thoroughly and only identified one such case in the UK in which damages had been awarded, five in Germany, three in Spain, two in France and three in Italy.

The gap between jurisdictions in which private enforcement actions predominate and those jurisdictions (the vast majority) in which it is negligible is thus extreme with neither system providing a model for what is required to achieve a balanced and more convergent framework for private enforcement. The international spread of merger control laws, notwithstanding all its shortcomings, is an example of the level of convergence that can be achieved in the anti-trust field but arguably that was less of a challenge because in most cases it was achieved by introducing entirely new laws rather than changing deeply entrenched and long standing existing laws. In terms of mechanics, short cuts could be considered such as the establishment of specialist competition courts with their own procedures in the various jurisdictions including the European Union – in the latter case possibly as a specialist chamber of the European Court of First Instance pursuant to the provisions of the Nice Treaty<sup>6</sup>. Whatever the mechanics adopted this is clearly the work of years rather than months which will necessarily involve the international political will to carry the necessary legislation forward with vigour. Of course, a more convergent global framework in this area would also be facilitated by certain changes in the existing US system, some of which are likely to be considered by the US Antitrust Modernisation Commission, such as limiting the number and type of cases in which treble or punitive damages are available. A move away from jury trials in such cases might also help to reduce damages awards to more objectively justifiable levels.

## 2. Specific Issues

As mentioned in numerous previous papers on this subject any moves towards encouraging private actions in the anti-trust field need to be balanced and mindful of a range of potentially adverse side effects as follows:

- The need for safeguards in any private enforcement network against the cost, business disruption and damage to reputation which can result from private actions brought for strategic or abusive reasons, e.g. by aggressive competitors. One obvious step here is to give the Court or Tribunal

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<sup>2</sup> See OECD, Rights of Foreign Firms under Competition Laws, COM/DAFFE/CLP/TD(98)23.

<sup>3</sup> It would also be interesting to see data on the percentage of US private actions which have resulted directly or indirectly from public enforcement action by DOJ or the FTC.

<sup>4</sup> "Europe Gets Litigious" by Mark Wegener and Peter Fitzpatrick. Legal Times. 23 May, 2005.

<sup>5</sup> Comparative study undertaken by Ashursts on behalf of the European Commission in 2004.

<sup>6</sup> See Nice Treaty. Article 225(a).

the power to award costs against the unsuccessful plaintiff if this is not the generally applicable rule already.

- In order to deal with the forum shopping and "long arm" issues there needs to be clarity as to when a national court or tribunal will accept jurisdiction in a particular case and when it will assist (e.g. by making disclosure orders) with anti-trust proceedings in other jurisdictions. There have been a number of cases in Europe recently which have apparently disregarded even contractual selection of jurisdiction agreements<sup>7</sup> and it has also now been clarified by the European Court of Justice that the 2001 Regulation on Jurisdiction and Enforcement means that the court in which proceedings are first brought has to decide upon its own jurisdiction. The Empagran Case<sup>8</sup> before the US Supreme Court highlights the importance of this issue. However, whilst the Supreme Court in that case gave considerable weight to issues of international comity and anti-trust enforcement cooperation in restricting the reach of US anti-trust law in cases involving conduct taking place outside the US differing considerations appeared to apply in the Intel Case<sup>9</sup> which followed shortly afterwards. In that case the Supreme Court supported an expansion of the role of US courts in the context of foreign anti-trust proceedings. The US legal position on these issues is further confused by the conflicting District Court decisions in the Methionine Antitrust Litigation<sup>10</sup> (denying an order to produce documents provided to foreign anti-trust authorities) and the Vitamins Antitrust Litigation<sup>11</sup> (compelling defendants in a private action to produce documents provided to foreign anti-trust authorities). On this evidence it would seem necessary to re-visit OECD recommendations<sup>12</sup> concerning cooperation between Member Governments and, if necessary, to beef them up taking into account the importance which leniency programmes now play in the context of enforcement and the desirability of respecting the confidentiality of requests made for leniency in whichever jurisdiction such action is taken.
- It is questionable whether private actions should be encouraged in merger cases given that the resulting cost and delay can undermine mergers which are, in actual fact, pro-competitive or efficiency enhancing. The recent trend in the UK is an example of the problems which can arise in this regard<sup>13</sup>.
- Sensitive issues can also arise concerning the extent to which competition authorities will grant private claimants access to information gathered in a public investigation which is not otherwise available under "Freedom of Information" legislation, if any, in the relevant jurisdiction.
- A further issue concerns whether the relevant regulators should have the right to intervene in support of private actions and, if so, how this can be done.

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<sup>7</sup> JP Morgan Europe Ltd v PrimaCom AG [2005] All ER (D) 03 (April).

<sup>8</sup> F Hoffman-La Roche Ltd v Empagran SA. 124 S. Ct. 2359 (2004).

<sup>9</sup> Intel Corp v Advanced Micro Devices, Inc. 124 S. Ct. 2466 (2004).

<sup>10</sup> No. C-99-3491 CRB (JCS) MDL No. 1311.

<sup>11</sup> No. 99-197 (TFH) MDL No. 1285 (April 2002).

<sup>12</sup> Recommendation of the Council of the OECD of 28 July, 1995, concerning Cooperation between Member Countries on Anti-Competitive Practices affecting International Trade.

<sup>13</sup> Office of Fair Trading v IBA Health [2004] EWCA Civ 142; Unichem Limited v Office of Fair Trading Case No. 1049/4/1/05. Judgement of 1 April, 2005 as a consequence of which the discretion of the OFT to clear mergers at the first stage has been constrained.

- The risk of multiple parallel proceedings in different jurisdictions is another possible adverse consequence which would need to be managed. Any private action framework would need to take into account prior proceedings and/or action taken or pending by a public authority.
- The subject of this roundtable, namely, a degree of commonality on key procedural issues would be another essential ingredient of a viable international framework covering the burden and standard of proof, active case management, the availability of pre-trial disclosure of evidence and the use of expert testimony. Bearing in mind that timing issues can be particularly important in anti-trust issues, the availability of interim relief would be a significant attraction in many cases.
- The availability of damages is one of the most critical issues which is also pivotal to the question of incentivisation. The US model with its treble and punitive damages, class actions, contingency fees and general absence of liability for the cost of the defendants offers the greatest incentive to plaintiffs. However, it is unlikely that this model would be adopted by any other jurisdiction given the scale of the litigation which it seems to have created in the US which few other countries would be able or willing to cope with. There is also the issue of principle as to whether private parties should be the recipients of windfall gains resulting from successful treble damages claims; the point here is that the function of treble damages is to punish rather than reward and that it is arguably more appropriate that this deterrent effect should be achieved through fines levied by public authorities. Equally, if claimants are limited to simple damages, then there is scope for clarifying the basis upon which such damages can be calculated. Generally, the prospect of recovering substantial damages will be a powerful incentive for private actions and this can probably be largely achieved without adopting all of the more controversial features of the US model. Once the claimants begin to recover significant amounts in private enforcement actions outside the US also, then the number of such cases can be expected to increase rapidly.
- In seeking to develop a framework for private enforcement which can be widely exported, the essential requirement is for a balanced approach. Most jurisdictions will strive to avoid the cost and disruption that could result from a flood of speculative litigation on competition issues fuelled by the prospects of rich pickings for those without, in reality, legitimate or substantive grievances. Equally, some increase in private enforcement action would help to foster the more widespread development of a competition culture in support of (but not as a substitute for) public enforcement action. A key element in the latter respect is the availability and use of leniency programmes and great care will be needed to ensure that parties are not discouraged from availing themselves of such programmes for fear of the private actions that may result later<sup>14</sup>.

### **3. Production of Evidence in Private Litigation**

The discussion papers prepared for this meeting by the delegations of the USA, the European Commission and others well illustrate what might be described as the great divide between the "common law" tradition (as followed in the US, Canada, England, Ireland, Australia and other Commonwealth countries) and the "civil law" tradition as followed in most EU Member States. In terms of evidence gathering powers, recent studies show that the claimant is far better placed as a general rule under the common law system with its emphasis on the parties to a dispute being required to put all their cards on the table (whether favourable or unfavourable) prior to trial. Under the civil law system the claimant only has limited power to compel the production of evidence or to elicit testimony from adverse or third parties and

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<sup>14</sup> See the paper presented to the ABA Antitrust meeting on 31 March, 2005 on "International Antitrust – Developments after Empagran and Intel – Country Considerations" presented by Cal Goldman QC, Chris Hersh and Crystal Wilterick of Blake, Cassels & Greydon LLP.

must, therefore, rely upon voluntary cooperation or seek intervention by the Court. Whilst judges in civil law procedures may generally play a more significant role in fact finding than under common law, there is also comment that judges are less likely to intervene in purely civil cases<sup>15</sup>. This is, no doubt, why several of the national reporters of the Ashurst Study identified the difficulty of obtaining evidence in civil law jurisdictions as one of the major obstacles to private damages actions. Their suggestion was that solutions should be looked at such as the introduction of discovery rules, giving power to judges to order production of classes of documents, and facilitating access by Courts to documents held by national competition authorities. They also suggested removing restrictions on calling certain witnesses and the introduction of cross-examination where this does not already exist.

On the face of it the removal of the restrictions which often apply in civil law jurisdictions in relation to the production of evidence by, inter alia, introducing pre-trial discovery would appear to be a strong candidate in terms of encouraging private actions. However, such analysis may be over simplistic in that the existence of such rules (as well as a specialist competition court) has not resulted in an upsurge of private enforcement actions in the United Kingdom and it also fails to take into account the significant downside of discovery systems which have plagued the common law jurisdictions. Full disclosure is inordinately expensive and time consuming; in the current electronic messaging era the complexities of email disclosure are still being explored but if not contained could result in crippling expense and significant disruption to the parties. Full disclosure may represent the gold standard of evidence production but who can afford it? In recent years the Courts in jurisdictions such as the US and England have been seeking ways to contain disclosure through active case management and other techniques but in any civil proceedings in common law jurisdictions it can prove to be a highly contentious issue with one party or the other often seeking to stretch the rules to launch so called "fishing expeditions" to try and bolster claims which otherwise they would have difficulty in substantiating. The prospect of offers of teams of expensive lawyers ploughing through mountains of seemingly inconsequential documents looking for the "smoking gun" which could make their case is hardly attractive or compelling as a model to follow voluntarily. On the whole it seems unlikely that civil law jurisdictions including the European Courts of Justice (which effectively follow the civil law tradition) would be prepared to accept this very different approach to evidence production given its well recognised imperfections. The US delegation<sup>16</sup> argues that the US Federal Discovery Rules "limit the risks" and help to avoid costly and risky trials by promoting settlements prompted by parties discovering the strengths and weaknesses of their respective cases; whilst having some justification this assessment strikes us as being unduly positive.

In contemplating how to bridge the great divide the relatively recent example of the Competition Appeals Tribunal in the UK provides some interesting lessons. This specialist competition court has been set up with procedures deliberately modelled on those of the European Court of First Instance (which follows the civil law tradition) but without excluding the best features of the common law adversarial rules of procedure and evidence. The emphasis is on the case of each party being fully set out in writing as early as possible with supporting documents produced at the outset. Active case management techniques are followed to concentrate on the main issues, to avoid undue delay and to ensure that evidence is presented efficiently. In this way the worst potential abuses of discovery rules are contained and managed so that only evidence relevant to the main issues is required. This type of balanced approach could provide a useful model for civil law jurisdictions to follow particularly if a trend towards establishing specialist competition courts develops. Other possible models which would be worth taking further are the

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<sup>15</sup> See written submission of the delegation of the European Commission to WP3 DAF/COMP/WP3/WD(2005)15.

<sup>16</sup> See DAF/COMP/WP3/WD (2005) 20 at para 15.

ALI/UNIDROIT project on transnational procedure and the model law produced by the Working Group for the Approximation of Civil Procedural Law<sup>17</sup>.

In tackling the wider issues of obstacles to the production of evidence there is a pressing need, somewhat in the other direction, to adopt consistent rules and practices in relation to attorney-client privilege. This is a fundamental protection for all parties which is entirely justified by the desirability that all parties to a dispute should be able to obtain appropriate legal advice in complete confidence. This right should apply regardless of the identity of the lawyer giving the advice or whether he or she is employed by the client or is in private practice whether in the country of the dispute or elsewhere, e.g. a US lawyer practising in Paris. The only safeguard required is that the lawyer is a member of a recognised professional body of lawyers and subject to effective disciplinary rules. The current stance of the European Commission in not only refusing to recognise that employed and "foreign" lawyers are entitled to privilege but actually targeting them in their investigations may be justified (as appears to be their principal motivation) in terms of "administrative convenience" but is wrong in principle and disregards the established legal rights of lawyers and their clients in approximately half of the Member States not to mention comity principles in the case of other jurisdictions. Other jurisdictions which have not yet fully accepted the concept of legal privilege should be encouraged to do so in order to help create a level playing field in which private enforcement actions can be encouraged with appropriate safeguards.

With regard to witnesses, some key issues are whether cross-examination should be the order of the day, whether expert witnesses should be appointed by the Court rather than by the respective parties and whether the right not to self-incriminate should be tempered by the right of the Court to draw adverse inferences from the refusal to respond to a question which is fairly put. There is scope for endless debate on each of these issues. Cross examination can be an unpleasant ordeal for the witness but it has proved to be an effective means of reaching the truth particularly where there are facts in dispute or an absence of documentation. Its introduction in jurisdictions which do not have it would thus make litigation more effective and thereby more likely to reach the correct result. A less rigorous alternative might be to introduce the US style deposition technique without the right to re-examine the witness in Court. On the topic of expert witnesses generally, the trend has been to try and break through the ritual of expert witnesses giving diametrically conflicting evidence on the same technical issues depending upon their client's standpoint, by making them more directly answerable to the Court. If appointed by the Court in the first place it might also result in cost savings since fewer experts would be required. On self incrimination, it seems reasonable that a Court should be entitled to draw adverse inferences from silence taking into account the factual matrix and dynamics underlying the case.

In terms of opening up the files of competition authorities to private litigants the risk is that this would ultimately make it more difficult for public investigations to be conducted effectively; this would be too high a price to pay for the proposed benefit. The better answer would be to encourage greater transparency on the part of regulatory authorities; if their findings and/or decisions are explained and reasoned as fully as possible and made available on their web sites, then it creates within the public domain a data base which can be used to support private actions. Public authorities should, nevertheless, continue to respect business secrets which they have the power to obtain from parties though this should be limited to information which can be reasonably justified as such by the relative party.

#### **4. Conclusions**

Methods need to be found to encourage private enforcement actions in jurisdictions other than the US but, most importantly, without opening the flood gates to speculative or vexatious claims which disrupt and potentially restrict legitimate commercial activities.

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<sup>17</sup> See references in Section 9 of DAF/COMP/WP3/WD (2005) 15.

In order to narrow the "great divide" further measures should be considered to curb the current high level of private enforcement actions in the US, e.g. by limiting the availability of treble damages remedies and giving the Courts greater powers to make cost orders against "rogue" plaintiffs.

Where some encouragement of private actions is required one of the most effective tools is likely to be the introduction of some form of discovery to improve the capability of obtaining the necessary evidence. The fact based model adopted by the UK Competition Appeal Tribunal is worth a second look in this regard provided that it is combined with active case management.

Both at the level of the European Court of Justice and at the national court level consideration should be given to the establishment of specialist competition courts as a practical means of accelerating convergence based on a common agreed framework for private anti-trust enforcement actions.

Any proposed strengthening of rights to privately enforce anti-trust claims is unlikely to be a panacea as can be seen from the UK experience and cannot be a substitute, in any event, for continuing vigorous public investigation of hard core anti-competitive practices such as cartels.

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## SUMMARY OF DISCUSSION\*

### 1. Discovery of Documents

The Chair invited the European Commission to summarize the findings related to gathering of evidence and pre-trial discovery in a recent Report on private remedies in EU member states.<sup>1</sup> The Commission stated that discovery is one of the most significant points of difference between common law and civil law jurisdictions in EU member states. The Report identified three groups of member states: Only three member states permitted pre-trial discovery (UK, Ireland, Cyprus); in most member states the parties would have to specify with more or less detail the documents they seek to obtain from the other party; and countries like Portugal and Spain had somewhat more liberal rules where one party could request the production of categories of documents from the other party.

The Commission emphasized that it was too early to definitively conclude whether the limited scope of discovery in member states should be viewed as a problem. The issue was more complex and not limited to discovery. Discovery, for example, was also linked to the question of burden of proof. There were also systemic differences between member states. In common law jurisdictions, civil procedure was characterized by a system of continuous trial with party-controlled proceedings. In contrast, in civil law countries judges are control of the proceedings which would consist of a series of hearings. The Report had confirmed that in most member states the lack of discovery created obstacles for more effective private litigation. However, the Commission had not yet reached any conclusions concerning possible action, and would, after the publication of the Green Paper, consult with member states before proposing any specific solutions.

As regards possible solutions, there were a number of topics that would be subject to further discussion. These included, for example, issues related to burden of proof and the proper scope of discovery rules. The Commission referred to an ALI/Unidroit proposal which envisaged a more limited form of discovery with emphasis on fact pleading, and Ireland's contributions which indicated that discovery occurs not pre-trial but at a later stage of the proceedings, after the issues have been identified.

The Chair then asked Norway to explain its new rules concerning discovery. Norway explained that under its current rules the parties were not obliged to make documents in their possession available. A new law would soon become effective, however, which will provide for an explicit obligation to disclose evidence. The new discovery rules should assist courts in obtaining complete and accurate facts. Under the new rules, a party will have an obligation to notify the other party of the intention to file a case, and concurrently with this notification must inform the other party of "important evidence" in its possession. The new rules were seen as a positive trend, even though there were concerns about the uncertainty created by the "important evidence" threshold. Overall, the discovery rules would not be as detailed and ambitious as in the United States and the UK. The new rules would not be limited to competition cases, but they are expected to facilitate competition litigation, especially in cases against dominant firms and in actions for damages.

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\* This discussion took place in May 2005.

<sup>1</sup> Ashurst, Study on the conditions of claims for damages in case of infringement of EC competition rules, Comparative report prepared for the European Commission's DG Comp (2004).

The Chair then pointed out that Germany had recently adopted certain new rules on civil procedure that should facilitate private litigation, but these changes did not include discovery rules. Germany explained that there was strong opposition to pre-trial discovery, mainly by the private industry which was concerned about the burdens pre-trial discovery in the United States can impose on firms. Moreover, pre-trial discovery would be a fundamental change to the civil litigation system in Germany where the judge currently has a more active role during the trial. Pre-trial discovery rules were therefore not foreseen. There had, however, been several recent changes in German law to facilitate private litigation: for example, with respect to the passing-on defence, the burden of proof has been reversed and in the future the defendant will have to prove that the plaintiff has not suffered damages because she has been able to pass on higher prices to her customers.

The Chair asked the United States to explain how in a system known for extensive pre-trial discovery concerns about excessive use of discovery had been addressed. The United States discussed that the combination of a common law adversarial system and broad discovery rules had been found to impose significant costs on an already overburdened system, thus impeding the goals of just, speedy, and inexpensive determination of every action. To address these concerns, the Federal Rules of Civil Procedure had been amended, in particular with respect to discovery and depositions, in order to limit number and duration of depositions and interrogatories. Judges also have been encouraged to be more aggressive in identifying and discouraging over-use of the discovery process.

BIAC commented that it supported in principle some strengthening of private remedies while avoiding excessive litigation. Difficulties in obtaining documents in civil law jurisdictions appeared to be a major obstacle to private litigation, as identified in the Ashurst study, but there were also concerns about costs of discovery in the UK and United States. These costs were rising, especially in light of increasing role of electronic communication. Encouraging active case management by judges would be an important measure. Moreover, discovery should be fact based, which would help to limit its scope. The rules of the UK Competition Appeals Tribunal might provide a useful model. The CAT rules followed the CFI procedures, which were based on a civil law system, while retaining the benefits of common law system. The rules were focused on fact based discovery, reinforced by active case management. The legal profession privilege should be respected in all systems.

As concerns witnesses, cross examination could be a useful tool, especially where facts were disputed or little documentary evidence was available. Expert witnesses should be more frequently appointed by the court, even if they were paid by the parties. Regarding the access of private parties to files of public enforcement authorities, BIAC raised concerns about the potential effects on leniency programs if there was broad access to files.

## **2. Expert Witnesses**

The Chair invited Ireland to explain its new rules concerning expert witnesses. Ireland explained at the outset that the competition authority does not adopt decisions, but had to go to court where it was in the same role as a private party plaintiff. It then explained that there had been several reasons for the new Rules of Court concerning expert witnesses: there was disquiet about a case litigated a few years ago which took more than 90 days in court and was very expensive; new rules for commercial litigation were adopted which provided a model; and the network of European competition judges encouraged comparison with other countries' procedural rules with a view to identify "best practices." The new rules have not yet been tested in actual cases, but similar principles were applied in two cases in which the competition authority was involved. In the recent Credit Union case, the parties exchanged names of expert witnesses and reports under the direction of the judge, but failed to agree on a list of issues under contention. In a currently pending case, names of experts and reports have been exchanged, and the narrowing of the set of issues is occurring. Overall, this experience suggested that the new rules would work reasonably well. In

addition, Ireland mentioned that in the Credit Union case the judge appointed an independent assessor to help him work through the economic evidence submitted by parties. In future cases, such an arrangement should have beneficial effects on the quality of economic evidence submitted by parties.

The Chair referred to the Denmark's contribution which described that experts were appointed by the court and asked Denmark to explain what the parties could do if they disagreed with an expert and whether there was a risk that the system would give too much weight to the opinion of the expert. Denmark explained that expert witnesses appointed by the court were taken from a list of experts which had to be of good reputation and impartial. It was widely believed that expert witnesses of parties would not be impartial. Parties could examine the expert's written report to challenge her opinions. They also could offer their own expert witnesses, although their evidential value would be somehow lower. However, challenges of experts were rare. Usually the parties agree with the appointment of the expert witness and her opinions.

The Netherlands followed up on BIAC's contributions and asked whether in abuse of dominance cases lack of discovery rules created fewer problems than in other competition cases because in abuse cases it was more likely that the plaintiffs possess relevant evidence.

BIAC responded that it was not aware of any particular cases in this area. But in a system with discovery plaintiffs in general would have better access to information because each party typically is under an obligation to disclose also information that is adverse to its interests.

The UK followed up on BIAC's comments on the CAT rules. It explained that reforms of the rules on disclosure of evidence had been enacted to deal with the ever increasing emphasis on discovery not only in competition cases, but across the legal system. The advantage of the specialized competition court was that it would gain experience over time and improve the management of cases. Despite these developments, however, there was an increasing volume of evidence sought by the parties to defend their positions.

### **3. Competition Authorities and Private Evidence Gathering**

The Chair invited Japan to elaborate on its submission, in particular on a statement that a court could ask the JFTC in competition cases for an opinion on the amount of the plaintiff's damages. Japan explained that the JFTC would not provide an opinion about the actual amount of damages, but about the methodology to assess damages, such as a "before and after" analysis. Such requests occurred in bid rigging cases since all private litigation in which the JFTC had become involved concerned bid rigging. Courts would take the JFTC's submission into account, but they were not bound by the JFTC's opinion.

Japan also explained that a judge would sometimes order the production of documents in the JFTC's possession. If there was a conflict with confidentiality obligations, or the document was related to the JFTC's investigation techniques, it would refuse to submit such documents and immediately appeal such orders.

The Chair next asked the United States to explain why the Antitrust Division as a matter of principle did not make documents in their files available to private parties, and how courts have reacted to this position. The United States explained that the courts recognized the doctrine of law enforcement investigatory privilege and have been receptive to the Division's arguments against disclosure of documents to private parties. The law enforcement investigatory privilege was not absolute and could be overridden, but there was a strong presumption against disclosure. The Division also relied on grand jury secrecy rules to prevent the disclosure of documents in its files.

The Chair referred to Hungary's submission and invited Hungary to explain whether the apparently more liberal rules concerning disclosure of documents on file with the competition authority could interfere with investigations. Hungary explained that courts can order an agency to disclose information in its files, both during an agency's investigation and after an investigation has been closed. This could occur if the parties have no other access to the relevant evidence. Under the current competition law rules, however, the competition authority has the exclusive power to decide whether the competition act has been infringed, and courts could decide cases only after the competition authority has adopted a decision on the issue of infringement. Under the current rules it was therefore impossible that a court would ask the authority for documents pending the authority's investigation. A planned amendment to the competition act would end this exclusive power and allow parties to bring their competition cases directly before courts. The new law would require courts to suspend their proceedings pending an investigation by the competition authority of the same case. Nevertheless, it cannot be excluded that in certain scenarios a court could ask the competition authority to provide information in its files during an investigation. This could occur, for example, if the court and the authority did not investigate the same case. There would be no deadlines for the competition authority's response, however, and the competition authority could discuss with the court how to proceed. A court might be willing to wait for the evidence or suspend its proceedings.

Brazil mentioned that it started to experience problems in leniency applications where parties were reluctant to submit written document because of concerns about private litigation in the United States. Second, Brazil explained even though it did not have pre-trial discovery rules, district or local prosecutors could have the right to undertake an investigation in a case related to private rights that also impacted the public interest. This has not yet happened in competition cases, but in other areas of white collar crime. In such a case, private parties could "free ride" on the investigations by the local or district prosecutor.

The European Commission commented on the United States' description of the investigatory privilege and grand jury secrecy rules. It observed that in the US system it was primarily the parties' roles to discover evidence, and it was legitimate that an agency did not to support private parties by making document available to them for private litigation purposes. In other systems, where pre-trial discovery rules did not exist, competition authorities might take a different position and it might be more justified to provide parties access to its files, always with the exception of leniency applications. The European Commission asked about the scope of the investigatory privilege if evidence was available only with the public authority, for example if a party deposited original documents with the competition authority. Was there a point where the investigatory privilege would not apply?

United States responded that even if the authority had the original evidence and the evidence was not available elsewhere, the court would be inclined to decide that private parties would have to wait until the public investigation has ended. In discovery procedures, plaintiffs would typically ask for information that had been in the other party's possession and in the party's knowledge was sent somewhere else. It would therefore not be possible to hide the information. If it came to light that a party had sent a document to the authority, courts would put emphasis on the question whether the information could be obtained anywhere else. The Antitrust Division would not monitor private lawsuits, so it was possible that evidence relevant to private litigation would be in the Division's files and that plaintiffs in a private lawsuit were not aware of it.

Last, the Chair asked Switzerland to describe the relationship between Swiss courts and the competition authority. Switzerland referred to a meeting in 1997 in which courts and the competition authority participated. This meeting was held after the new Cartel Act had been enacted which imposed on the cantons the obligation to appoint one court in their jurisdiction with the exclusive power to hear cases under the Cartel Act. One goal of the meeting was to make the courts aware of their obligation in civil cases involving the Cartel Act to send the dossier of the case to the competition authority so the authority

could render an opinion whether there was on infringement of the Cartel Act. Courts also were required to send the competition authority all final judgements. These cases were rare, however. Only one to two cases per year were sent to the competition authority.



## COMPTE RENDU DE LA DISCUSSION\*

### 1. Recherche de documents

Le Président invite la Commission européenne à résumer les conclusions relatives à la production d'éléments de preuve et à la recherche de documents précédant l'instruction dans un récent rapport sur les actions civiles dans les Etats membres de l'Union européenne.<sup>1</sup> La Commission déclare que la recherche de documents constitue l'un des principaux points de divergence entre les pays de common law et les pays de droit civil dans le cadre de l'Union européenne. Le rapport identifiait trois groupes d'Etats membres : trois seulement d'entre eux autorisent la recherche de documents précédant l'instruction (Royaume-Uni, Irlande, Chypre) ; dans la plupart des Etats membres, les parties doivent préciser de manière plus ou moins détaillée les documents qu'elles souhaitent obtenir de l'autre partie ; quant à des pays comme le Portugal et l'Espagne, ils appliquent des règles un peu plus libérales en vertu desquelles l'une des parties peut demander à l'autre partie de produire certaines catégories de documents.

La Commission souligne qu'il est trop tôt pour tirer des conclusions définitives sur la question de savoir si les possibilités limitées de recherche d'éléments de preuve dans les Etats membres doivent être considérés comme un problème. La question est plus complexe et ne se limite pas à la recherche de documents. Par exemple, la recherche de documents est également liée à la question de la charge de la preuve. Il existe aussi des différences de systèmes entre les Etats membres. Dans les pays de « common law » l'action civile est caractérisée par un système de jugement continu où la procédure est contrôlée par les parties. Au contraire, dans les pays de droit civil, les juges détiennent le contrôle de la procédure qui peut comporter une série d'auditions. Le rapport avait confirmé, que dans la plupart des Etats membres, l'absence de recherche d'éléments de preuve constituait un obstacle à une plus grande efficacité dans le règlement des litiges privés. Toutefois, la Commission n'est pas encore parvenue à des conclusions concernant les mesures possibles, et elle consultera les Etats membres après la publication du Livre vert avant de proposer des solutions spécifiques.

En ce qui concerne les solutions possibles, il existe un certain nombre de sujets à examiner de manière plus approfondie. C'est le cas par exemple des questions relatives à la charge de la preuve et au champ d'application approprié des règles concernant la recherche de documents. La Commission s'est référée à un projet d'ALI/Unidroit qui envisageait une forme de recherche plus limitée mettant l'accent sur des débats portant sur des questions de fait, et aux contributions de l'Irlande qui indiquait que la recherche de documents intervient non pas avant le jugement mais à un stade ultérieur de la procédure, après que les questions posées aient été identifiées.

Le Président demande ensuite à la Norvège d'exposer sa nouvelle réglementation concernant la recherche de documents. La Norvège explique que selon sa réglementation actuelle, les parties ne sont pas tenues de transmettre les documents en leur possession. Cependant, une nouvelle loi instaurant une obligation explicite de communiquer les éléments de preuve entrera bientôt en vigueur. Les nouvelles

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\* Cette discussion a eu lieu en mai 2005.

1. Ashurst, Etude sur les conditions des demandes de dommages et intérêts en cas d'infraction à la réglementation de la concurrence de la Communauté européenne, Rapport comparatif établi pour la Commission européenne, DG Comp (2004).

règles en matière de recherche de documents devraient aider les tribunaux à obtenir des informations complètes et exactes sur les faits. Selon la nouvelle réglementation, une partie sera tenue de notifier à l'autre partie son intention d'engager une procédure judiciaire et d'informer conjointement avec cette notification l'autre partie des « éléments de preuve importants » en sa possession. Les nouvelles réglementations sont considérées comme correspondant à une évolution positive, bien que des préoccupations soient émises quant à l'incertitude sur la question de savoir à partir de quel seuil les éléments de preuve sont importants. Dans l'ensemble, les règles concernant la recherche de documents ne sont pas aussi détaillées et ambitieuses qu'aux Etats-Unis et au Royaume-Uni. Les nouvelles réglementations ne se limiteront pas aux cas concernant la concurrence, mais elles devraient faciliter les litiges portant sur la concurrence, même dans les procès intentés à des entreprises dominantes et dans les actions en dommages et intérêts.

Le Président fait ensuite observer que l'Allemagne a adopté récemment de nouvelles réglementations en matière de procédure civile qui devraient faciliter l'action civile, mais ces modifications ne portent pas sur les réglementations relatives à la recherche d'éléments de preuve. L'Allemagne explique qu'il existe une forte opposition à la recherche de preuves précédant l'instruction, surtout de la part des entreprises privées qui sont préoccupées par la charge que cette recherche de preuves est susceptible d'imposer aux entreprises aux Etats-Unis. De plus, la recherche de preuves précédant l'instruction constituerait un changement fondamental de la procédure civile en Allemagne, où le juge dispose actuellement d'un rôle plus actif au cours du procès. Il n'est donc pas prévu d'instaurer des réglementations concernant la recherche d'éléments de preuve précédant l'instruction. Cependant, un certain nombre de modifications ont été récemment apportées à la législation allemande pour faciliter les litiges privés : par exemple, en ce qui concerne l'argumentation de la défense fondée sur la répercussion, la charge de la preuve a été inversée et à l'avenir le défendeur devra prouver que le plaignant n'a pas subi de dommages du fait qu'il était en mesure de répercuter l'augmentation des prix sur ses clients.

Le Président demande aux Etats-Unis d'expliquer comment, dans un système caractérisé par l'ampleur du dispositif de recherche d'éléments de preuve précédant l'instruction, il a été possible de répondre aux préoccupations suscitées par le recours excessif à la recherche de preuves. Les Etats-Unis font observer que la combinaison d'un système contradictoire de « common law » et de réglementations prévoyant un large recours à la recherche d'éléments de preuve était apparue comme faisant peser des coûts importants sur un système déjà surchargé, ce qui compromettrait la réalisation des objectifs de règlement équitable, rapide et peu coûteux de tout litige. Pour répondre à ces préoccupations, les réglementations fédérales en matière de procédure civile ont été modifiées, en particulier en ce qui concerne la recherche d'éléments de preuve et les dépositions, afin de limiter le nombre et la durée des dépositions et des auditions. Les juges ont également été invités à se montrer plus restrictifs lorsqu'il s'agit d'identifier et de décourager les abus de procédure de recherche d'éléments de preuve.

Le BIAC fait observer qu'il est favorable en principe à un certain renforcement des actions civiles tout en s'efforçant d'éviter des contentieux trop nombreux. Les difficultés d'obtention de documents dans les juridictions de droit civil apparaissent comme un obstacle majeur aux actions civiles, comme l'a montré le rapport Ashurst, mais le coût de la recherche d'éléments de preuve est également préoccupant au Royaume-Uni et aux Etats-Unis. Ces coûts augmentent, surtout du fait du rôle accru des communications électroniques. Il serait souhaitable d'encourager un traitement dynamique des affaires par les juges. De plus, la recherche d'éléments de preuve devrait être axée sur les faits, ce qui contribuerait à limiter son champ d'application. Les règles en vigueur appliquées par le Competition Appeals Tribunal du Royaume-Uni pourraient constituer un modèle utile. Ces règles suivent les procédures du Tribunal de première instance (« Court of First Instance »), qui sont fondées sur un système de droit civil, tout en conservant les avantages d'un système de « common law ». Ces règles mettent l'accent sur la recherche d'éléments de preuve fondée sur les faits, renforcées par une gestion active des affaires. Le secret professionnel de l'avocat doit être respecté dans tous les systèmes.

En ce qui concerne les témoignages, des recoupements constitueraient un instrument utile, notamment lorsque les faits sont contestés ou lorsqu'on ne dispose pas de beaucoup de documents. Le tribunal doit faire plus souvent appel à des témoins experts, même s'ils doivent être payés par les parties. En ce qui concerne l'accès des parties privées aux dossiers des autorités de contrôle publiques, le BIAC s'inquiète des effets potentiels d'un large accès à ces dossiers sur les programmes de clémence.

## 2. Témoins experts

Le Président invite l'Irlande à exposer ses nouvelles réglementations concernant les témoins experts. Le représentant de l'Irlande explique dès le départ que l'autorité de la concurrence ne prend pas de décision mais doit recourir aux tribunaux, devant lesquels elle se trouve dans la même situation qu'un demandeur privé. Il explique ensuite que l'adoption des nouvelles réglementations des tribunaux concernant les témoins experts est due à plusieurs raisons : des inquiétudes ont été suscitées par une affaire jugée quelques années plus tôt, que le tribunal avait examinée pendant plus de 90 jours et qui avait été très coûteuse ; de nouvelles règles devant servir de modèle ont été adoptées pour les litiges commerciaux ; par ailleurs, le réseau de juges européens de la concurrence encourage les comparaisons avec les règles de procédure des autres pays afin d'identifier les « bonnes pratiques ». Les nouvelles règles n'ont pas encore été testées dans des affaires réelles mais des principes similaires ont été appliqués dans deux cas ayant fait intervenir l'autorité de la concurrence. Dans l'affaire récente Credit Union, les parties ont échangé des noms d'experts et des rapports sous le contrôle du juge mais n'ont pu s'entendre sur une liste de questions litigieuses. Dans une affaire en cours, des noms d'experts et des rapports ont été échangés, et les questions litigieuses ont tendance à se réduire. Dans l'ensemble, cette expérience a montré que les nouvelles réglementations fonctionnent d'une manière assez satisfaisante. En outre, l'Irlande fait observer que dans l'affaire Credit Union, le juge a nommé un assesseur indépendant pour l'aider à traiter les documents économiques transmis par les parties. Dans les affaires futures, un tel dispositif devrait avoir des effets bénéfiques sur la qualité des documents économiques transmis par les parties.

Le Président se réfère à la contribution du Danemark, qui indique que des experts sont nommés par le tribunal et lui demande d'expliquer ce que les parties peuvent faire si elles sont en désaccord avec un expert et s'il existe un risque que ce système ne donne un poids excessif à l'opinion de l'expert. Le Danemark explique que les experts nommés par le tribunal sont choisis à partir d'une liste d'experts qui doivent jouir d'une bonne réputation et être impartiaux. Beaucoup pensent que les rapports d'experts ne sont pas impartiaux. Les parties peuvent examiner les rapports écrits des experts pour contester leurs avis. Ils peuvent aussi proposer leurs propres rapports d'experts, bien que leur valeur probante soit un peu moindre. Cependant, les contestations des expertises sont rares. En général, les parties sont d'accord avec la nomination de l'expert et avec ses conclusions.

Les Pays-Bas font suite aux contributions du BIAC et demandent si dans les cas d'abus de position dominante, l'absence de règles concernant la recherche d'éléments de preuve pose moins de problèmes que dans les autres affaires relatives à la concurrence, dans la mesure où, dans ces cas, les demandeurs ont plus de chances d'être en possession des éléments de preuve nécessaires.

Le BIAC répond qu'il n'a pas connaissance d'affaires particulières dans ce domaine. Cependant, dans un système comportant des règles en matière de recherche d'éléments de preuve les demandeurs auraient en général un meilleur accès aux renseignements dans la mesure où chaque partie a l'obligation de communiquer également les informations qui sont contraires à ses intérêts.

Le Royaume-Uni fait suite aux commentaires du BIAC sur les règles appliquées par le Competition Appeals Tribunal. Il explique que les réformes de la réglementation sur la recherche d'éléments de preuve ont été adoptées pour tenir compte de l'importance croissante de cette recherche, non seulement dans les affaires concernant la concurrence mais aussi dans l'ensemble du système juridique. L'avantage d'un

tribunal spécialisé dans la concurrence est le fait qu'il acquerra progressivement de l'expérience et améliorera la gestion des affaires. Toutefois, malgré cette évolution, les parties cherchent à obtenir un volume croissant d'éléments de preuve pour défendre leurs positions.

### **3. Les autorités de la concurrence et la production d'éléments de preuve**

Le Président invite le Japon à donner des précisions sur sa contribution, en particulier sur l'affirmation selon laquelle un tribunal pourrait demander à la Fair Trade Commission du Japon (JFTC), dans les affaires concernant la concurrence, son opinion sur le montant des dommages subis par le demandeur. Le Japon explique que la JFTC ne donne pas d'évaluation du montant effectif du préjudice mais indique la méthode suivie pour évaluer ce préjudice, comme dans le cadre d'une analyse comparant la situation avant et après. De telles demandes ont été formulées dans le cas d'affaires de soumission concertée, du fait que tous les litiges privés dans lesquels la JFTC est intervenue concernaient des affaires de ce type. Les tribunaux tiennent compte de la contribution de la JFTC mais ils ne sont pas liés par son avis.

Le Japon explique par ailleurs qu'un juge exige parfois la production de documents qui sont en la possession de la JFTC. Si cette production est contraire à des obligations de confidentialité, ou si le document est lié aux techniques d'enquête de la JFTC, celle-ci refuse de transmettre ces documents et formule immédiatement un recours contre de telles décisions judiciaires.

Le Président demande ensuite aux Etats-Unis d'expliquer pourquoi la Division antitrust ne communique pas par principe les documents figurant dans ses dossiers à des parties privées, et comment les tribunaux ont réagi à cette position. Les Etats-Unis expliquent que les tribunaux reconnaissent la doctrine du secret de l'enquête et ont admis les arguments de la Division contre la communication de documents à des parties privées. Le secret de l'enquête n'est pas absolu et peut être levé mais il existe une forte présomption à l'encontre de la communication de renseignements. La Division se fonde également sur les règles de secret applicables au grand jury pour interdire la communication de documents figurant dans ses dossiers.

Le Président se réfère à la contribution de la Hongrie et invite ce pays à indiquer si sa réglementation apparemment plus libérale concernant la communication des documents figurant dans les dossiers de l'autorité de la concurrence risque d'interférer avec les enquêtes. La Hongrie explique que les tribunaux peuvent ordonner à une agence de communiquer les renseignements qui figurent dans ses dossiers, aussi bien au cours d'une enquête portant sur cette agence qu'après la clôture de cette enquête. Cela pourrait se produire si les parties n'avaient pas d'autre accès aux éléments de preuve dont elles ont besoin. Cependant, en vertu des réglementations actuelles concernant le droit de la concurrence, l'autorité de la concurrence dispose du pouvoir exclusif de décider si la loi sur la concurrence a été violée, et les tribunaux ne peuvent prendre de décision sur les affaires qui leur sont soumises qu'après que l'autorité de la concurrence ait pris une décision sur la question de la violation de la loi. Dans le cadre de la réglementation actuelle, il est donc impossible qu'un tribunal demande à l'autorité des documents au cours d'une enquête effectuée par cette autorité. Il est envisagé d'apporter une modification à la loi sur la concurrence qui mettrait fin à ce pouvoir exclusif et permettrait aux parties de soumettre directement leurs affaires concernant la concurrence aux tribunaux. La nouvelle loi exigerait que les tribunaux suspendent leurs procédures en attendant une enquête de l'autorité de la concurrence portant sur la même affaire. Néanmoins, il ne peut être exclu que dans certains cas de figure un tribunal demande à l'autorité de la concurrence de communiquer des renseignements figurant dans ses fichiers au cours d'une enquête. Cela pourrait se produire par exemple si le tribunal et l'autorité n'ont pas enquêté sur la même affaire. Cependant, aucune date limite ne serait fixée pour la réponse de l'autorité de la concurrence et celle-ci pourrait discuter avec le tribunal de la manière de procéder. Un tribunal pourrait souhaiter attendre des éléments de preuve ou suspendre sa procédure.

Le Brésil indique qu'il a commencé à connaître des problèmes d'application des programmes de clémence lorsque les parties étaient réticentes à transmettre des documents écrits du fait qu'elles craignaient des actions civiles aux Etats-Unis. En second lieu, le Brésil explique que, bien qu'il n'applique pas de réglementations relatives à la recherche d'éléments de preuve précédant l'instruction, le ministère public au niveau du district ou au niveau local pourrait avoir le droit d'entreprendre une enquête dans une affaire relative au droit privé ayant également une incidence sur l'intérêt public. Cela ne s'est pas encore produit dans des affaires de concurrence mais dans d'autres domaines de délinquance en col blanc. Dans un tel cas, les parties de droit privé pourraient bénéficier indûment des enquêtes effectuées par le ministère public au niveau local ou au niveau du district.

Le représentant de la Commission européenne commente la description par les Etats-Unis du secret de l'enquête et des règles de secret qui s'appliquent au grand jury. Il fait observer que, dans le système des Etats-Unis, c'est essentiellement aux parties qu'il incombe de rassembler les éléments de preuve et il est légitime qu'une agence n'apporte pas son aide à des parties privées en leur communiquant des documents à des fins leur permettant d'intenter des actions en droit civil. Dans d'autres systèmes, où les règles de recherche d'éléments de preuve précédant l'instruction n'existent pas, les autorités de la concurrence peuvent adopter une position différente et il pourrait être plus justifié qu'elles laissent les parties accéder à leurs dossiers, toujours à l'exception de l'application des programmes de clémence. La Commission européenne demande quel est le champ d'application du secret de l'enquête si les éléments de preuve ne sont détenus que par l'autorité publique, par exemple si une partie a déposé des documents originaux auprès de l'autorité de la concurrence. Y a-t-il des cas où le secret de l'enquête ne s'applique pas ?

Les Etats-Unis répondent que même si l'autorité dispose des éléments de preuve originaux et que ceux-ci ne sont pas disponibles ailleurs, le tribunal aurait tendance à décider que les parties privées doivent attendre que l'enquête publique soit terminée. Dans le cadre des procédures de recherche d'éléments de preuve, les demandeurs demandent généralement des renseignements qui ont été en la possession de l'autre partie et qui à leur connaissance ont été envoyés ailleurs. Il n'est donc pas possible de dissimuler les informations. S'il apparaissait qu'une partie a envoyé un document à l'autorité, les tribunaux mettraient l'accent sur la question de savoir si les informations auraient pu être obtenues ailleurs. La Division antitrust n'assure pas le suivi des litiges privés de sorte qu'il est possible que des éléments de preuve concernant de tels litiges figurent dans ses fichiers et que les parties à un litige privé n'en aient pas connaissance.

En dernier lieu, le Président demande à la Suisse de décrire les relations entre les tribunaux suisses et l'autorité de la concurrence. La **Suisse** se réfère à une réunion de 1997 à laquelle ont participé les tribunaux et l'autorité de la concurrence. Cette réunion a eu lieu après l'adoption de la nouvelle Loi sur les cartels qui imposait aux cantons l'obligation de choisir dans leur juridiction un tribunal disposant d'une compétence exclusive pour les affaires relevant de cette loi. L'un des objectifs de la réunion était d'informer les tribunaux de leur obligation dans les affaires civiles relevant de la Loi sur les cartels d'envoyer le dossier de l'affaire à l'autorité de la concurrence de manière que celle-ci puisse donner un avis sur la question de savoir s'il y a eu infraction à la Loi sur les cartels. Les tribunaux étaient également tenus d'envoyer à l'autorité de la concurrence tous les jugements définitifs. Cependant, ces cas étaient rares. Une à deux affaires seulement par an étaient soumises à l'autorité de la concurrence.



## CHAPTER 3

### PASSING-ON DEFENSE / INDIRECT PURCHASER STANDING AND THE DEFINITION OF DAMAGES

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## **Request for Written Contributions**

Below is a list of issues that delegates might wish to address in their contributions. The list is not intended to be restrictive or comprehensive, and delegates are encouraged to address other issues as well. Written contributions should discuss not only national rules applicable in these areas, but also the effects they have on the ability of private parties to bring private actions in competition cases, any concerns that have been raised about these rules, and any plans to review and possibly revise such rules in an effort to facilitate private litigation. There will be no background paper by the Secretariat.

**Written contributions are requested by Friday, January 27, 2006.**

### **1. Passing-On Defense/Indirect Purchaser Standing**

Please describe any rules in your jurisdiction concerning the passing-on defence, *i.e.*, the defendant's ability to mitigate its liability by establishing that the plaintiff has been able to pass on some or all of the overcharges that resulted from the defendant's anticompetitive conduct to the plaintiff's customers. These could include rules precluding such a defence, evidentiary rules making such a defence more difficult, or rules specifically permitting/facilitating such a defence.

Please describe any rules in your jurisdiction affecting the ability of indirect purchasers to bring civil actions in order to remedy any damages they have suffered because overcharges have been passed on to them from the direct purchasers of the person accused of a competition law violation. Such rules could include, for example, rules concerning standing or evidentiary rules.

Have there been any more or less recent changes to the rules concerning passing on-defence and/or indirect purchaser standing that would affect the ability of plaintiffs to bring actions under competition laws?

If direct and indirect purchasers at different levels of the supply chain are allowed to bring actions for damages against the person accused of a competition law violation, what are the rules concerning the allocation of damage awards among them?

Have any concerns been raised that the rules concerning passing on defence and indirect purchaser standing might complicate case management in private antitrust litigation? For example, could the rules result in the potential of multiple suits in different courts when direct and indirect purchasers can bring their claims in different courts? Are there any rules allowing for the consolidation of such suits?

Please describe any views/discussions as to whether the current rules concerning passing on defence and/or indirect purchaser standing reflect the right policies in the context of private antitrust litigation? This could include discussions whether rules should be changed to facilitate private litigation or whether the rules impose unreasonable burdens on defendants because they could result in multiple damage awards. If concerns have been raised that the system could result in multiple recovery, is there any evidence that this occurs in practice, for example where a direct and indirect purchaser recover the same loss?

### **2. Definition of Damages**

Please describe any rules in your jurisdiction concerning the definition of damages in private antitrust litigation. For example damages can be calculated with regard to the loss suffered by the plaintiff or the gain made by the defendant. When calculating the loss suffered by the plaintiff, is account taken of losses

arising both from the increase in price and reduction in quantity purchased?<sup>1</sup> Please also describe other aspects of damage calculation such as the use of multipliers to increase the defendant's total liability once a violation of competition laws has been found, and/or the inclusion of pre-judgment interest in the calculation of damages.

Have there been any more or less recent changes to these rules?

If multipliers can be used in civil competition cases, please describe whether their use is mandatory or in the courts' discretion. If courts have discretion, what criteria can they use in deciding whether to apply a multiplier?

Please describe any views/discussions concerning the use of multipliers in civil competition cases, either the possible introduction of multipliers to encourage more civil law suits, or concerns that existing multipliers can result in over-deterrence.

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<sup>1</sup> Consider an upstream market with 10 firms that produce a certain product to one retailer that resells the product to final consumers. Assume that the price at which the upstream firms sell to the retailer is 10 per unit at a cost of 8 per unit. The retailer resells the product without additional cost for a price of 12 per unit to final consumers who value the good on average at 15 per unit. At the price of 12, consumers are willing to buy 10000 units of the product. Consider now the effect of an upstream cartel. The cartel increases price to 13 per unit for the retailer and 14 per unit for the final consumer. At the new price of 14, consumers are willing to buy only 8000 units. The effect of the cartel is twofold. First, the retailer faces a reduced profit margin on the sales he still makes ( $8000 \times 1$  instead of  $8000 \times 2$  implying a damage of 8000) and the consumer faces a reduced utility gain for the units that are still bought ( $8000 \times 1$  instead of  $8000 \times 3$  implying a damage of 16000). Second, in addition to this increase in price effect, the retailer loses sales of 2000 that result in a damage of 4000 and consumers have a damage of 6000 ( $2000 \times 3$ ) in utility.



## CZECH REPUBLIC

### 1. Experience with private remedies

The undertakings and consumers in the Czech Republic suffering damage from breach of competition law may submit their claims by means of private actions to the civil courts; there are no courts specialized in this type of claims. The Office is not involved in the proceedings (and even does not have to be informed about it), it is however possible for the plaintiff to use the Office's decision declaring breach of competition law, which is binding for the court.

According to the knowledge of the Office the civil claims in competition cases are still applied only rarely. Currently, the Office is informed about the first case of civil dispute related to an infringement of national competition rules. We believe that the publicity which the case enjoyed (due to the fact that the parties to the proceeding were two major Czech telecommunication operators) will contribute to the public awareness of the possibility to bring the civil claims in competition case before the courts.

The particular situation in the Czech Republic may be caused especially by the fact that **there is still no settled approach of the Czech courts towards the competition matters** and their decision-making is therefore to a significant extent unpredictable. **The court procedure in the Czech Republic is quite lengthy** which is connected also with increase of the average costs of conducting a civil procedure. This situation should be remedied by the complex reform of the judiciary in the Czech Republic aimed at making the procedures speedier, which is currently discussed by the Czech Government; no specific details concerning this reform were published yet.

### 2. Relationship between the Office and the Courts

The Office is not entitled to decide on damages. **However, once there is a decision of the Office on a breach of competition law, it is binding also for the civil courts.** The plaintiff therefore does not need to prove the unlawfulness of the defendant's action, and it cannot be challenged by the defendant. In case when there is not the Office's decision in force, courts are entitled to assess the whole matter, including the breach of the competition law, or to interrupt the proceeding and await the decision of the Office. According to our experience, no court has ever decided to assess a breach of competition law on its own in civil proceedings.

In order to be informed about private claims based on breach of competition law (and possibly to intervene in them as *amicus curiae*), the Office initiated negotiations with the Ministry of Justice, asking it to oblige the courts to inform the Office. These negotiations have not been closed yet, but the Ministry is not in favour of imposing any new obligations on courts.

### 3. Claims for damages

In the Czech legal order, there are no specific provisions concerning claims for damages based on breach of competition law; only the general provisions of the Civic Code are used. It is worth mentioning that the Civic Code is more than 40 years old, and it does not fully reflect current economic reality. A new Civic Code is being prepared, but it is not supposed to come into force within next three years.

According to the Civic Code, anybody who suffered damage as a result of unlawful conduct of somebody else is allowed to claim it, on condition he is able to prove

- the unlawfulness of such a conduct (in this respect, decision of the Office may be used, as discussed above),
- the damage he suffered, and
- causal link between unlawfulness and the damage.

Provided they are able to bring evidence necessary to prove these three conditions, anybody is allowed to bring a claim. Therefore, even indirect purchaser has, as a matter of principle, *locus standi* to file such an action. There is no experience with this sort of actions in the Czech Republic, but due to lack of any specific legal provisions, one may suppose it would be extremely difficult to establish the casual link and the amount of damage. Before the case law is settled in cases concerning direct purchasers, which will take at least another five years, we do not foresee any such claims.

As far as definition of damages is concerned, the Civic Code states only that the damages shall include the actual prejudice suffered and the income prevented by the breach of law (*damnum emergens and lucrum cessans*). It is on the plaintiff to prove the exact amount of damage he sustained. Since there has not yet been any judicial decision on this problem in competition cases, it is possible only to predict the possible reasoning of the judges.

With regard to definition contained in the Civic Code, the damages would be calculated with regard to the loss suffered by the plaintiff, not the gain made by the defendant. Establishing the loss, it might be possible to claim reduced profit margin as well as lost sales; it is however not possible to predict standard of evidence the courts would be requiring in these cases.

The defendants are allowed to contradict the amount of damage and the causality claimed by the plaintiff (and in cases where there was no previous decision of the Office, even the unlawfulness of their conduct); as a matter of principle, the passing-on defence might therefore be used. According to our general experience with Czech litigation, this sort of defence would be used, especially due to the fact that the basis for calculating damage is the real loss suffered; nonetheless, there is no experience with it yet.

#### **4. Case study**

As mentioned above, the Office is informed about only one case of private enforcement of claims based on competition law. Two mobile telecommunication operators were established on relevant market before the third one entered it. The former two required fees for interconnection of their networks that were lower than the fees required for the calls between their networks and the one belonging to the new entrant. The Office initiated proceedings with the two operators, which were, according to then valid laws, both found dominant on the relevant market. The Office decided they had abused their dominant position. On the basis of these decisions, the third operator initiated civil proceedings against the other two, claiming damages based on the fact that due to higher interconnection costs

- its clients realised fewer calls to the competing networks and
- it acquired fewer customers, while many of the potential customers were discouraged by the higher fees

The court has not decided yet, and no oral proceeding has taken place until these days.

## FINLAND

### 1. Introduction

The Finnish Competition Authority (FCA) has the right to apply the EC competition rules and the national Competition Act to competition restrictions. The EC competition rules are applicable when the competition restraint has an appreciable effect on the trade between the EU member states.

Damages claims are brought in arbitration or by actions in civil courts. Damages actions may be brought for breaches of the national Competition Act or the EC competition rules. If damages are brought for infringement of EC antitrust law, EC law shall also be considered when the situation is appraised. Insofar as this is the case, reference may be made to the EC Commission Green Paper on Damages Actions for Breach of the EC antitrust rules<sup>1</sup> and EC Commission's contribution for this roundtable.

The following account mainly deals with the situations where damages are brought for breaches of the national Competition Act. Finland does not yet have a sufficient amount of case-law on antitrust damages claims. What follows is thus mainly based on what has been prescribed on antitrust damages in the law and its travaux préparatoires.

### 2. Legislation

In Finland, liability for damages has traditionally been divided into contractual based and non-contractual based liability.

In a case of contractual based liability, the parties have a mutual arrangement and the damage occurs when one party does not fulfil its obligations in the manner agreed upon. The general Damages Act does not apply to contractual based damages; instead, damages are determined according to contractual principles.

In cases of non-contractual based damages, the party who has suffered damages and the one who has caused it do not have a contractual relationship. The Damages Act essentially applies to these situations. However, on the basis of the Damages Act, damages may primarily only be awarded for personal or material damages. Economic (or financial) damages may only be awarded on the basis of the Damages Act only for especially weighty reasons. Damages arising from infringements of antitrust law are typically financial damages, and the Damages Act is hence ill suited for antitrust damages claims.

Since this was the case, a special provision on damages was prescribed to the Competition Act in 1998 (Competition Act, Article 18 a). It was e.g. intended that those who have suffered financial losses arising from an infringement of antitrust law would be put in an equal position irrespective of whether there was a contractual relationship between the party who suffered damages and the one who caused it.

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<sup>1</sup> [http://europa.eu.int/comm/competition/antitrust/others/actions\\_for\\_damages/gp.html](http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/gp.html)

Competition Act, Article 18 a:

- A business undertaking, who, either intentionally or negligently, violates the prohibitions prescribed in Article 4 or 6 or Article 81 or 82 of the EC Treaty, is obliged to compensate the damage caused to another business undertaking. The compensation for damage shall cover compensation for the expenses, price difference, lost profits and other direct or indirect economic damage resulting from the competition restriction. (318/2004)
- The compensation may be adjusted if a full compensation is considered unreasonably demanding in view of the nature and extent of the damage, the circumstances of the parties involved and other relevant issues. (303/1998)
- The right for compensation shall expire if the action for damages has not been instituted within five years from the date that the business undertaking was informed or should have been informed of the occurrence of the damage. (303/1998)
- During its proceedings regarding an action for damages, the court may request a statement from the Finnish Competition Authority. (303/1998)

The provision applies to both contractual based and non-contractual based antitrust damages. Liability for damages arises with an act of infringement of the competition law. Damages may be brought in a civil court e.g. without a non-appealable decision by the FCA. In practice, damages appear to be brought only after the competition authority or court has issued a non-appealable decision. In this case, due to FCA's decision, the party bringing damages is not obliged to prove the infringement any more.

### 3. Defining damages

In the Competition Act, the definition of damages is primarily based on **the loss** suffered by the plaintiff. The damages provision of the Competition Act states that the compensation for damage shall cover compensation for the expenses, price difference, lost profits and other direct or indirect economic damage resulting from the competition restriction.

The basic rationale is that the plaintiff is entitled to a full compensation: the compensation should fully award the losses incurred by the plaintiff. Liability for damages also requires that causality has been established between the competition restraint and the alleged damage.

In Finland, the civil courts do not use multipliers in damage compensations. It is likely that civil courts, in the absent of law amendments, are reluctant to introduce any kind of multipliers even in compensations for antitrust damages. This conclusion can be drawn due to so-called *unjust enrichment prohibition* that courts commonly use in damages cases (see below).

### 4. Indirect Purchaser Standing

On the basis of the *Competition Act*, damages may be brought only by a *business undertaking*.<sup>2</sup> If the party who has suffered the damages is not a business undertaking, damages may not be brought on the basis of the Competition Act but on the basis of the Damages Act.

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<sup>2</sup> The claim of the Competition Act under which only business undertakings are eligible for damages does not concern infringements of EC competition rules. Cf. EC Court of Justice in case *Courage Crehan* "...

A consumer is not eligible to damages on the basis of the Competition Act, since s/he is not a business undertaking referred to by the Act. A consumer may still bring damages based on the Damages Act, but success may be unlikely as the causality to a competition restraint may be hard to establish. Finnish law does not know a class action.

The Competition Act does not exclude secondary injured parties from bringing damages for breaches of antitrust rules. The travaux préparatoires of the Competition Act state that business undertakings further along the production or distribution chain (cf. direct and indirect purchasers) are eligible for damages if causality can be established between the competition restraint and the damages suffered.

It is possible to bring multiple damages for the breach of the same competition restraint where the plaintiffs include both direct purchasers and indirect purchasers. Centralised proceedings are also possible, i.e. a consolidation of suits may be heard at the same trial. Although the Competition Act enables the bringing of damages by business undertakings in different production or distribution levels, there are no provisions on the allocation of damage awards in the Competition Act.

## 5. Passing-on-Defence (POD)

The Damages Act or the Competition Act does not contain clear provisions on whether the damages awarded to the injurer may be decreased on the grounds of POD. However, POD has a connection to the unjust enrichment or non-profiting principle, which comes up when the application of the Damages Act is to be discussed. The non-profiting principle is based on the notion that damages should always restore the suffering party's financial position similar to what it was prior to the competition restraint. The ratio of the non-profiting principle lies in that the compensation to be paid for damages shall not be overly compensatory, to prevent the party who has suffered from making a profit as a result of the damages.

In the application procedure of the Damages Act, the non-profiting principle has been taken into consideration when determining the amount of damages and it has been assessed whether plaintiffs have received some other compensations from other sources. If the compensations obtained from elsewhere have guaranteed the injured party a partial compensation for damages, it has been possible to decrease the amount of damages.

As regards damages for breaches of *antitrust rules*, the caselaw is very limited, if exist at all. It is not known whether the POD or the non-profiting principle have ever arisen in these cases. However, if the direct or indirect purchaser has been able to pass on the damage, the defendants are likely to claim reduced damages precisely on the basis of the non-profiting principle. The defendants may find that claimants have not suffered the injury they have claimed, since they have been able to pass on the damage (e.g. excess price) to their customers. Should this be ignored, perhaps the non-profiting principle would be violated.

In the end, the end users shall pay the excess price, as they are the final step in the distribution chain. If the end users are consumers, they shall bring damages for financial injuries suffered on the basis of the Damages Act alone as damages under the Competition Act may only be brought by business undertakings. The Damages Act compensates for financial damage for particularly weighty considerations. It is obvious that the damages brought by individual consumers are not successful because it may be extremely difficult to establish causality between the competition restraint and the damage. In this situation, approving the POD may mean that the injurer may escape damages altogether because consumers cannot bring damages and the damages by steps preceding the consumers are rejected on the basis of the POD.

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the full effectiveness of article 81 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 81(1) would be put at risk if it were not open **to any individual** to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition”.



## IRELAND

### 1. Introduction

The right to bring private antitrust actions arises from section 14(1) of the Competition Act, 2002. Very few such cases have yet been brought, notwithstanding that a similar right existed under previous legislation. As a result, procedural rules in relation to defenses and the calculation of damages are not well-developed.

Although the development of procedural rules for defenses and the calculation of damages lag behind other jurisdictions, there has been some recent progress in the development of rules specific to Competition litigation. A High Court Judge has been designated as the ‘Competition Judge’ who now has an antitrust case list. The Rules of the Superior Courts have been amended with addition of special rules<sup>1</sup> on the conduct of competition cases. These changes are in part a response to the new EC Regulation 1/03 and clearly anticipate an increase in antitrust litigation both public and private. The rules deal with, amongst other matters, case management (to include pre-trial case management conferences chaired and managed by the Judge), court appointed assessors and the establishment of a ‘Competition List.’

### 2. Passing-On Defense

No rules on the passing-on defense exist in Irish law. As far as we are aware, this defense has not yet been raised in the Irish Courts.

### 3. Indirect Purchaser Standing.

The rules in relation to the right of any private individual to bring a civil action are contained in section 14(1) of the Competition Act 2002. This subsection provides as follows:

“Any person who is aggrieved in consequence of an agreement, decision or concerted practice which is prohibited under section 4 or 5 shall have a right of action under this subsection ...”

A person’s right to bring the action depends therefore upon his being able to establish that he is “aggrieved”. Although the term “aggrieved person” is not defined in the Competition Act itself, it is a term that appears in other statutes, and there is some case law on its meaning. It is, according to the court in *The State (Lynch) v Cooney*<sup>2</sup>,

“a term to be generously interpreted - which is generally understood to include any person who has reasonable grounds to bring the proceedings [...]The question of whether or not a person has sufficient interest must depend upon the circumstances of each particular case. In each case the question of sufficient interest is a mixed question of fact and law which must be decided upon legal principles but, it should be added, there is greater importance to be attached to the facts because it

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<sup>1</sup> See Statutory Instrument No. 130 of 2005, the Rules of the Superior Courts (Competition Proceedings) 2005 at “Order 63 B”.

<sup>2</sup> [1982] IR 337

is only by an examination of the facts that the court can come to a decision as to whether there is a sufficient interest in the matter to which the application relates.”

#### **4. Multiple suits**

Because any “person aggrieved” by the unlawful behaviour may sue, there is nothing to prevent multiple suits for damages arising in respect of the same unlawful activity.

The Irish courts have previously allowed consolidation of multiple suits in mass tort actions, such as in train crash cases. This has happened only very rarely but indicates that there may be a willingness with the Irish Courts to allow the consolidation of multiple suits for injured consumers in follow on competition cases. The Irish Law Reform Commission has recently made a recommendation regarding consolidation of multiple suits.<sup>3</sup>

#### **5. Calculation of Damages**

There are no special rules for the calculation of damages in antitrust litigation, so the ordinary rules of damage calculation apply. Damages are normally calculated by reference to the loss suffered by the plaintiff. The traditional approach is to seek to place the plaintiff in the position he would have been in had the damage not occurred. However, there are exceptions to this rule both in tort and in contract cases, and it seems that in an appropriate case, damages based on profit to the defendant might be awarded. In *Hickey v Roches Stores*<sup>4</sup>. Finlay P. said:

"Where a wrongdoer has calculated and intended by his wrongdoing to achieve a gain or profit which he could not otherwise achieve and has in that way acted *mala fide* then irrespective of whether the form of his wrongdoing constitutes a tort or a breach of contract, the Court should, in assessing damages, look not only to the loss suffered by the injured party but also to the profit or gain, unjustly or wrongly obtained by the wrongdoer. If the assessment of damages confined to the loss of the injured party should still leave the wrongdoer profiting from his calculated breach of the law, damages should be assessed so as to deprive him of that profit. In extending this measure of damages, which heretofore has been confined to tort, to cases of breach of contract, I have acted upon a conclusion that the protection of a party to a contract, from uncertain or extensive damages, against which he had no opportunity to provide by the terms of the contract, should not apply where he has thus acted *mala fide*."

#### **6. Exemplary Damages**

Section 14 of the Competition Act, 2002 provides that the court may award exemplary damages to a plaintiff in a private antitrust action in addition to the other reliefs that are available which include injunctive relief. So far, exemplary damages have not been awarded in any antitrust case. In awarding them in other cases, the Irish courts have applied the requirements that:

- the plaintiff must be the victim of the punishable behaviour involved;
- there must be restraint in the assessment of damages;
- the means of the defendant must be taken into account; and

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<sup>3</sup> Law Reform Commission Report on Multi-Party Litigation(LRC 76-2005) September 2005

<sup>4</sup> Unreported, High Court (Finlay P) 14 July 1976

- exemplary damages should be proportionate to the compensatory damages awarded.<sup>5</sup>

Issues relating to multiple plaintiffs and exemplary damages have also arisen before the courts. In *Conway v INTO*<sup>5</sup> there were 70 claims against the defendant in all. In the High Court, Barron J managed the number of claims by awarding a flat amount of £1,500 damages to each of the plaintiffs. Noting that that this made a total of about £105,000, he said:

“in my view the exemplary damages should be measured in an amount to meet the wrongdoing rather than to benefit the wronged. For this reason I would measure damages under this head at £1,500...”

#### **7. Pre-judgment interest**

Section 22 of the Courts Act, 1981, gives the court the discretion to order pre-judgment interest in any proceedings where damages have been awarded.

#### **8. Multipliers**

There are no rules in relation to the use of multipliers in private antitrust actions

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<sup>5</sup> [1991] 2 IR 305



## NETHERLANDS

### 1. Passing-On Defense/Indirect Purchaser Standing

**1.1 *Please describe any rules in your jurisdiction concerning the passing-on defence, i.e., the defendant's ability to mitigate its liability by establishing that the plaintiff has been able to pass on some or all of the overcharges that resulted from the defendant's anticompetitive conduct to the plaintiff's customers. These could include rules precluding such a defence, evidentiary rules making such a defence more difficult, or rules specifically permitting/facilitating such a defence.***

No specific provisions of Dutch legislation have laid down the principle of passing-on defence or its exclusion. Damages actions arising out of infringement of competition rules are based on section 162 Book 6 of the Dutch Civil Code (DCC). As a basic principle of this provision on tort, only real damages are compensated i.e. damages actually suffered. As a consequence, the issue of damages assessment is central.

To establish the damages actually suffered, the situation of the claimant due to an infringement of competition rules is compared to the hypothetical situation of the claimant without said infringement. The damages are concretely evaluated taking into account all circumstances. Dutch courts have in principle a large freedom to establish damages, thus also the freedom to apply the passing-on defence.

Considering the current Dutch legislation, the passing-on defence could only be applied or rejected in the Netherlands by court decision i.e. judicial interpretation of the law. To date, the Dutch Supreme Court has not ruled on the application of passing-on defence.

However, some law practitioners consider that there is a good chance that the passing-on defence will not be allowed in the Netherlands enabling the direct purchaser to fully claim back the overcharged price from the infringer.

As for any claims based on EC competition law, rather than solely on the Dutch Competition Act, the European Court of Justice has not ruled on the passing-on defence either but the Courage/Crehan judgment is sometimes considered to require that both indirect and direct claims for infringement of competition law should be actionable under national law when Article 81 and/or 82 EC are at issue.

**1.2 *Please describe any rules in your jurisdiction affecting the ability of indirect purchasers to bring civil actions in order to remedy any damages they have suffered because overcharges have been passed on to them from the direct purchasers of the person accused of a competition law violation. Such rules could include, for example, rules concerning standing or evidentiary rules.***

Two rules under Dutch law affect the ability of indirect purchasers to bring civil actions in order to remedy any damages suffered due to passed-on overcharges from the direct purchaser of an alleged infringer to competition rules: the relativity requirement and the causation requirement.

Firstly, the relativity requirement pursuant to section 163 Book 6 DCC, entails that no obligation to compensate damages exists if the violated norm did not aim at providing protection against such damages.

In this instance, the violated norm would be the competition rules. The question is whether the purpose of competition rules can be said to protect only end-consumers or also intermediate undertakings in the chain. Do competition rules aim at providing protection to intermediaries against damages? The Dutch courts have not yet answered this question.

Secondly, the causation requirement pursuant to section 98 Book 6 DCC. implies that the indirect purchaser must prove that the paid price would have been lower without the infringement of competition rules. In practice, such evidence is very complex to establish.

**1.3 *Have there been any more or less recent changes to the rules concerning passing on-defence and/or indirect purchaser standing that would affect the ability of plaintiffs to bring actions under competition laws?***

To date, there have been no recent changes to the rules concerning passing-on defence and/or indirect purchaser standing that would affect the ability of plaintiffs to bring actions under competition laws.

**1.4 *If direct and indirect purchasers at different levels of the supply chain are allowed to bring actions for damages against the person accused of a competition law violation, what are the rules concerning the allocation of damage awards among them?***

As passing-on defence and indirect purchaser standing have, thus far, not yet been applied in the Netherlands, we cannot answer as to which are the rules concerning the allocation of damages awards.

**1.5 *Have any concerns been raised that the rules concerning passing on defence and indirect purchaser standing might complicate case management in private antitrust litigation? For example, could the rules result in the potential of multiple suits in different courts when direct and indirect purchasers can bring their claims in different courts? Are there any rules allowing for the consolidation of such suits?***

Some Dutch law practitioners have emphasised the advantages of either concentrating civil procedures relating to infringement of competition rules in the hands of a restricted group of judges or attributing the competence over these cases to only one special court. In the latter case and as suggested by some law practitioners, the District Court of Rotterdam, which is already the competent court of first instance for competition law cases in administrative procedures, could fulfil this role.

**1.6 *Please describe any views/discussions as to whether the current rules concerning passing on defence and/or indirect purchaser standing reflect the right policies in the context of private antitrust litigation? This could include discussions whether rules should be changed to facilitate private litigation or whether the rules impose unreasonable burdens on defendants because they could result in multiple damage awards. If concerns have been raised that the system could result in multiple recovery, is there any evidence that this occurs in practice, for example where a direct and indirect purchaser recover the same loss?***

At this moment we have not taken a position as to whether the rules concerning passing-on defence and/or indirect purchaser standing reflect the right policies in the context of private antitrust litigation.

## **2. Definition of Damages**

**2.1 *Please describe any rules in your jurisdiction concerning the definition of damages in private antitrust litigation. For example damages can be calculated with regard to the loss suffered by the plaintiff or the gain made by the defendant. When calculating the loss suffered by the plaintiff, is account taken of losses arising both from the increase in price and reduction in***

***quantity purchased?*<sup>1</sup> Please also describe other aspects of damage calculation such as the use of multipliers to increase the defendant's total liability once a violation of competition laws has been found, and/or the inclusion of pre-judgment interest in the calculation of damages.**

In the Netherlands there are no specific rules for the definition of damages in private antitrust litigation. Furthermore, there are very few competition cases in which damages have been awarded in private litigation. The general rule for calculating the level of the damages is calculation in such a way that is most appropriate with the nature of the damages. If the level of damages cannot be calculated precisely, an estimation will be made (section 97 Book 6 DCC). Therefore, the judge has considerable freedom to choose a method of calculating the damages fitting to the circumstances.

Both foregone profits and suffered losses *can* be considered for damages<sup>2</sup> (section 96 sub 1 Book 6 DCC) but there is no obligation for the judge to do so. In addition the "fair" costs for calculating the damages, liability and external experts *can* be added to the damages. For compensation of costs for legal assistance a system of fixed amounts applies. Since the judge is free in his or her evaluation of proof (art. 152 sub 2 Civil Procedure Code (*Wetboek van Burgerlijke Rechtsvordering*)) and can estimate the damages as he or she sees fit if the damages cannot be calculated precisely (section 97 Book 6 DCC), the models for damages calculation as put forward in the Ashurst report commissioned by the European Commission (2004) *can* in principle all be used by the claimant to substantiate the damages.

In principle a judge *can* also take into account losses arising from the reduction in quantity purchased if this is sufficiently substantiated by the claimant (this may be difficult to substantiate since this involves price elasticities of demand). For damages in private antitrust litigation prejudgment interest (the statutory interest rate) is generally due from the moment on which damage is being suffered. This is the general rule for tort cases.

## **2.2 *Have there been any more or less recent changes to these rules?***

There have not been recent changes to these general rules.

## **2.3 *If multipliers can be used in civil competition cases, please describe whether their use is mandatory or in the courts' discretion. If courts have discretion, what criteria can they use in deciding whether to apply a multiplier?***

The general rules in the DCC do not contain provisions for multipliers. In general damages are awarded to compensate for suffered pecuniary damages. Additionally, in accordance with section 106 Book 6 DCC other damages can be awarded if physical damage or other personal damage is suffered or the

<sup>1</sup> Consider an upstream market with 10 firms that produce a certain product to one retailer that resells the product to final consumers. Assume that the price at which the upstream firms sell to the retailer is 10 per unit at a cost of 8 per unit. The retailer resells the product without additional cost for a price of 12 per unit to final consumers who value the good on average at 15 per unit. At the price of 12, consumers are willing to buy 10,000 units of the product. Consider now the effect of an upstream cartel. The cartel increases price to 13 per unit for the retailer and 14 per unit for the final consumer. At the new price of 14, consumers are willing to buy only 8,000 units. The effect of the cartel is twofold. First, the retailer faces a reduced profit margin on the sales he still makes (8,000\*1 instead of 8,000\*2 implying a damage of 8,000) and the consumer faces a reduced utility gain for the units that are still bought (8,000\*1 instead of 8,000\*3 implying a damage of 16,000). Second, in addition to this increase in price effect, the retailer loses sales of 2,000 that result in a damage of 4,000 and consumers have a damage of 6,000 (2,000\*3) in utility.

<sup>2</sup> E.g. in April 2000 the Supreme Court ruled that suffered losses *and* (part of) the profit made by the defendant cannot be added up in a damages claim concerning copyrights.

defendant had the intent to cause damages to the plaintiff. Whether this could be applied in private antitrust litigation remains to be seen.

**2.4** *Please describe any views/discussions concerning the use of multipliers in civil competition cases, either the possible introduction of multipliers to encourage more civil law suits, or concerns that existing multipliers can result in over-deterrence.*

At this moment we have not taken a position as to whether multipliers should be introduced for private antitrust litigation and if so for what kind of breaches of competition rules (e.g. hardcore cartels).

## NORWAY

### 1. Passing-on Defence/Indirect Purchaser Standing

Liability for damages under Norwegian competition law has no statutory basis. The basis for actions against the infringer of competition law is general tort law. A basic principle under Norwegian tort law is that the defendant is usually only liable for the loss suffered by the plaintiff. There are no rules precluding or specifically permitting passing-on defence. Thus, such a defence may be relevant in the assessment of damages for the defendant's anti-competitive conduct.

The number of competition cases before the courts regarding claims for damages in Norway is very limited. We are not aware of a single judgement. Presumably, most cases on private remedies are either settled or handled confidentially before arbitration courts. The relevance of case law concerning damages in other fields of law is uncertain. However, the general principles of tort law and law on civil procedure are applicable even though difficult to elaborate with satisfactory certainty and detail.

According to general principles of procedural law the court is to establish the facts of the case based on a free evaluation of the evidence. In most cases the standard of proof in civil cases is preponderance of evidence. The burden of proof regarding the conditions for liability rests with the plaintiff, including the extent of the plaintiff's loss. Regarding the passing-on defence, however, it is possible that the burden of proof would rest on the defendant. However, as there is no known case law this cannot be stated with certainty.

In some cases it may not be too complicated to prove that the plaintiff has suffered a loss if infringement is established, but it may still be very difficult stipulate the extent of the damages. In such situations Section 192 of the Civil Litigation Act might in some cases be helpful to the plaintiff as it lays down the principle that damages may be rewarded at the discretion of the court.

In judgments based on discretionary assessment it is possible that the passing-on defence will play a less significant role as the question whether the loss has been passed on in such cases presumably will be attached with considerable uncertainty. However, in principle loss that has been passed on to the plaintiff's customers is a part of the assessment also under Section 192 of the Civil Litigation Act.

The indirect purchaser may in theory claim damages, on condition that the connection between the injuring conduct and the loss is not too remote. Hence, damages can only be rewarded for loss that was reasonably foreseeable. Apart from that, the general principles mentioned above apply.

The rules on standing will possibly not be a major obstacle for actions from indirect purchasers. The plaintiff has to demonstrate a legal interest in instituting legal proceedings, but the assessment of legal interest is based on the plaintiff's presentation of the case. The rules on standing do not include evaluation as to the merits of the case. It is not too be ruled out that the possibility of indirect purchasers to claim damages, alongside the possibility of discretionary assessment of the extent of the damages and the possible burden of proof for passing-on defense may in practice in some cases result in multiple recovery.

There are no specific rules as to the allocation of damage awards amongst direct and indirect purchasers. The loss of each plaintiff has to be assessed individually. It might be expected, however, that future case law to some extent will take the possibility of multiple recovery into account.

As there is no statutory basis or case law concerning damages for violation of competition law, no changes to the rules can be pointed out.

Consolidation of law suits is, under certain conditions, admissible. Class actions are at present not possible. However, under the new Civil Litigation Act, which has not yet entered into force, class actions may be filed.

Passing-on and indirect purchaser standing have only to some degree been discussed in Norway. In the report (NOU 2003: 12) that formed the basis of the present Competition Act, private remedies were only treated in an appendix written by associate professor Erling Hjelmeng. The Competition Act, which entered into force on 1 May 2004, does not include statutes on damages or other private remedies.

In his paper Hjelmeng proposed a statutory basis for damages resulting from competition law infringement where only the direct customer can claim damages and passing-on defense is precluded, both to avoid complications in private antitrust litigation and to avoid multiple recovery.

## **2. Definition of Damages**

As mentioned above there is no specific statutory basis for damages in competition cases. According to the principles of tort law the injured party's economic loss is to be fully compensated, see Section 4-1 of the Act on Torts. However, the defendant's profits are not necessarily excluded when assessing the loss.

Both losses arising from increase in price and reduction in quantity purchased may entail claim for damages from the direct purchaser and retailers. Reduction in utility gain for the final consumer can only be compensated if it can be considered as an economic loss.

It should be noted that only injury protected by the prohibition that has been violated is to be compensated. Hence, in relation to infringement of competition rules only damage that has occurred as a result or as an element of conduct restricting competition can be compensated. Furthermore, the condition that loss must be reasonably foreseeable may limit the damages that may be claimed by an indirect purchaser.

Pre-judgment interest on damages is awarded from the 30<sup>th</sup> day following the day which the plaintiff made a written claim for damages. The interest rate is calculated per year. The current interest rate is 9,25 %. The level of interest is at minimum seven percentages above the current reference rate decided by the Central Bank of Norway.

Multipliers to increase the defendant's total liability are not available in Norway. We do not expect multipliers to be proposed as it appears quite foreign to Norwegian legal tradition. For the same reason we do not expect that multipliers will be the subject of extensive discussions in Norway.

## SWITZERLAND

### 1. Introduction

Although the Swiss Law on Cartels does allow for private rights of action (see annex) and in particular for damage or reparation claims (i.e. no double or treble damages), the normal way of proceeding against anticompetitive practices in Switzerland is through administrative procedures. Nonetheless, an important difficulty in precisely evaluating the effectiveness of the Swiss private antitrust remedies lies in the fact, that the enforcement of the civil rules in the Swiss Law on Cartels is in the competence of the responsible tribunals of our 26 cantons, each of which disposes of a different procedural law. To our knowledge, there are no comprehensive statistics available which would give further insight into the matter. This paper thus limits itself to some general remarks regarding the questions raised by the Secretariat (DAF/COMP/WP3(2005)6). An indication which confirms the assumption that Swiss private rights of action are seldom used, lies in the fact that Swiss scholars have not paid any particular attention to private antitrust remedies. It also appears that Swiss law firms seldom encourage their clients to take such actions. Furthermore, our Supreme Court so far has only very rarely dealt with private law suits based on the Law on Cartels and never with damage claims.

There are various reasons that can be put forward to explain this situation: Among others, civil proceedings entail cost risk and impose a heavy burden of proof onto the complainant not only regarding the existence of a restrictive business practice but also regarding damage, causality and fault.

The respective rules of the Swiss Law on Cartels have not been changed during the last major revision in 2003 and, so far, no intention has been expressed to revise these provisions in the near future. Furthermore, Swiss civil law relies heavily on the idea that damage claims ought to be strictly limited to the actual loss occurred and the concept of multiple damages appears to be an alien element within the system. So far, the policy has been that even the slightest incentive for vexatious action ought to be avoided. At the most, a plaintiff thus receives full compensation for the losses suffered.

### 2. Passing-On Defense / Indirect Purchaser Standing

#### 2.1 *Passing-On Defense*

The Swiss system does not know a “passing-on defense” properly speaking. Rather, the question is to be examined when looking at the substantial requirements that have to be fulfilled in order to sue for damage. The Swiss Law on Cartels does not enumerate particular requirements but rather refers to general civil law.

According to the relevant requirements a person filing a damage claim evidently needs to have suffered a damage which is defined as a pecuniary loss or the difference between the actually existing assets of a person and the amount the assets would include had there been no damage-triggering event. Consequently, a plaintiff that has passed on *all* of the overcharges that resulted from the defendant’s anticompetitive conduct to his own costumers does not suffer from any pecuniary loss at the moment he initiates proceedings. As a result, the plaintiff would not be successful with his claim.

## 2.2 *Indirect Purchaser Standing*

According to art. 12 (1) of the Swiss Law on Cartels any natural or legal person impeded by an unlawful restraint of competition from entering or competing in a market has standing to sue. On the one hand, this rule clearly excludes a consumer's or trade association's standing as they cannot be impeded from entering or competing in a market. On the other hand, this rule does not limit standing to direct competitors or direct purchasers.

However, indirect purchasers that have suffered a damage according to the definition described above might have difficulties in proving the causative link with the infringing behavior. Swiss law and doctrine is based on the concept of an "adequate" causality, i.e. an event / behavior is only in those cases the cause of a certain damage if according to general life experience the relevant behavior is actually capable of giving rise to these losses. For the reasons explained initially, it is unknown if adequate causality has been accepted by the cantonal judges in such cases.

## 3. **Definition of Damages**

The definition of damage in Swiss law has already been described earlier. This definition involves an actual pecuniary loss (*damnum emergens*) or missed profits (*lucrum cessans*). The second possibility would also include losses resulting from the reduction in quantity purchased. However, the party alleging to have suffered a pecuniary damage also needs to prove its existence and its extent. If the plaintiff fails to prove this he loses the case and has to bear the costs which increase proportionally to the alleged losses and, above all, also include the lawyer's fees of both parties.

One major problem in antitrust cases consists in evaluating the difference between the monopoly price and the market price in competitive circumstances as, from an economic point of view, it is very difficult to determine what would be that competitive price. Referring to the standard of proof that would be required to succeed in court, this task has to be considered virtually impossible. Another problem consists in the exact distribution of damages along the supply chain, especially in those cases in which the direct purchaser has *not* passed on *all* the overcharges resulting from the defendant's infringing behavior to the indirect purchaser or alleges that he himself has suffered losses from the reduction in quantity purchased.

Nonetheless, Swiss law provides for a certain relaxation regarding the rules on evidence of damages: In those cases in which the exact extent of the damage cannot be proven or if this requirement would amount to an unreasonably severe burden, it is in the judge's discretion to estimate the losses. According to the law, the judge needs to take into consideration the "normal course of action" and the measures that have already been taken by the person who has suffered these losses.

Again, it is unknown to us whether and how the latter provision has been applied by the cantonal judges most of whom are not specialized in competition law and thus less sensitive to its particularly complex problems that might arise in such damage claims.<sup>1</sup>

## 4. **Summary and conclusion**

Given the considerable cost risk, the general lack of clarity about rules and practices appears to be a major obstacle to private antitrust actions in Switzerland. Not only is an analysis of the possible case law

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<sup>1</sup> However, it is necessary to emphasize here that in those cases in which the lawfulness of a restraint of competition is questioned in the course of a civil proceeding, the case has to be referred to the Competition Commission for an opinion (art. 15 of the Swiss Law on Cartels).

hampered by the fact that the relevant rules are applied by the responsible tribunals of our 26 cantons subject to 26 different procedural laws, but the lack of clarity is further exacerbated by the lack of interest of Swiss scholars in the particular problems arising in the context of private antitrust remedies.

Although Swiss legal culture is very reluctant to accept the idea of double / treble damages it cannot be denied that other possibilities exist to facilitate private rights of actions, e.g. by introducing more specialized antitrust civil law rules. Although the general civil law rules in Switzerland provide for a certain flexibility with regard to standing and requirements of proof of damage it is not only unclear how, if at all, they are applied, but current rules do not provide a solution at all for particular problems such as damage allocation between plaintiffs on different levels of the supply chain. Another important measure would consist in raising the awareness of cantonal judges for competition matters.

## ANNEX: PROVISIONS RELATING TO CIVIL PROCEDURE IN THE SWISS LAW OF CARTELS

### Chapter 3: Provisions relating to civil procedure

#### *Article 12: Actions arising from an obstacle to competition*

10. A person impeded by an unlawful restraint of competition from entering or competing in a market may request:
  1. removal or cessation of the obstacle;
  2. damages and reparations in accordance with the Code of Obligations<sup>17</sup>;
  3. remittance of illicitly earned profits in accordance with the provisions on conducting business without a mandate.
11. Obstacles to competition include in particular refusal to deal and discriminatory measures.
12. The actions set forth at paragraph 1 above may also be taken by a person who, on account of a lawful restraint of competition, is impeded more seriously in his ability to compete than is warranted by the implementation of such restraint.

#### *Article 13: Exercise of actions for removal or cessation of the obstacle*

In order to ensure removal or cessation of the obstacle to competition, the courts may, at the petitioner's request, rule that:

1. contracts are null in whole or in part;
2. the person at the origin of the obstacle to competition must conclude contracts on market terms with the person impeded under the conditions usually pertaining in the concerned.

#### *Article 14: Jurisdiction*

13. Cantons shall designate for their territory a court with sole jurisdiction within the canton in suits brought for restraint of competition. Such court shall also have jurisdiction in other civil suits if they are brought at the same time as the suit in restraint of competition and are related thereto.
14. ...<sup>18</sup>

#### *Article 15: Assessment of the lawfulness of a restraint of competition*

15. If the lawfulness of a restraint of competition is questioned in the course of a civil proceeding, the case shall be referred to the Competition Commission for an opinion.

16. If a restraint of competition that is as such unlawful is presented as being necessary for the safeguard of compelling public interests, the matter shall be referred to the Federal Council for a ruling.

***Article 16: Keeping of business secrets***

17. In disputes concerning restraints of competition, the parties' manufacturing or business secrets shall be kept.
18. The adverse party may have access to means of proof liable to reveal such secrets only to an extent that is compatible with the keeping of the secrets.

***Article 17: Provisional remedies***

19. In order to protect justified claims arising from a restraint of competition, the courts may order provisional remedies at a party's request.
20. Articles 28c to 28f of the Swiss Civil Code<sup>19</sup> shall apply by analogy to such provisional remedies.



## TURKEY

### 1. Introduction<sup>1</sup>

Section Five of the Law on the Protection of Competition No 4054 (Law No 4054) provides rules about private law consequences of limiting competition. Article 57 entitled “Right to Compensation”, Article 58 entitled “Compensation for the Damage” and finally Article 59 entitled “Burden of Proof” provide provisions about compensation of damages arising from limitation of competition.<sup>2</sup> The conduct

<sup>1</sup> The explanations in the contribution are based on Aksoy, N. (2004), “*Private Legal Consequences of Violation of Law on the Protection of Competition*”, Publication by Turkish Competition Authority, Ankara.

<sup>2</sup> The texts of the Articles are as follows:

#### **Legal Nature of Agreements and Decisions Contrary to This Act**

**Article 56-** Any agreements and decisions of associations of undertakings contrary to article 4 of this Act are invalid. The performance of acts arising out of such agreements and decisions may not be requested. In case a request is made for reclamation due to the invalidity of previous acts fulfilled, the return obligation of the parties is subject to articles 63 and 64 of the Code of Obligations.

The provision of article 65 of the Code of Obligations is not applicable to disputes arising out of this Act.

#### **Right to Compensation**

**Article 57-** Anyone who prevents, distorts or restricts competition via practices, decisions, contracts or agreements contrary to this Act, or abuses his dominant position in a particular market for goods or services, is obliged to compensate for any damages of the injured. If the damage has resulted from the behaviour of more than one people, they are responsible for the damage jointly.

#### **Compensation for the Damage**

**Article 58-** Those who suffer as a result of the prevention, distortion or restriction of competition, may claim as a damage the difference between the cost they paid and the cost they would have paid if competition had not been limited. Competing undertakings affected by the limitation of competition may request that all of their damages are compensated by the undertaking or undertakings which limited competition. In determining the damage, all profits expected to be gained by the injured undertakings are calculated by taking into account the balance sheets of the previous years as well.

If the resulting damage arises from an agreement or decision of the parties, or from cases involving gross negligence of them, the judge may, upon the request of the injured, award compensation by three fold of the material damage incurred or of the profits gained or likely to be gained by those who caused the damage.

#### **Burden of Proof**

**Article 59-** Should the injured submit to the jurisdictional bodies proofs such as, particularly, the actual partitioning of markets, stability observed in the market price for quite a long time, the price increase within close intervals by the undertakings operating in the market, which give the impression of the existence of an agreement, or the distortion of competition in the market, then the burden of proof is for the defendants that the undertakings are not engaged in concerted practice.

The existence of agreements, decisions and practices limiting competition may be proved by any kind of evidence.

limiting competition within the scope of Law No 4054 may lead to tortious liability. The person who causes damages on consumers or rival undertakings through his transactions or practices distorting, preventing or limiting competition will have to compensate such damages within the framework of tortious liability. The person can ask for compensation via suits he files in civil courts. The plaintiff has to prove that there is an infringement of competition either within the scope of Article 4 of Law No 4054 prohibiting agreements, concerted practices and decisions limiting competition or Article 6 prohibiting abuse of dominant position and he has suffered damages as a result of the infringement.

Although rules to be applied for damages resulting from limitation of competition are those in Law of Obligations, Law No 4054 brings rules different from Law of Obligations with respect to calculation and proof of compensation. Therefore, these different provisions in Law No 4054 have precedence in application whereas Law of Obligations shall apply for other matters.

## **2. General Principles concerning Compensation in Private Legal System in Turkey**

Law of liability is based on the principle that the person who causes damages pays the damages incurred by the relevant person. Tortious liability is the obligation to compensate the damages that originates from infringing a legal duty that one must comply against everyone. The conditions for compensation (tortious liability) are the existence of act, damages, appropriate causal relation, fault and unlawfulness. Act refers to human behaviour causing damages. Damage is the difference between value of properties at the moment and value of properties that would have been if the event causing damages had not happened. Basic types of pecuniary damage are actual damages and the profits one is deprived of. Pecuniary damage occurs when value of property decreases as a result of the act causing damages. Profits one deprived of refer to decrease in value of property when increase in the value of the property in normal course of events is prevented due to the act causing damages. Appropriate causal relation is cause and effect relationship between the damages occurred and the act. Fault that can be intentional or negligent is the conduct condemned or not favoured by legal order and requires act contrary to law. Burden of proving fault in tortious liability is on the person who incurs damages. Unlawfulness is infringement of imperative rules written or unwritten that aim to protect properties belonging to people or themselves directly or indirectly. The act should be contrary to a certain rule of law in order that conditions for compensation occur.

The aim of law of liability is to compensate in kind or in cash the decrease in the property of the person who incurs damages without his volition. Therefore before determining the amount of compensation, the damages should be calculated. General rule is that the amount of compensation to be paid by the one who causes damages can never exceed the amount of the damage occurred because the purpose of the compensation is not to punish the one who causes the damage or enrich the one who incurs the damage but to compensate the damage. According to Turkish Code of Obligations, it is the plaintiff who should prove that it has incurred damages and the amount of the damage. However, the judge has wide discretionary powers in determining the damages and he decides the amount of the damage according to experiences of life, normal course of events, statistical information and if necessary the expertise of the expert witness. According to the principle of subtracting the benefits obtained from the event causing damages, the benefits from the event causing damages obtained by the person who incurred the damages are deducted from the amount of damages. Otherwise the person incurring the damages is enriched unjustly at such an amount.

## **3. Provisions in Law No 4054 concerning Compensation**

Articles 57-59 of Law No 4054 concerning compensation include both elements repeating the general principles of law of liability and provisions completely contrary to these general principles.

Article 57 entitled “Right to Compensation” regulates the parties to and conditions of compensation obligation within the scope of Law No 4054. First sentence of the Article demonstrates that the lawmaker has not limited the parties to the action for damages by taking the characteristics of competition law into account and as a result everyone who causes damages by a conduct contrary to Law No 4054 can be a defendant whereas everyone who incurs damages can be a plaintiff.<sup>3</sup> Article 57 also regulates under which conditions right to compensation occurs. According to the Article, those causing damages via practices, decisions, contracts or agreements contrary to Article 4 of Law No 4054, or abuses his dominant position in a particular market for goods or services contrary to Article 6 of Law No 4054 is obliged to compensate the damages.

As mentioned earlier, net amount of damages should be determined before deciding on the amount of compensation. Lawmaker explains in Article 58 the principles in determining the damages of the consumers and competing undertakings as a result of limitation of competition. First sentence of Article 58 provides that “Those who suffer as a result of the prevention, distortion or restriction of competition, may claim as a damage the difference between the cost they paid and the cost they would have paid if competition had not been limited.” The type of the damage that consumers incur is the actual damages in their property because they pay higher price and it is based on the presumption that prices increase due to limitation of competition. However, although the consumers would be able to claim the extra amount they paid as damages, it could be very difficult, sometimes even impossible, to determine the price difference in practice. While determining the price difference, it should be kept in mind that prices could be affected by some other conditions in addition to limitation of competition. There could be significant difficulties in calculating the prices that would have occurred if competition had not been limited. Prices in a similar market where competition is not limited can be taken as point of reference. Another problem that can be faced in practice is how the consumers can file a suit if they are in great numbers although there is no doubt that consumers who has paid extra prices can file a suit individually.

Final sentence of first paragraph of Article 58 provides that “In determining the damage, all profits expected to be gained by the injured undertakings are calculated by taking into account the balance sheets of the previous years as well.” The type of damages incurred by competing undertakings is profits they are deprived of. A method to calculate damages of competing undertakings takes into account the difference between the actual amount of the property and the amount that would have been if competition had not been limited. This method suggested while calculating the potential profits of the competing undertakings can cause great complications in practice.

It must be accepted that although the lawmaker, while calculating the damages, takes into account the price paid by the customer and the profits that competing undertakings are deprived of, they are cited as examples; parties incurring damages as a result of limitation of competition are not limited to the consumers and competing undertakings; similarly the damages occurred are not composed of only the examples in Article 58. Therefore, the judge will have the discretion to decide those causing and incurring damages and how to calculate the damages.

Article 58(2) provides that “If the resulting damage arises from an agreement or decision of the parties, or from cases involving gross negligence of them, the judge may, upon the request of the injured, award compensation by three fold of the material damage incurred or of the profits gained or likely to be

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<sup>3</sup> Although the first two sentences of Articles 58(1) cites consumers implicitly and rival undertakings explicitly as plaintiffs in an action for damages, the list should not be seen as exhaustive because the real purpose of Article 58 is not to cite the parties to action for damages but to determine how to calculate the damages and Article 57 overtly regulates that everyone who incurs damages can file a suit for compensation. Therefore, it is contrary to purpose of competition law to accept that right to compensation is granted to only competing undertakings and consumers. See Aksoy, p. 56.

gained by those who caused the damage.” It is seen that the lawmaker aims that the person causing damages pays compensation that is higher than the damages he has caused. Three fold compensation goes beyond the basic principle of law of liability that aims to compensate the damages of the injured. In Turkish legal system, there is the principle that the amount to be decided in action for damages cannot exceed the damages incurred. Anti-trust law of the United States provided the inspiration for the insertion of three fold compensation into Law No 4054. It must be accepted as a sort of punitive sanction rather than compensation.<sup>4</sup> The wording of Article 58(2) provides that the judge has discretionary power regarding three fold compensation although it is said that the injured must request so. Another element in Article 58(2) that is not compatible with law of liability is the fact that the profits of the person causing damages will also be taken into account in addition to the damages of the injured. This is also contrary to the principle that compensation cannot exceed the damages.

Final article of section five of Law No 4054 is about burden of proof. As a rule, it is the person claiming compensation who should prove that the elements of tortious act have occurred and the amount of damages as a rule. Although this is also valid in competition law, Article 59 brings a reversal of the burden of proof in case of concerted practices similar to the one in Article 4<sup>5</sup> of Law No 4054. Therefore, burden

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<sup>4</sup> Aksoy, p. 59. Aksoy cites a view from literature that one of the possible aims of this threefold compensation is to encourage litigation for the compensation of damages incurred by third persons.

<sup>5</sup> Full text of Article 4 is as follows;

**Agreements, Concerted Practices and Decisions Limiting Competition**

**Article 4-** Agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings which have as their object or effect or likely effect the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services are illegal and prohibited.

Such cases are, in particular, as follows:

- a) Fixing the purchase or sale price of goods or services, elements such as cost and profit which form the price, and any terms of purchase or sale,
- b) Partitioning markets for goods or services, and sharing or controlling all kinds of market resources or elements,
- c) Controlling the amount of supply or demand in relation to goods or services, or determining them outside the market,
- d) Complicating and restricting the activities of competing undertakings, or excluding firms operating in the market by boycotts or other behaviour, or preventing potential new entrants to the market,
- e) Except exclusive dealing, applying different terms to persons with equal status for equal rights, obligations and acts,
- f) Contrary to the nature of the agreement or commercial usages, obliging to purchase other goods or services together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or putting forward terms as to the resupply of a good or service supplied.

In cases where the existence of an agreement cannot be proved, that the price changes in the market, or the balance of demand and supply, or the operational areas of undertakings are similar to those markets where competition is prevented, distorted or restricted, constitutes a presumption that the undertakings are engaged in concerted practice.

Each of the parties may relieve itself of the responsibility by proving not to engage in concerted practice, provided that it is based on economic and rational facts.

of proof is eased for the injured in case of concerted practice because it is hard to prove the existence of concerted practice. Second paragraph of Article 59 that provides that “The existence of agreements, decisions and practices limiting competition may be proved by any kind of evidence” brings easiness of freedom of proof to the parties. However, it should be kept in mind that to claim compensation the plaintiff should not only prove that competition is limited but also elements of tortious liability.



## UNITED KINGDOM

### 1. Summary

In English law there are no specific rules applying to the passing-on defence, the standing of indirect purchasers or the calculation of damages in competition law cases. The application of general tort law principles suggests the following: a) passing-on arguments could be relevant in calculating damages in actions for breach of statutory duty; b) indirect purchasers may be able to sue in tort if they satisfy the requirements established by the common law; and c) damages are generally awarded on a compensatory basis but the possibility of exemplary damages also exists.

### 2. Responses to questions raised in the OECD request for submissions

The following analysis is limited to claims in tort but similar principles may apply to contractual claims. Furthermore, the analysis is deals with English law only.

#### 2.1 *Passing-on defence/indirect purchaser standing*

##### 2.1.1 *General*

There are no specific rules in English law applicable to the passing-on defence and the standing of indirect purchasers in competition law cases except, perhaps, section 47B(2) of the Competition Act 1998 – see below. General principles of tort law and rules relating to specific torts apply.

##### 2.1.2 *Passing-on defence*

The current position of English law on the ‘passing-on’ defence and ‘indirect purchaser’ issues is open. There is no decided case where passing-on issues have been discussed by a court. The law of tort or contract is determinative, depending on whether the claim is a tortious or a contractual one.

The fundamental rule in English tort law is that damages are compensatory. Damages should be governed, as far as possible, by the principle of *restitutio in integrum*. In *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39, Lord Blackburn said:

Where any injury is to be compensated by damages, in settling the sum of the money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

A subsidiary rule that gives effect to the dominant principle is that the claimant cannot recover from the defendant loss that has been avoided because the claimant has received a countervailing benefit. It is sometimes difficult to distinguish receipts that go directly to reducing the loss and receipts that are indirect or collateral and, therefore, must not be taken into account to reduce the damages recoverable. The test would appear to be whether the benefit received is sufficiently causally connected with the defendant’s wrongdoing to require it to be taken into account.

### 2.1.3 *Indirect purchaser standing*

The approach is the same in relation to the ‘standing’ of indirect purchasers. There is no specific rule that applies to the ‘standing’ of indirect purchasers in competition law claims. The rules on ‘standing’ depend on the tort which is to be pleaded as a cause of action. The prevailing view appears to be that breach of the competition law prohibitions may amount to the tort of breach of statutory duty. The tort of breach of statutory duty arises when a court concludes that a statute which is primarily regulatory or criminal in nature should be treated as giving rise to civil liability. There would appear to be two rules limiting ‘standing’ in actions for breach of statutory duty: a) the statutory duty must be owed to the claimant or, to put it another way, the claimant must fall within the class of persons that the statute intends to protect; b) the claimant must have suffered injury of the kind which the statute is intended to prevent. If the statute is intended to prevent a mischief of a particular kind, a person who suffers loss of a different kind cannot recover its loss in an action for breach of statutory duty. There is no reason to believe that an indirect purchaser would be unable to satisfy both tests.

Section 47A of the Competition Act 1998<sup>1</sup> provides that a person who has suffered loss or damage as a result of the infringement of a relevant competition prohibition (as defined in section 47A(2)) may make a claim in proceedings before the Competition Appeal Tribunal if the infringement has already been established by a decision of the OFT, the European Commission, or the Competition Appeal Tribunal. Section 47B of the Competition Act 1998<sup>2</sup> provides that specified bodies designated by the Secretary of State may bring proceedings before the Competition Appeal Tribunal which comprise consumer claims on behalf of at least two individuals. A consumer claim is defined in section 47B(2) as a ‘claim to which section 47A applies which an individual has in respect of an infringement affecting (directly or indirectly) goods or services to which subsection (7) applies’. Subsection 7 provides: ‘This subsection applies to goods or services which - (a) the individual received, or sought to receive, otherwise than in the course of a business carried on by him (notwithstanding that he received or sought to receive them with a view to carrying on a business); and (b) were, or would have been, supplied to the individual (in the case of goods whether by way of sale or otherwise) in the course of a business carried on by the person who supplied or would have supplied them’. Section 47B(2) could be read as explicitly allowing indirect purchasers actions in claims brought on behalf of consumers as defined in section 47B, but this interpretation has not yet been tested in the courts.

## 2.2 *Definition of damages*

### 2.2.1 *General*

In English tort law, damages are normally assessed on the basis of injury suffered by the claimant. Compensation for loss must be assessed at the time of the injury. Interest is awarded from the date the infringement occurred to the date of the judgement, and on the judgement debt at the judgement rate (if applicable) after the judgement. In so far as is relevant to damages actions arising from breaches of competition law, there are three areas in which the claimant may recover a sum that may not correspond to the loss he suffered: a) exemplary damages; b) restitution; and c) account of profits.

### 2.2.2 *Exemplary damages*

In English tort law, exemplary damages may be awarded in certain circumstances. Their object is to punish the defendant and deter future conduct. *In Rookes v Barnard* [1964] AC 1129, Lord Devlin limited

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<sup>1</sup> Inserted by section 18(1) of the Enterprise Act 2002.

<sup>2</sup> Inserted by section 19 of the Enterprise Act 2002.

exemplary damages to three categories of cases: 1) 'Where the claimant has been the victim of oppressive, arbitrary or unconstitutional action by servants of government'; 2) 'where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the [claimant]'; 3) 'where authorised by statute'<sup>3</sup>. After the judgement of the House of Lords in *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] 3 All ER 193, it is now clear that exemplary damages are available so long as the conduct falls within one of the categories established by Lord Devlin in *Rookes v Barnard*. Their availability is not restricted to specified causes of action. As a consequence, conduct in breach of the competition law prohibitions may fall into the second category if it is intentional or reckless (this would seem to follow from *Rookes v Barnard* above and *John v MGN* [1996] 2 All ER 35) or met the criterion of 'outrageous conduct' as defined in *A v Bottrill* [2002] UKPC 44.

### 2.2.3 *Restitution*

Under English law, in appropriate circumstances, the victim of a tort may have a restitutionary remedy. As a consequence, he can sue either in tort or in the law of unjust enrichment. If the claimant sues in the law of unjust enrichment, he will recover the defendant's gain rather than his own loss. No case so far has turned on the availability of a restitutionary remedy as a consequence of a wrong that was a breach of a competition law prohibition. The availability of such a remedy cannot in principle be excluded.

### 2.2.4 *Account of profits*

Finally, the claimant may seek an account of the defendant's profits resulting from the tort rather than to claim damages. The remedy is more frequently awarded in passing off cases but there would not appear to be anything in the law limiting it to any specific tort.

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<sup>3</sup> The one existing statute which allows an award of exemplary damages is the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951.



## UNITED STATES

### 1. Damages Under the Federal Antitrust Laws

The right to damage awards under the federal antitrust laws of the U.S. is governed by Section 4 of the Clayton Act, which provides that “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor ... and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”<sup>1</sup> Although treble damages “play an important role in penalizing wrongdoers and deterring wrongdoing,” the treble damage provision “is designed primarily as a remedy.” *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-86 (1977). Given the availability of treble damages, additional “punitive” damages are not available in antitrust actions.

“Any person” has been interpreted broadly to include individuals, partnerships, corporations, and associations. A plaintiff seeking damages for an antitrust violation must first prove an actual injury to itself. “Although the antitrust violation need not be the sole cause of the injury, it must be a ‘material’ and a substantial cause.”<sup>2</sup> An injury to “business” has been construed as an injury to “‘commercial interests or enterprises,’ including a person’s occupation. ... [M]ost courts have held that injury to an enterprise in the planning stage is actionable, provided that the plaintiff has an intent and capability to enter the market and has achieved a sufficiently advanced state of preparation for doing so.”<sup>3</sup>

Injury to property “encompasses any interest the law protects[,]”<sup>4</sup> including a payment of money wrongfully induced, higher prices paid by consumers for personal goods, and interference with a valid contract.

An antitrust plaintiff must show that its injury is of the type the antitrust laws were intended to prevent. Thus if a plaintiff’s injury results solely from increased competition resulting from an act that violates the antitrust laws, no redressible antitrust injury has occurred. In *Brunswick Corp.*, for example, the Supreme Court denied recovery to bowling alley operators who alleged that they would be injured by the defendant’s anticompetitive acquisition of rival bowling centers that would otherwise have gone out of business.<sup>5</sup> The Court characterized plaintiffs’ theory of injury as being that “competitors were continued in

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<sup>1</sup> 15 U.S.C. § 15(a). The treble damages provision has existed since the original enactment of the Sherman Act in 1890, and was reputedly derived from the 1623 British Act Against Monopolies. Damages multipliers have existed at least since the late 13<sup>th</sup> century, when Edward I introduced double damages for cases of novel disseisin – wrongful ejection from lawfully occupied lands – when committed by a royal official. Michael Prestwich, *Edward I 271* (1988).

<sup>2</sup> ABA Section of Antitrust Law, *Antitrust Law Developments* (5<sup>th</sup> ed. 2002) at 840.

<sup>3</sup> *Id.* at 842.

<sup>4</sup> *Id.* at 843.

<sup>5</sup> The defendant, a manufacturer of bowling equipment that was acquiring bowling alleys throughout the U.S. in repossessions from operators who could not make payments during a decline in the industry for equipment purchased on credit, had five times as many bowling centers as its nearest competitor, but controlled only 2 percent of U.S. bowling centers.

business, thereby denying respondents an anticipated increase in market share.” *Id.* at 484. The Court ultimately rejected this theory, stating that “[p]laintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.” *Id.* at 489. *See also Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990)(cutting prices to get more business is the essence of competition; hence a competitor injured by low but nonpredatory price competition suffers no antitrust injury).

Injuries resulting from increased or continuing competition, rather than lessened competition, are thus not subject to relief under the antitrust statutes. Courts have also declined to find antitrust injury in situations where the plaintiff’s alleged injury “is deemed unrelated to the alleged antitrust violation or where the defendant’s conduct injures the plaintiff without having an adverse effect on competition in general. Antitrust injury is also not likely to be found where the alleged injury would be better addressed through a breach of contract or business tort cause of action.”<sup>6</sup>

A plaintiff bears the burden of proving antitrust injury, but “a somewhat relaxed standard applies to proof of the amount of the plaintiff’s damages once injury has been shown.”<sup>7</sup> The amount of damages need not be proven with mathematical precision; although “a just and reasonable estimate ... based on relevant data,” including both “probable and inferential as well as direct and positive proof” is acceptable, “speculation and guesswork” are not.<sup>8</sup> “In price-fixing cases and cases involving monopolistic overcharges, the measure of damages in a suit by a purchaser normally is the difference between the price the purchaser paid and the price it would have paid absent the violation. ... In many other contexts, the measure of damages ordinarily is the plaintiff’s lost profits.”<sup>9</sup> Any damages attributable to factors other than the defendant’s antitrust violation, such as the plaintiff’s mismanagement, lawful competition, or general economic conditions, are not recoverable.

Section 4 of the Clayton Act was amended in 1980 to provide for pre-judgment interest, at the court’s discretion when “just in the circumstances,” and limited to actual damages for the period between the date of service of the antitrust complaint and the date of judgment, or any shorter period. The “circumstances” to be considered relate to bad faith or dilatory tactics of the parties. There appear to be no reported cases in which pre-judgment interest was granted under this provision.

## 2. The Antitrust Modernization Commission

The issue of mandatory trebling of antitrust damages is currently being reviewed by the Antitrust Modernization Commission (AMC), a body created by Congress with 12 members, 4 appointed by the President, 4 by the Senate, and 4 by the House of Representatives. The AMC is charged by statute to examine whether there is a need to modernize the antitrust laws, to identify and study related issues, and to submit a report to Congress and the President. A hearing on various civil remedies issues, including damages multipliers, attorneys’ fees, pre-judgment interest, joint and several liability, contribution, and claim reduction, was held on July 28, 2005. A transcript of the hearing, along with witness statements, is available at [http://www.amc.gov/commission\\_hearings/civil\\_remedies\\_issues.htm](http://www.amc.gov/commission_hearings/civil_remedies_issues.htm).

<sup>6</sup> ABA Section of Antitrust Law, *Antitrust Law Developments* (5<sup>th</sup> ed. 2002) at 848-49.

<sup>7</sup> *Id.* at 869.

<sup>8</sup> *Bigelow v. RKO Pictures*, 327 U.S. 251, 264 (1946).

<sup>9</sup> ABA Section of Antitrust Law, *Antitrust Law Developments* (5<sup>th</sup> ed. 2002) at 874-75.

On the question of treble damages, witnesses at the AMC hearing raised many issues. Among the (often conflicting) positions stated were the following:

- treble damages do not overcompensate plaintiffs and in fact only serve to reinstate actual damages; damages in antitrust cases are limited because of the statute of limitations, the difficulty of proving damages and the rule against speculative damages, and the absence of pre-judgment interest, which greatly erodes the value of a judgment after years of litigation
- the continuing existence of major international price-fixing cartels demonstrates that treble damages are still necessary to deter antitrust violations
- a damage multiplier is necessary for optimal deterrence of unlawful conduct that may go undetected and be difficult to prove
- trebling should be discretionary, or reserved for hard core, criminal, or covert offenses
- trebling unfairly overcompensates plaintiffs and encourages costly suits that over-deter innovative and efficient behavior
- treble damages are not really treble, as they do not account for the opportunity cost of losses (pre-judgment interest) or allocative inefficiencies caused by anticompetitive conduct
- treble damages made sense in an era when much conduct was per se unlawful, but advances in economic understanding and acceptance of much efficient conduct today has eliminated the rationale for trebling, at least with respect to non-hard core offenses
- rarely do antitrust cases actually proceed to judgment and treble damage awards; the vast majority of cases are settled for amounts closer to actual damages
- few frivolous antitrust cases are brought; antitrust cases are notoriously difficult to pursue and courts have many tools to winnow out non-meritorious claims
- the law should be changed to allow for pre-judgment interest from the date of the violation.

The AMC's report is to "contain a detailed statement of the findings and conclusions of the Commission, together with recommendation for legislative or administrative action the Commission considers to be appropriate," and is due by July 15, 2007.

### 3. *Illinois Brick* and Claims of "Passing On" Antitrust Overcharges to Indirect Purchasers

In the United States, private damages for antitrust violations are available under both federal and state antitrust laws. Until relatively recently, the favoured approach for virtually all plaintiffs had been to seek treble damages in federal court for violation of the antitrust laws. The 1977 Supreme Court decision in *Illinois Brick*, however, limited the availability of such a remedy under federal antitrust rules to plaintiffs who purchased **directly** from the defendant. Whereas direct purchasers may continue to avail themselves of federal treble damages remedies under Section 4 of the Clayton Act, indirect purchasers, *i.e.*, those who did not make their purchases directly from the defendant, have been left to pursue remedies only under state antitrust laws, many of which also afford the possibility of a treble damages award. This discussion tracks the development and impact of the Supreme Court's *Illinois Brick* doctrine, which has dramatically altered the U.S. system for seeking private damages for antitrust violations.

#### 4. The intersection of “passing on” claims and the availability of remedies to Indirect Purchasers under U.S. antitrust law

Determining when and where indirect purchasers may sue for treble damages blends difficult questions of facts and fairness, economics, jurisprudence, and federalism. It is, of course, important to know who suffered injury, and how much injury they incurred. But deciding whether or not to permit indirect purchasers to sue in federal (and/or state) courts also inevitably implicates questions regarding the over- or under-deterrence of undesirable conduct, the effective and manageable administration of justice, and the proper relationship between federal and state authority to prosecute competitive misconduct.

As noted in the previous section, plaintiffs in a federal treble damages case under Section 4 of the Clayton Act<sup>1</sup> must have suffered antitrust injury. In addition, however, their injury must not be so remote from the defendant’s conduct that the parties cannot manageably develop and present reliable evidence, and that the court cannot fairly and manageably hear all the parties’ claims, affix liability, assess the injury, and impose a remedy that will both compensate victims and deter future violations. In determining how to treat claims of “passing on,” the Supreme Court has sought to promote, or at least balance, all of these concerns; its resolution of the issue has profoundly limited the customers who may seek treble damages for their injuries under the federal antitrust laws.

The prevailing approach holds that a direct purchaser from an antitrust violator may sue under federal antitrust law for the entire amount of an unlawful overcharge, regardless of whether this purchaser passed on some or all of the overcharge to his own customers. Indirect purchasers, however, may not invoke “passing on” arguments to claim that they have incurred injury; consequently, they are virtually foreclosed from bringing damages actions under federal law. This doctrine, commonly known in U.S. law as the indirect purchaser, or *Illinois Brick*,<sup>2</sup> doctrine, has been among the most hotly debated antitrust issues in recent decades.<sup>3</sup>

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<sup>1</sup> 15 U.S.C. § 15(a).

<sup>2</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). See also *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

<sup>3</sup> Among the many recent discussions of *Illinois Brick* are the following: Gavil, “Antitrust Remedy Wars Episode I: *Illinois Brick* from Inside the Supreme Court,” 79 ST. JOHN’S L. REV. 553 (2005); Cavanaugh, “*Illinois Brick*: A Look Back and a Look Ahead,” 17 LOY. CONS. L. REV. 1 (2004); and Page, “Class Certification in the Microsoft Indirect Purchaser Litigation,” 1 J.COMP. LAW & ECON. 303 (2005).

The ABA Section of Antitrust Law has produced many useful references. See, e.g., ABA Section of Antitrust Law, *Antitrust Law Developments* (5<sup>th</sup> ed. 2002), Chaps IX B (re state enforcement) and X C (re federal suits) and annual supplements; and “Symposium” 15 ANTITRUST 28-46 (2001). Several task forces established by the Section of Antitrust Law have also provided useful analyses of, and recommendations regarding, indirect purchaser recoveries. See, e.g., “Report on Remedies,” (2004) (proposing legislation repealing *Illinois Brick* and prohibiting duplicative damages), <http://www.abanet.org/antitrust/comments/2004/RemediesReportCouncil.doc>; and “Report of the Indirect Purchaser Task Force,” 63 ANTITRUST L.J. 993 (1995).

Many useful papers have been submitted to the Antitrust Modernization Commission, which convened two panels on June 27, 2005 dealing with indirect purchaser actions. A summary of the written testimony from these panels is available at [http://www.abanet.org/antitrust/pdf\\_docs/comments/07-05-purchaser-hearings.pdf](http://www.abanet.org/antitrust/pdf_docs/comments/07-05-purchaser-hearings.pdf).

For a compendium of references regarding remedies, including many entries addressing *Illinois Brick* issues, see Fox & Sirkis, “Antitrust Remedies—Selected Bibliography and Annotations,” American

The contours of the indirect purchaser doctrine were not resolved by *Illinois Brick* alone. In 1968, the Supreme Court held in *Hanover Shoe*<sup>4</sup> that an antitrust violator could not defend a suit by a direct purchaser by asserting that the purchaser had not suffered injury because it had passed on the overcharge to its own customers. Nine years later, *Illinois Brick* presented the converse issue. In this case, the Court decided that an indirect purchaser could not sue an antitrust violator for damages under Section 4 of the Clayton Act, even where the direct purchaser passed on the overcharge to the plaintiff. In response to these cases, many states created their own statutes **permitting** damages actions by indirect purchasers. These statutes were upheld by the Court in 1989 in *California v. Arc America Corp.*<sup>5</sup> Finally, in 1990, the Court made clear in *Kansas v. Utilicorp United Inc.*<sup>6</sup> that it would not freely make or apply exceptions to the indirect purchaser doctrine, even though the Court itself had contemplated such exceptions in *Hanover Shoe* and *Illinois Brick*. Each of the four cases, therefore, focuses on a different attribute of use of “passing on” arguments in U.S. antitrust law: use of “passing on” claims by the defendant; use of “passing on” claims by the plaintiff; state alternatives to the federal indirect purchaser doctrine; and exceptions to the doctrine. Below we examine the four cases in greater detail.

***Hanover Shoe.*** The plaintiff in *Hanover Shoe* was a shoe manufacturer that alleged that United had maintained its monopoly power in the market for shoe manufacturing machinery by refusing to sell its more complicated machines and instead requiring its customers to enter into lengthy and restrictive leases. This approach cost customers such as Hanover more than if they had been able to purchase the machines, a difference that constituted the injury in the case, subject to trebling pursuant to Section 4 of the Clayton Act.

In its defense, United claimed, *inter alia*, that Hanover had not suffered injury because it had passed on any illegal overcharge to its own customers in the form of higher prices for shoes. The Court rejected this argument and held that the injury in a Clayton Act, Section 4, case should be treated as complete once the overcharge was imposed, regardless of the victim’s subsequent actions to alleviate the harm.<sup>7</sup>

The Court was skeptical of United’s defensive “passing-on” arguments.<sup>8</sup> In the Court’s view, obtaining the evidence necessary to demonstrate that “passing on” mitigated or eliminated a purchaser’s injury would present a virtually insurmountable task. In addition, the Court anticipated that if the “passing-on” defense were permitted, defendants would frequently assert it, thereby making treble damages actions far lengthier and more complex.<sup>9</sup> Moreover, the Court noted that if the defense were accepted, defendants could raise the defense against indirect purchasers as well, contending that they too had passed on the overcharge to their customers. The consequence of accepting the defense, the Court concluded, is that “those who violate the antitrust laws by price fixing or monopolizing would retain the

Antitrust Institute Working Paper 06-01 (June, 2005), prepared for AAI conference on “Creative Antitrust Remedies,” (June, 2005), available at <http://www.antitrustinstitute.org/recent2/476.pdf>.

<sup>4</sup> *Hanover Shoe, Inc. v. United Show Machinery Corp.*, 392 U.S. 481 (1968).

<sup>5</sup> 490 U.S. 93 (1989).

<sup>6</sup> 497 U.S. 199 (1990).

<sup>7</sup> 481 U.S. at 489-91 and note 7 (reviewing precedents).

<sup>8</sup> The Court did contemplate one possible exception in which a purchaser could use passing on to avoid all injury. The situation postulated by the Court would arise where a monopolist imposed an equal overcharge on all of its customers, and the buyer as well as all of its rivals were able to pass on the full cost increase without losing sales. Nevertheless, the Court viewed this exception as unlikely and considered the evidentiary demands in proving it to be virtually insurmountable. *Id.* at 492.

<sup>9</sup> *Id.* at 492-94.

fruits of their illegality because no one was available who would bring suit against them.”<sup>10</sup> Accordingly, the Court rejected the use of “passing-on” claims as a defense, although it did recognize, in *dicta*, that its concerns might not be present in some circumstances, *e.g.*, in instances in which it would be relatively easy to prove that the direct purchaser had not been injured, such as where a direct purchaser sold the products for which he was overcharged pursuant to a pre-existing cost-plus contract.

***Illinois Brick.*** In *Illinois Brick*, the State of Illinois and 700 local governments sued the defendants, manufacturers of concrete blocks, for price-fixing, and sought treble damages under Section 4 of the Clayton Act.<sup>11</sup> The defendants sold the blocks to masonry contractors, who sold them to general contractors, who, in turn, passed on the overcharges in the prices that they charged the plaintiffs for construction projects. The plaintiffs contended that they should be permitted to seek treble damages under Section 4 because the unlawful overcharges had been passed on to them. The defendants asserted, however, that if *Hanover Shoe* prevented them from using “passing on” defensively, then indirect purchasers should not be able to use “passing on” offensively to justify damages suits by those further down the chain of distribution.

The Court agreed with the defendants for three basic reasons. First, the Court felt that permitting indirect purchasers to use the “passing-on” argument offensively would be inconsistent with *Hanover Shoe*’s prohibition against defendants’ use of the argument against direct purchasers. In the majority’s view, such an asymmetry would potentially subject a defendant to multiple liability: direct purchasers might receive treble damages based on the full amount of the overcharge, and then indirect purchasers conceivably might receive treble damages based on the amount of the overcharge that was actually passed on.<sup>12</sup> To avoid this dilemma, the Court perceived a need either to reject suits by indirect purchasers or to overturn *Hanover Shoe*. The Court selected the former option, because it felt that it had correctly decided the earlier case and believed that considerations of *stare decisis* militated in favor of retaining that holding.<sup>13</sup>

Second, the majority believed that federal treble damages litigation by indirect purchasers would be overly complex. Tracing overcharges through multiple layers of distribution, and determining the amount and source of overcharge at each level would present daunting evidentiary tasks that, according to the Court, would magnify the litigation’s intricacy and length.<sup>14</sup> Moreover, the Court found that permitting both direct and indirect purchasers to sue for damages might necessitate unwieldy attempts to join all injured parties (including perhaps even the ultimate consumers) into a single potentially massive action, thus further undermining the litigation’s manageability.<sup>15</sup>

Third, the Court believed its rule would best promote the twin goals of treble damages litigation: deterrence and compensation. By concentrating the entire overcharge in the hands of direct purchasers, the Court believed it would maximize direct purchasers’ incentives to sue and thus the deterrent impact of their efforts. By contrast, the Court reasoned, these incentives to sue would be diluted if a direct or indirect

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<sup>10</sup> *Id.* at 494.

<sup>11</sup> State and local governments are “persons” within the ambit of section 4 of the Clayton Act and therefore permitted to bring suit for treble damages under that statute where section 4’s other requirements are satisfied.

<sup>12</sup> 431 U.S. at 730.

<sup>13</sup> *Id.* at 736-37.

<sup>14</sup> *Id.* at 731-32.

<sup>15</sup> *Id.* at 737ff.

purchaser could base its action only on the amount of damages it had actually incurred.<sup>16</sup> The majority also believed that eliminating indirect-purchaser suits would not materially detract from efforts to compensate victims, because, in the Court's view, direct purchasers usually suffer most of the injury, whereas the harm sustained by indirect purchasers is often relatively small, to the point that many might not even seek recovery if such actions it were permitted.<sup>17</sup>

The majority opinion mentioned, although it did not formally declare, two possible exceptions to its rule. The first is where the direct purchaser has sold the goods in question to an indirect purchaser pursuant to a pre-existing cost-plus contract.<sup>18</sup> The second is where the indirect purchaser actually owns or controls the direct purchaser.<sup>19</sup> In each instance, it would be relatively easy to conclude that the direct purchaser was not injured.

**California v. Arc America.** Some states and other critics have disagreed with the Court's conclusion in *Illinois Brick* that the risk of increased complexity of indirect purchaser litigation outweighed the interest of indirect purchasers in recovery for violations of the antitrust laws.<sup>20</sup> In *Arc America*, four states and subsidiary governmental entities sued cement manufacturers for engaging in a nationwide price-fixing conspiracy in violation of federal antitrust laws. The plaintiffs sought treble damages under Section 4 of the Clayton Act. In their complaints, the states also alleged that the price-fixing conspiracy violated state antitrust laws. The state laws provided for treble damages and also permitted suits by indirect as well as direct purchasers. The states' claims were consolidated in federal district court with the claims of many direct purchasers challenging the conduct. After the plaintiffs reached settlement with some of the defendants, the private, direct-purchaser plaintiffs argued that *Illinois Brick* prevented the states from receiving any of the settlement fund, because the governmental plaintiffs were indirect purchasers. Although *Illinois Brick* clearly applied to claims under Section 4 of the Clayton Act, the key question before the Court was whether or not the states could recover from the settlement fund for the violation of state laws, *Illinois Brick* notwithstanding.

In this case, the Court faced significant issues of federalism and the relationship between the parallel systems of federal and state law that exist in the United States. The Court decided unanimously to honor the state law allowing indirect purchasers to seek damages for violation of state antitrust statutes. Accordingly, the states could participate in the distribution of the settlement fund.

The Court noted at the opinion's outset that "[c]ongress intended the federal antitrust statutes to supplement, not displace, state antitrust remedies."<sup>21</sup> Rather than assert claims of pre-emption, however, the direct purchasers contended that the state indirect purchaser statutes interfered with achieving the goals

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<sup>16</sup> *Id.* at 734-35

<sup>17</sup> *Id.* at 746-47.

<sup>18</sup> *Id.* at 732, n.12. This exception was also noted in *Hanover Shoe*, 392 U.S. at 494.

<sup>19</sup> *Id.* at 736, n.16.

<sup>20</sup> Gavil, "Antitrust Remedy Wars Episode I: *Illinois Brick* from Inside the Supreme Court," 79 ST. JOHN'S L. REV. 553 (2005); O'Connor, "Is the *Illinois Brick* Wall Crumbling?" 15 ANTITRUST 34, 37 (2001); see also *Illinois Brick* at 748-66 (Brennan, J., dissenting) (as a practical matter, procedural devices for consolidating cases and the short statute of limitations makes the prospect of multiple liability under Section 4 of the statute remote). These critics and others also assert that concentrating all of the injury in the hands of direct purchasers, as a matter of law, may frustrate rather than advance the statutory goals of deterrence and compensation.

<sup>21</sup> *Id.* at 102. The Court noted that there is a presumption against federal preemption of state law in fields that the states traditionally have regulated, and that 21 states had antitrust laws at the time that Congress passed the Sherman Act in 1890. *Id.* at n.4.

of the federal antitrust laws, deterrence and compensation. The Court rejected this argument on the ground that *Hanover Shoe* and *Illinois Brick* were intended only to provide a statutory interpretation of Section 4 of the Clayton Act. These cases therefore did not presume to declare what states may authorize under their own antitrust statutes.

The Court also concluded that the state indirect-purchaser laws did not undermine the goals of *Hanover Shoe* and *Illinois Brick*. The Court reasoned that a state's indirect-purchaser laws will not complicate a federal antitrust litigation because many state cases will be brought in state court.

Although an unsuccessful defendant's resources might be strained by having to pay damages in state as well as federal litigation, the Court emphasized that *Illinois Brick* was not concerned with the amount of money a defendant would be able or required to pay overall; rather, it "was concerned that requiring direct and indirect purchasers to apportion the recovery under a single statute – § 4 of the Clayton Act – would result in one plaintiff having a sufficient incentive to sue under that statute."<sup>22</sup> The Court noted that the fact that direct and indirect purchasers might have to share a settlement fund does not inhibit fair compensation of victims but merely reflects the form of settlement adopted in the particular case.

Finally, the Court rejected the suggestion that the finding liability under separate federal and state antitrust laws created an impermissible risk of multiple liability. The concern in *Illinois Brick*, however, is only that a defendant might face multiple liability under Section 4 of the Clayton Act, not that a defendant might be found liable under separate state and federal statutory schemes. The Court found no clear Congressional intent that it should interpret Section 4 to preclude finding liability under other statutes as well.<sup>23</sup>

In most states, the *Arc America* opinion has triggered the adoption of what are commonly known as *Illinois Brick* repealer statutes. Although they vary widely in their features, these statutes permit action by or on behalf of indirect purchasers for violation of state antitrust or consumer protection laws.<sup>24</sup> They are now available in approximately two-thirds of the states.<sup>25</sup>

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<sup>22</sup> *Id* at 104

<sup>23</sup> *Id.* at 105.

<sup>24</sup> Among the variations, some permit any indirect purchaser to sue, where others are more restrictive, *e.g.*, permitting recovery by indirect purchasers only if they are governmental entities or authorizing only the state's attorney general to bring a suit on behalf of the class of all indirect purchasers, whereas others permit private plaintiffs to maintain such suits as well. Some states allow recovery under the state's antitrust laws, whereas others states permit indirect purchasers to sue for damages or restitution under the state's unfair trade practice or consumer protection laws. State statutes authorizing suits by indirect purchasers also vary with respect to the amount of damages they permit; for example, some allow treble damages and others do not. State statutes also differ with respect to the types of proof of injury they require and the types of defenses they permit. The variety of these approaches provides a wide range of examples that can help to demonstrate what, if any, types of causes of action by or for indirect purchasers will prove to be both fair and effective. See Cohen and Lawson, "Navigating Multistate Indirect Purchaser Lawsuits," 15 ANTITRUST 29, 30 (2001); O'Connor, *supra*, 15 ANTITRUST at 34-35.

<sup>25</sup> A 2001 counting finds that 25 states and the District of Columbia have "*Illinois Brick*" repealer statutes; three states permit indirect purchaser suits by state judicial decision; and one permits recovery by indirect purchasers under state consumer protection laws. Cavanaugh, "*Illinois Brick*: A Look Back and a Look Ahead," 17 LOY. CONS. L. REV. 1, 2, n.3 (2004). Significantly, for 13 of the states that were not on Cavanaugh's list, the court in *Fed. Trade. Comm. v. Mylan Labs.*, 99 F.Supp 2d 1 (D.D.C. 1999) held that the attorneys general could seek restitution on behalf of indirect purchasers, although for some of these states *Illinois Brick* precluded claims for damages.

As a result, direct purchasers may bring treble-damages suits in federal courts (where multiple, related suits may be consolidated), while indirect purchasers bring suits in one or more state courts. Although this creates potential litigation management difficulties, state attorneys general and litigants in related suits in different states are developing informal, voluntary means for cooperation that are often effective.<sup>26</sup>

***Kansas v. Utilicorp United, Inc.***<sup>27</sup> In this case, an investor-owned public utility, as well as other utility companies and purchasers of natural gas, sued five natural gas producers and a pipeline company. The plaintiffs sued for overcharges that they paid as direct purchasers from the defendants. The states of Kansas and Missouri filed separate actions under Section 4 of the Clayton Act on behalf of all natural persons and governmental entities within the states that had paid inflated prices for natural gas to any utility. The suits were consolidated in federal court, which then dismissed the governmental plaintiff's claims, because they were by or on behalf of indirect purchasers. The Court of Appeals affirmed, as did the Supreme Court.

In its opinion, the Court displayed its antipathy for exceptions to the *Illinois Brick* rule, even in the context of regulated industries. The Court concluded that no exception to *Hanover Shoe* and *Illinois Brick* was needed in this situation to promote its indirect-purchaser rule.<sup>28</sup> In particular, the Court was unpersuaded by the States' contention that problems of apportioning the injury were less formidable in this situation because industry regulation ensured that the direct purchasers, *i.e.*, the utilities, passed on the entire overcharge. The Court felt, however, that the task of apportioning the injury between direct and indirect purchasers remained problematic due to complex or unknowable factors regarding market conditions, the timing of the utilities' efforts to pass on the overcharge, and the inclinations of state regulators in managing the utilities and industry prices. The Court opined that the presence of regulation arguably militated more for not making an exception, because regulators could require utility companies to pass on to consumers at least part of any Section 4 recovery that the overcharged utilities obtained from the producers.<sup>29</sup>

The Court also asserted, without much discussion, that it did not find the risk of multiple recovery to be less because of the industry regulation. In addition, bringing all interested parties together in one massive lawsuit would make a complicated case even more complex.<sup>30</sup>

Regarding the third *Illinois Brick* rationale, the majority rejected the States' contentions that the utilities would lack sufficient incentives to sue their suppliers because regulators would permit them to pass on all the overcharges. Nonetheless, the Court felt that Section 4's trebling of damages would provide the utilities with ample incentive to challenge the gas producers, because, even if regulators required the utilities to compensate consumers for their injuries, the utilities might be able to retain what remained of their treble damages recovery.<sup>31</sup>

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<sup>26</sup> Cohen and Lawson, *supra*. Some commentators argue that experience with these state repealer statutes suggests that the evidentiary and litigation difficulties raised in the *Illinois Brick* opinion may not be prohibitive. See *e.g.*, O'Connor, *supra*, at 37. These commentators note that while antitrust litigation by indirect purchasers may be difficult, it is no more demanding than other forms of complex litigation, and existing techniques for calculating damages should be adequate, and will continue to improve with experience. See also *Illinois Brick* at 748-66, at 759 (Brennan, J., dissenting).

<sup>27</sup> *Kansas v. Utilicorp United*, 497 U.S. 199 (1990).

<sup>28</sup> *Id.* at 206-07.

<sup>29</sup> *Id.* at 208-12.

<sup>30</sup> *Id.* at 212-13.

<sup>31</sup> *Id.* at 2214-15.

After disposing of the case on the facts, the Court moved to a broader point:

The rationales underlying *Hanover Shoe* and *Illinois Brick* will not apply with equal force in all cases. We nonetheless believe that justification exists for our stated decision not to “carve out exceptions to the [direct purchaser] rule for particular types of markets.” . . . In sum, even assuming that any economic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions. Having stated the rule in *Hanover Shoe*, and adhered to it in *Illinois Brick*, we stand by our interpretation of § 4.

497 U.S. at 216, quoting *Illinois Brick*, 431 U.S. at 744.

The Court did not abandon the possibility raised in *Hanover Shoe* and repeated in *Illinois Brick*, that an exception might be warranted where a direct purchaser sells to the indirect purchaser pursuant a pre-existing cost-plus contract.<sup>32</sup> Rather, the Court found that the exception was not applicable to the facts before it. Nor did the Court limit, or even mention, the second exception it suggested in *Illinois Brick*, which might arise where the direct purchaser is owned or controlled by the indirect purchaser.<sup>33</sup>

Lower courts have suggested additional exceptions.<sup>34</sup> The most prominent of these arises when the seller and direct purchaser, such as a manufacturer and wholesaler, are part of a conspiracy, in which case a party that purchases from the wholesaler is actually purchasing directly from the conspiracy. Application of such a “co-conspirator” exception does not require apportionment of injury through several layers of distribution and therefore does not violate the rationale underlying the *Illinois Brick* rule.<sup>35</sup>

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<sup>32</sup> See note 20, *supra*.

<sup>33</sup> See note 21, *supra*

<sup>34</sup> ANTITRUST LAW DEVELOPMENTS (FIFTH) (2002) 859-61.

<sup>35</sup> *Id.* at 860 and n.117; *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 604, 614-15 (7<sup>th</sup> Cir. 1997).

## EUROPEAN COMMISSION

### 1. Passing On Defence/ Indirect Purchaser Standing

#### 1.1 Introduction

If a cartel or a dominant company sells its goods at supra-competitive prices, a direct purchaser, e.g. a wholesaler, suffers as a result of having paid a price that is in excess of the competitive price. However, the direct purchaser may or may not be able to pass on all or some of the loss to the next purchaser in the chain, e.g. a retailer or a consumer. In case of pass-on, these purchasers, who are only indirectly linked with the seller, e.g. a cartelist or a dominant firm engaged in anti-competitive behaviour, in turn suffer a loss by paying a supra-competitive price which has been passed on to them. If there has been such a pass-on, can the original seller invoke a pass-on defence with regard to the final purchaser?

What becomes clear from the example is that the ‘passing-on defence’ substantially increases the complexity of damages claims as the exact distribution of damages along the supply chain could be exceedingly difficult to prove. Evidentiary problems also burden actions of ‘indirect purchasers’, as they might be unable to prove the extent of their damages and the causal link with the infringing behaviour of the original sellers.

#### 1.2 Rules in EU jurisdiction

The existence and operation of rules in EU jurisdiction on the passing-on defence in EU law is complex. So far the Community Courts have not examined the issue in depth in the area of competition. Section V of the Annex to the Green Paper sums up the situation by stating “that there is no passing-on defence in Community law; rather, there is an unjust enrichment defence which requires (1) proof of passing on and (2) proof of no reduction in sales or other reduction to income.”<sup>1</sup> This issue is considered in greater detail in section V of the Annex to the Green Paper attached to this contribution.

On the subject of standing for indirect purchasers to bring civil actions for damages the Annex to the Green Paper states that “the Community courts have not taken any position on the standing of indirect purchasers in antitrust actions. It has been argued, however, that the ruling of the Court in its *Courgage v Crehan* ruling operates against any restriction on standing of indirect purchasers.”<sup>2</sup> Again this issue is considered in greater detail in section V of the Annex to the Green Paper.

This leads to two related questions:

- Should there be rules on the admissibility and operation of the passing-on defence? If so, which form should such rules take?
- Should the indirect purchaser have standing?

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<sup>1</sup> Quote from paragraph 173, section V of the Annex to the Green Paper (attached).

<sup>2</sup> Quote from paragraph 177, section V of the Annex to the Green Paper (attached).

The question then arises as to what criteria should be used when assessing the impact of different options on the effectiveness and efficiency of antitrust damage claims. This means having to balance a number of criteria such as deterrence, compensation, engaging consumers and efficient administration of justice.

### **1.3 Policy options for the treatment of the passing on defence and indirect purchaser standing**

The Green Paper identifies the following options for the treatment of the passing-on defence and indirect purchaser standing:

**1<sup>st</sup> Option<sup>3</sup>:** The passing on defence is allowed and both indirect and direct purchasers can sue the infringer

Under this model, damages have to be apportioned between direct and indirect purchasers. This can involve difficulties in the assessment of passing on at the various stages in the production and distribution chain, as discussed above, though the system would adhere to the principle of damages for each party that has suffered injury. The actions would be in principle separate and independent though in practice there is no reason why parties could not seek to coordinate their actions and thereby possibly save costs and time through making use of appropriate procedural devices. In this regard, the use of group action mechanisms as well as some form of representative action at consumer level could be applied under this model.

**2<sup>nd</sup> Option<sup>4</sup>:** The passing on defence is excluded and only direct purchasers can sue the infringer

This option privileges direct purchaser recovery over recovery by other classes of potential litigants. This brings advantages principally in terms of the deterrent effect of actions for damages of competition law, since it can be anticipated that the direct purchaser normally has better access to the evidence necessary to establish the infringement and also to quantify damage, including damage suffered at lower levels of the production/distribution chain. The more one moves away from the infringer(s) and direct purchasers, the more difficult it becomes to assess damages. For these reasons the direct purchaser is usually the best placed claimant and so a system which encourages direct purchaser claims can be anticipated to achieve a greater degree of enforcement and deterrent effect.

It is arguable in addition that if the direct purchaser is operating in a competitive market, market dynamics may, in some cases, redress the alleged unjust enrichment made by the direct purchaser by forcing him to pass on the gain made in the form of any damages award to the next levels of the production/distribution chain.

In order to allow for the possibility of recovery at the consumer level and the protection of consumer interests an exception could be created within this model to the reservation of standing to direct purchasers so as to allow for claims at the consumer level, such as claims by consumer organisations.

**3<sup>rd</sup> Option<sup>5</sup>:** The passing on defence is excluded but both direct and indirect purchasers can sue the infringer

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<sup>3</sup> The same as option 21 in the Green Paper.

<sup>4</sup> The same as option 22 in the Green Paper.

<sup>5</sup> The same as option 23 in the Green Paper.

This model could lead to over-recovery from the infringer. On the other hand, this model promotes a strong form of deterrence against the infringer and increased incentives to sue for both direct and indirect purchasers.

#### **4<sup>th</sup> Option<sup>6</sup>:** A two-step procedure

This system could be structured as follows:

- In initial proceedings the passing on defence is excluded and the infringer is sued for the total overcharge.
- In later proceedings damages are allocated as between all parties that have suffered a loss.

This system has the advantage of ensuring that the infringer has to repair all damages (deterrence aim). The subsequent allocation proceedings ensure as far as possible that the compensation aim is achieved. This option raises some further questions as to the precise modalities in which it might operate, which would require further consideration.

## **2. The definition of damages**

### **2.1 *The basis of the calculation***

Damages are traditionally considered to compensate a victim for the financial loss suffered because of an increase in price resulting from an antitrust infringement. It seems, however, that pure compensation of such financial loss does not always constitute a sufficient incentive for antitrust claimants to bring a case before the court. Thought should therefore be given to other methods of approaching damages. To the extent that these alternatives increase the likelihood of claimants bringing an antitrust damages claim before the court, they also contribute to the overall respect of the competition rules.

#### **2.1.1 *Compensation of financial and quantitative loss***

The damage suffered by the victim is not only the financial loss suffered because of an increase in price, but also the victim's quantitative loss in terms of volume of purchase and sales. When damages are awarded on the basis of compensating the claimant for its loss, both should be taken into account. The European Court of Justice indeed confirmed that “[t]otal exclusion of loss of profit as a head of damage for which reparation may be awarded in the case of a breach of Community law cannot be accepted. Especially in the context of economic or commercial litigation, such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible.”<sup>7</sup>

The amount of the quantitative loss largely depends on the price elasticity of the claimant's demand. In those circumstances in which it is difficult for the claimant to quantify his quantitative loss, an *ex aequo et bono* estimation of damages seems most appropriate.

<sup>6</sup> The same as option 24 in the Green Paper.

<sup>7</sup> Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-1029 at paragraph 87.

### 2.1.2 *Calculation based on the claimant's loss or on the defendant's illegal gain*

It may be that, even when both financial and quantitative loss is taken into account, the individual loss of the claimant is lower than the illegal gain made by the infringer. In that scenario, it could be considered to allow the claimant to base the calculation of damages on the defendant's illegal gain.

### 2.1.3 *Interests*

The European Court of Justice recognised that the award of interest must be regarded as an essential component of compensation.<sup>8</sup> What matters in the award of interest are both the interest rate and the point in time from which interest is awarded. In order to attain a genuine form of compensation, both elements have to be determined at a level that ensures that at least real values, as opposed to mere nominal values, are being compensated. That implies that in principle, interest is to be awarded from the moment the damage occurred. When set at a level that goes beyond compensating real value, interest may serve as a technique to increase deterrence. Setting high interest rates and/or allowing for compound interest seems to be the most workable technique in this respect.

### 2.1.4 *Damages beyond mere compensation*

Some EU Member States pursue beyond the mere compensation, a distinct *aim* of deterring the wrongdoer by the grant of punitive damages. The punitive element of a damages award can be viewed in part as simply compensating for aspects of real damage that are difficult to estimate. But usually, punitive damages deliberately go beyond compensation in order to achieve more deterrence or other policy goals. Under Community law, it has been established that if domestic law allows for punitive damages for actions similar to antitrust damages actions, it must also be possible to award exemplary damages for the latter actions. This implies that when punitive damages are available in actions for breach of national competition law, punitive damages must also be available to a claimant in an action concerning a breach of Article 81 or 82 EC.

One has to consider whether it would be appropriate to allow the national court to award damages beyond the mere compensation in case of the most serious antitrust infringements in order to create a clear incentive for claimants to file a damages claim. In its Green Paper on antitrust damages actions, the Commission put forward for debate an option to award double damages in the case of horizontal cartels. The resulting incentive for the claimant to file a claim would be most apparent were the national court to automatically award more than single damages in case of the most serious antitrust infringements. One could, however, also make the award dependent on the existence or the absence of predefined conditions or, alternatively, leave it completely to the discretion of the national court.

## 2.2 *Split proceedings*

Independent from the basis of calculation of the damage, the risk remains that the mere fact that damages have to be quantified may serve as a disincentive for potential claimants. It may therefore be useful to consider a procedural alternative by splitting the finding of the liability from the calculation and the award of the exact quantum of damages. This type of two-step procedure may well reduce the cost of litigation. If liability is demonstrated it is not unlikely that parties will reach a settlement as regards the quantum of damages, thereby avoiding costly recourse to experts and shortening the actual court proceedings.

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<sup>8</sup> Case C-271/91 Helen Marshall v Southampton and South-West Hampshire Area Health Authority [1993] ECR I-4367 at paragraph 31.

Annexes:

1. Section IV of the Annex to the Green Paper [COM(2005) 672 final]: Damages
2. Section V of the Annex to the Green Paper: The passing on defence and indirect purchaser standing

## SECTION IV: DAMAGES

### A. INTRODUCTION

112. Damages are traditionally considered to compensate a victim for the loss suffered because of an antitrust infringement. It seems, however, that pure compensation of the loss does not always constitute a sufficient incentive for antitrust claimants to bring a case before the court. As a result, thought should be given to other methods of approaching damages. Paragraphs 114 to 124 present different approaches that Member States have taken to calculate the basis of the damage in a way that makes it more attractive for claimants to file a damages claim. In doing so, the award may have as its purpose not only the compensation of the victim's individual loss but also the recovery of benefits gained by the defendant as a consequence of the tortious act. In addition, some Member States pursue beyond the mere deterrent *effect* of compensation, a distinct *aim* of punishing or deterring the wrongdoer by the grant of punitive or exemplary damages.
113. Apart from defining the basis of the damage, difficulties often arise with regard to the calculation of damages. Paragraphs 125 to 144 focus on different methods of quantification, showing both various models for the calculation of damages and a more equity based approach. Independent from the quantification method chosen, the risk remains that the mere fact that damages have to be quantified may serve as a disincentive for potential claimants. The final paragraphs 145 and 145 therefore consider a procedural alternative by splitting the finding of the liability from the calculation and the award of the exact quantum of damages.

### B. ELEMENTS RELEVANT TO THE DEFINITION OF DAMAGE

#### 1. Compensation

114. Compensation is the grant of an equivalent in kind or in money for the harm suffered. It differs from restitution, that aims at putting the victim in the situation he was in prior to the infringement. In some Member States compensation may only be given where full restitution is impossible or excessively difficult.

#### 2. Recovery of illegal gain

115. Alternatively, the action can be structured as an action for recovery of illegal gain made by the infringer as a result of the infringement. In this case, the claimant's claim is not for subjective loss suffered, but for the illegal gain that the defendant has made from the infringement. Where the illegal gain made by the infringer exceeds the loss of the claimant, using the former as a basis for calculating the damage is more advantageous to the claimant than pure compensation. The German competition law contains an example of this approach by allowing the national competition authority (*Bundeskartellamt*) to order an undertaking that infringed the competition rules to pay an amount that corresponds to the gain made as a result of the antitrust infringement.<sup>1</sup>

#### 3. Exemplary or punitive damages

116. Exemplary or punitive damages are damages awarded by way of punishment of the defendant for breach of the law and in order to deter repetition of wrongful conduct. The punitive element of a damages award can be viewed in part as simply compensating for aspects of real damage that are difficult to estimate. But usually, punitive damages deliberately go beyond compensation in order to achieve more deterrence or other policy goals.

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<sup>1</sup> Section 34 GWB.

117. In *Brasserie du Pêcheur*, the Court of Justice held that

“[i]n the absence of relevant Community provisions, it is for the domestic legal system of each Member State to set the criteria for determining the extent of reparation. However, those criteria must not be less favourable than those applying to similar claims or actions based on domestic law and must not be such as in practice to make it impossible or excessively difficult to obtain reparation. National legislation which generally limits the damage for which reparation may be granted to damage done to certain, specifically protected individual interests not including loss of profit by individuals is not compatible with Community law. Moreover, it must be possible to award specific damages, such as the exemplary damages provided for by English law, pursuant to claims for damages founded on Community law, if such damages may be awarded pursuant to similar claims or actions founded on domestic law”.<sup>2</sup>

Therefore, if domestic law allows for exemplary damages for actions similar to damages actions for breach of the competition rules, it should also be possible to award exemplary damages for the latter actions.

118. In England, case law has established categories for determining which claims allow for the award of exemplary damages. One of these categories 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”.<sup>3</sup> An action for breach of competition law is considered to fall into this category in extreme cases, such as where there was evidence that the defendant had calculated that his illegal profit would outweigh any damages awarded against him.<sup>4</sup>

119. In Ireland, exemplary damages are available in actions for breach of national competition law.<sup>5</sup> In accordance with the principle of equivalence, exemplary damages should thus also be available to a claimant in an action concerning a breach of Article 81 or 82 EC. Exemplary damages may be awarded where there has been a conscious and deliberate violation of rights or where the court is satisfied that the wrongdoer intended to make a profit over and above what would be awarded to the injured party. In *Donovan v Electricity Supply Board*, the court stated that, in compensating injured parties for damage suffered as a result of a breach of Irish competition law, “[it] is not concerned with the motives or the intention of the party in default unless the question of exemplary damages arises”.<sup>6</sup> Exemplary damages are rarely awarded in Ireland and are, usually, relatively modest.<sup>7</sup>

120. Under German law, exemplary or punitive damages are deemed to be contrary to public policy.<sup>8</sup> Nevertheless, the recent report of the Monopolkommission, *Das allgemeine Wettbewerbsrecht in der Siebten GWB-Novelle*, lists a number of measures which it considers not to be purely compensatory in nature.<sup>9</sup> In particular it refers to provisions that have a sanctioning character

<sup>2</sup> *Brasserie du Pêcheur*, para 90.

<sup>3</sup> Lord Devlin in *Rookes v Barnard* [1964] AC 1129. See also *Broome v Cassell* [1972] AC 1027 and *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29.

<sup>4</sup> See e.g. B. Rodger, *Private Enforcement and the Enterprise Act: An Exemplary System of Awarding Damages*, [2003] ECLR 103.

<sup>5</sup> Section 14(5) of the Competition Act.

<sup>6</sup> *Donovan v Electricity Supply Board* [1997] 3 IR 573 at page 585.

<sup>7</sup> E.g. *Kennedy v Ireland* [1987] IR 587.

<sup>8</sup> See Sections 723 s.2(2) and 328 s.1(4) ZPO.

<sup>9</sup> The report is available at: [http://www.monopolkommission.de/sg\\_41/text\\_s41.pdf](http://www.monopolkommission.de/sg_41/text_s41.pdf). See paragraph 79 and following.

such as damages claims for copyright infringements that are monitored by the collecting society GEMA. GEMA is entitled to recover double damages under which a 100% addition to the ordinary licensing fee can be made. This has been upheld by the Federal Court of Justice (*Bundesgerichtshof*) in Germany, that justified the sanctioning character of the double damages claim on the basis that potential infringers would have otherwise no incentive to comply with the rules.<sup>10</sup>

121. It should be borne in mind that most Member States exclude exemplary or punitive damages as contrary to their public policy. For that very reason, those Member States may refuse to recognize and to enforce decisions providing for such damages.<sup>11</sup> Despite this situation, one has to consider whether it would be appropriate to allow the national court to award more than single damages in case of the most serious antitrust infringements. In doing so, one would create a clear incentive for claimants to file a damages claim. Such an incentive would be most apparent were the national court to automatically award more than single damages in case of the most serious antitrust infringements. One could, however, also make the award dependent on the existence or the absence of predefined conditions or, alternatively, leave it completely to the discretion of the national court.

#### 4. Interest on damages

122. In the *Marshall II* case, the Court of Justice acknowledged that  
*“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”*.<sup>12</sup>
123. What matters in the award of interest are both the interest rate and the point in time from which interest is awarded. In order to attain a genuine form of compensation, both elements have to be determined at a level that ensures that at least real values, as opposed to mere nominal values, are being compensated. There are a number of possible points in time from which interest can be awarded, such as the date of the infringement, the date of the injury, the date of a demand for payment, the date of the notice to stop the breach, the date of the filing of a claim or the service of a writ of summons and finally the date of judgment.<sup>13</sup> Courts frequently have discretion in this matter. For example, in *Crehan v Innpreneur Pub Company*, the English High Court ruled that although the normal rule under English law is that damages are assessed at the date of loss, this is not an invariable rule of law and it may be that the justice of the case requires damages to be

<sup>10</sup> Bundesgerichtshof (*BGH*), judgments of 24 June 1955 (I ZR 178/53, BGHZ 17, 376), of 10 March 1972 (I ZR 160/70, BGHZ 59, 286) and of 15 November 1994 (VI ZR 56/94, NJW 1995, 861).

<sup>11</sup> See Article 11 of the Convention of 30 June 2005 on Choice of Court Agreements concluded within the context of the Hague Conference on Private International Law: “(1) Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered. (2) The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.”

<sup>12</sup> Case C-271/91 M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority [1993] ECR I-4367 at para 31.

<sup>13</sup> For an overview of what Member States use as the point in time from when interest can be claimed, see the Comparative Report, page 86.

measured at the date of judgment, e.g. “in times of high inflation when interest would not be any form of acceptable compensation”<sup>14</sup>.

124. When set at a level that goes beyond compensating real value, interest may serve as a technique to increase deterrence. That technique was used in the Directive on combating late payment in commercial transactions.<sup>15</sup> The Directive recognises the problem of late payments and the resulting heavy administrative and financial burdens which they place on businesses, particularly SMEs. It finds that late payment has been made financially attractive to debtors in most Member States by low interest rates. The Directive therefore aims at reversing this trend of late payments and ensuring that the consequences of late payments are such as to discourage late payment.<sup>16</sup> The Directive does so by establishing the interest rate at a level where it becomes financially more interesting to borrow at lower interest rates than to extend ones debts by way of late payment.

## C. QUANTIFICATION OF DAMAGES

### 1. Introduction

125. In an action for damages for breach of Community competition law, as in any damages action, the claimant will need to quantify the damages suffered. Quantification of damages in competition litigation can be particularly complex given the economic nature of the illegality and the difficulty of reconstructing what the situation of the claimant would have been absent the infringement, as usually required under tort rules.
126. Typically the measure of loss which shall be compensated in an antitrust damages case is taken to be the difference between the claimant’s actual position and the situation he would have been in “but for” the illegal conduct (the counterfactual). The former encompasses actual losses as well as profits that have not been gained, while the latter refers to the hypothetical situation in which the claimant would be had no competition law infringement occurred. The loss is thus compensated if the claimant is put into the financial situation he would have been in “but for” the infringement. A number of methods are used to establish this “but for” scenario, e.g. the prices, profits, costs, and the market situation etc., that would have prevailed in the absence of the infringement, to allow a comparison between the hypothetical and the actual situation.
127. The most commonly claimed types of antitrust damages are likely to be *overcharges* (i.e. increased prices in case of cartels or excessive prices in case of a dominant position) and damages claimed for other anti-competitive conduct (i.e. predatory pricing or refusal to supply) which has led to *lost net profits* to a continuing business or even lost going concern value of a terminated business.
128. A damage due to overcharge can consist of two parts, the damage due to the infringement (i.e. the higher price paid due to the cartel), but also lost profits due to the fact that the purchaser might have bought fewer input goods or services, e.g. for production purposes, and thus made less profit as he only could produce and sell fewer products.
129. When awarding damages, the court may also have to take into account effects that result from the behaviour of the claimant. That is particularly the case when the claimant is under an obligation to mitigate any losses. In addition, there is a question as to whether the claimant would have had to pay taxes in relation to the revenues he lost as a result of the antitrust infringement and for

<sup>14</sup> Crehan v Intrepreneur Pub Company and another (Case No: CH 1998 C801), [2003] EWHC 1510 (Ch).

<sup>15</sup> Directive 2000/35 on combating late payment in commercial transactions, OJ 2000 L 200/35.

<sup>16</sup> Recital 16 of Directive 2000/35, as note 15 above.

which he now asks compensation. If so, a court order would normally take these taxes into account by reducing the award.

## **2. Methods for calculation of damages**

130. A variety of damage quantification methods are available to the parties, as described in part II of the Study (the Economics Report). There is no reason why any Member State should require the use of one quantification method over another, though the claimant will often (in the common law jurisdictions in particular) need to bear in mind that his quantification will be disputed by the other side and to this extent will need to “defeat” the evidence put forward by the other side. In civil law jurisdictions investigation of quantum may to a greater degree be undertaken by the court, if necessary assisted by an expert.
131. Although in what follows, the methods for calculation of damages are presented separately, they are complementary in the sense that several methods may be considered depending on the facts of the case in order to see whether they yield similar estimates of the quantum of any damage. To a certain degree an overlap of the methods cannot be avoided and does not diminish the value of one method over the other. The simple methods can be used as a cross-check for the more complex methods. The existing case law from the Member States to date appears to show that the courts prefer the simple methods. There appears to be no case law to date in which econometric evidence has been considered by the court as the basis for an award.
132. A crucial question from a policy perspective is whether the accuracy brought by the more complex methods (assuming that this is the case) is sufficient to outweigh the extra cost and time involved in bringing and assessing this evidence. It might be desirable for courts to rely on simpler techniques, underpinned by the presumption that an equity estimation is sufficient or even, in some respects, preferable.

### **a. The simple calculation methods<sup>17</sup>**

133. There are basically three simple methods to calculate the damage caused by an antitrust infringement:
- the *before-and-after method* involves a simple comparison of prices during the infringement with the situation before and after the infringement to provide a reasonable assumption of the real price levels in the absence of an infringement;
  - the *yardstick approach* compares the distorted market with similar markets that were not affected by the infringement. Ideally the structure as to prices, costs and other characteristics is more or less similar to allow the assumption that price differences in the distorted market are the result of the anticompetitive action;
  - the *cost based approach* is based on information produced by those responsible for the infringement about their average unit production cost, to which a reasonable profit margin is added to obtain a price which can be considered to be reasonable under competitive conditions.

### **b. More complex calculation methods<sup>18</sup>**

134. The following two calculation methods may lead to a more accurate result, but are more time-consuming and data-intensive:

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<sup>17</sup> See Study on the conditions of claims for damages in case of infringement of EC competition rules, Analysis of economic models for the calculation of damages (the “Economics Report”), from page 17 onwards.

<sup>18</sup> See the Economics Report, from page 21 onwards.

- the *price prediction approach* uses econometric modelling to seek to predict prices in a “but for” scenario on the basis of historical determinants of prices or yardstick comparisons with other markets. This approach is a more sophisticated version of the before and after and yardstick approaches but is heavily dependent on the quality of the data available;
- the *theoretic modelling approach* simulates an oligopolistic model to ascertain the effects of the distortion. Econometric modelling and other data are used to estimate key model parameters to feed them into a theoretical model.

### c. The sampling method

135. Sometimes it may be disproportionately difficult or even impossible to exactly calculate the damage suffered as a result of an antitrust infringement. In those circumstances, it should be acceptable to show reasonable approximations of the damage suffered. One method to reach an approximation is the sampling method. This technique may be particularly effective in litigation involving large groups, such as certain indirect purchaser classes or consumer associations.<sup>19</sup>
136. In *Société anonyme des laminoirs* the European Court of Justice supported the technique to calculate damage via sampling. It held that

*“[w]hen it is necessary to consider a situation as it would have been if there had been no wrongful act or omission, the court must, whilst insisting that all available evidence be produced, accept realistic approximations, such as averages which have been established by means of comparisons. (...) In assessing their loss the applicants have used the only method possible. This consists in imagining the position which would have arisen for each factory concerned as regards the purchase of ferrous scrap, if the promises relating to the transport parity had not been made. Although in using this method it is not possible to arrive at an exact assessment of the damage, nevertheless the sampling methods habitually used in economic surveys make it possible to reach acceptable approximations provided that the basic facts are sufficiently reliable.”*<sup>20</sup>

### d. The *ex aequo et bono* quantification

137. The basic rule, operating in many Member States, is that where exact quantum is difficult to prove, proof of exact damage can be waived and the court can award a reasonable amount in its place (this is often called an *ex aequo et bono* estimation). In a few Member States, this possibility only applies to certain categories of damage, most notably loss of future profit.<sup>21</sup>
138. In a few Member States, this lowering of the required standard of proof of the claimant in relation to the quantification of damages does not exist. That means that if the claimant is unable to prove the exact loss, the claim fails. That is the case, e.g. in Spain, where a civil court may request the Competition Court to issue a report on the origin and quantum of damage.<sup>22</sup> The Competition Court is, however, not obliged to produce such a report and the findings of the report do not bind the requesting court.
139. *Ex aequo et bono* estimation of damages could be used in conjunction with, or to underpin from a legal perspective the use of simple calculation methods as outlined above. The principle is less

<sup>19</sup> In US *parens patriae* actions, damages may be calculated in a price fixing case for the whole class represented by statistical or sampling methods. There is no need to calculate damages for each individual on whose behalf the action has been brought (Section 4D of the Clayton Act).

<sup>20</sup> Joined cases 29, 31, 36, 39 to 47, 50 and 51/63 *Société anonyme des laminoirs v High Authority* [1966] ECR 139.

<sup>21</sup> See in particular the table at page 71 of the Comparative Report.

<sup>22</sup> Article 13.3 of Law 16/1989 of 17 July 1989 on the Defence of Competition.

compatible with complex models, that attempt to quantify damages with precision on the basis of econometric or statistical techniques.

### **3. Two special cases: calculating lost profits of the claimant and calculating damage on the basis of the defendant's illegal gain**

#### **a. Calculating lost profits of the claimant**

140. To calculate losses sustained in cases of anticompetitive conduct other than price increases, such as refusal to supply or predatory pricing, different methods are used. In such circumstances, damages may be assessed in terms of lost profits arising from the misconduct where the objective is to value that portion of a business that has been lost as a result of the antitrust infringement. A calculation will involve accounting, finance and economic methodologies to estimate the difference between what the claimant's profit was and what it would have been but for the infringement.
141. The following methods could be used for calculating lost profits.<sup>23</sup> These methods also appear to presuppose the use of one of the methods outlined at paragraphs 133 and 134 in the calculation of the counterfactual (i.e. the hypothetical price against which lost profit is measured):
- the *earnings based approach* involves discounting sales, costs and cash flows from the income statement in order to provide an estimate of the “but for” scenario;
  - the *market based valuation approach* uses financial multiples to value the injured business, such as stock market value or profits of comparable businesses whose shares are publicly traded on stock exchanges;
  - the *assets based valuation approach* uses information from the balance sheet to value a business. Measures include the book value of tangible net worth, fair market value of tangible net worth and liquidation value.
142. A number of generic issues are raised in loss of profits calculations that would apply to antitrust cases as well as in other contexts. Timing of injury means establishing the period in which the claimant's business was affected by the infringement. This might be difficult as this period could have started later than the infringement, but the infringement may continue to have consequences even after it has been terminated.
143. Finally, it should be underlined that in case of calculating damage resulting from lost profits, the Court of Justice pointed at the broad discretion of national courts where it stated that

*“the loss of earnings is the result not of a simple mathematical calculation but of an evaluation and assessment of complex economic data. The Court is thus called upon to evaluate economic activities which are of a largely hypothetical nature. Like a national court, it therefore has a broad discretion as to both the figures and the statistical data to be chosen and also, above all, as to the way in which they are to be used to calculate and evaluate the damage.”*<sup>24</sup>

#### **b. Calculating damage on the basis of the defendant's illegal gain**

144. Where the claimant's individual loss is too difficult to assess on a subjective basis, as may be the case particularly in relation to consumer claims, it may be possible to calculate the loss on the basis of the defendant's illegal gain.<sup>25</sup> E.g. in the case of a cartel the illegal gain is the difference between the competitive price and the cartel price, namely the overcharge. The calculation of the

<sup>23</sup> See paragraph 5.6 and following of the Economics Report.

<sup>24</sup> Joined cases C-104/89 and C-37/90 *Mulder and others v Council* [2000] ECR I-203, para 79.

<sup>25</sup> This calculation method is accepted in Cyprus, Germany, the Netherlands, Poland, Lithuania and Spain.

illegal gain does thus not take into account the lost profits from sales which the defendant no longer made as a result of the price increase. In Community law, the Directive on the protection of intellectual property rights<sup>26</sup> provides that the unfair profits made by the infringer can be taken into account in the calculation of the claimant's damages, next to the lost profits that the injured party has suffered.

#### D. SPLIT PROCEEDINGS

145. In some Member States, it is possible to get a partial judgment regarding the finding of the infringement and the finding of the damage. That judgment does not pronounce on the quantification of the damage, but the procedure continues until such time when the damages can be quantified. It is not infrequent for this latter procedure to be interrupted by a settlement between the parties as to the damages to be awarded.
146. Such split proceedings generally exists in two forms. In a first group of Member States, a single procedure is split into two phases, whereby liability is established in a first phase and damages are assessed in a second phase.<sup>27</sup> In a second group of Member States, two "full" and separately appealable judgments are rendered: a first one finding the liability and a subsequent one setting the amount of damages.<sup>28</sup>

#### E. POLICY OPTIONS

##### 1. Options in relation to the basis of defining the damage

###### Option 14: Compensatory damages

147. A first option is to award damages to the victim on the basis of pure compensation, to make amends for loss or injury arising from an infringement of EC antitrust rules.

###### Option 15: Recovery of illegal gain

148. Another option would be to allow the victim to calculate its loss on the basis of the defendant's overcharge. One could envisage two sub-options:
- a first is to allow the victim to claim the entire overcharge from the infringement. In a subsequent procedure, damages are then allocated between all parties that have suffered a loss;
  - another option would be to allow the victim to claim the overcharge only arising from his commercial dealings with the defendant. For example if the overcharge was 30%, the claim would be for 30% of invoice price of the victim's purchases.
149. The recovery of the defendant's illegal gain only covers part of the victim's loss, namely what the latter paid more than what he would have paid at a competitive price (*damnum emergens*). In order to fully compensate the victim, this part needs to be completed by a compensation of the victim's quantitative loss in purchase (*lucrum cessans*, named "deadweight loss" because it is not appropriated by the defendant). The amount of the deadweight loss largely depends on the price

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<sup>27</sup> This is the case in the Czech Republic, Spain, France, Ireland, Italy, Malta, Poland.

<sup>28</sup> This is the case in Denmark, Germany, Estonia, the Netherlands, Portugal and Slovenia. In Germany, the claimant who does not have all necessary information to quantify the amount of damage, can ask the court for a declaratory judgment stating the defendant's obligation to compensate the claimant for all damage caused by the infringement.

elasticity of the claimant's demand. It may in some circumstances therefore be difficult for the claimant to quantify the deadweight loss. In those circumstances, an *ex aequo et bono* estimation of damages seems most appropriate.

Option 16: Double damages for horizontal cartels

150. In order to create a clear incentive for claimants to bring antitrust damages cases, it could be envisaged to award double damages in case of the most serious antitrust infringements, i.e. horizontal cartels. Comments are invited as to whether, if it is introduced, such award is considered useful, it would be automatic, conditional or at the discretion of the national court.

Option 17: Prejudgment interest

151. To ensure that the availability of prejudgment interest is a sufficiently strong incentive to encourage claimants to bring cases, the date from which prejudgment interest runs could be set at the date of the infringement or the date of the injury. A similar incentive could be created by increasing interest rates generally and/or allowing for claimants to claim compound interest.

**2. Options in relation to methods of quantification of damages**

Option 18: The quantification methods

152. From the description in paragraphs 125 to 144 it can be seen that there are a variety of techniques available for quantifying damages. The choice of technique, ranging from an equity approach, over simple methods to more complex and detailed methods will usually depend on the specifics of the case and the data that are available.
153. Views are sought as to the suitability of the described methods in damages quantification before civil courts. In particular, a key issue would appear to be the added value brought by the more complex models over the simpler models in terms of greater accuracy of quantification and whether, in the view of stakeholders, any such added value is justified by the additional time and cost that the more complex models might be expected to bring.

**3. Other options**

Option 19: Commission guidelines on quantification of damages

154. It may be appropriate to provide national courts with some form of guidance with regard to the quantification of damages. Such guidance might be particularly useful in explaining the more complex quantification techniques as set out above.

Option 20: Split proceedings as between liability and quantum

155. Split proceedings may be another way of facilitating actions for damages. If liability can be established separately before assessing damages, this may well reduce the cost of litigation. If liability is demonstrated it is not unlikely that parties will reach a settlement as regards the quantum of damages, thereby avoiding costly recourse to experts and shortening the actual court proceedings.

## SECTION V: THE PASSING ON DEFENCE AND INDIRECT PURCHASER STANDING

### A. INTRODUCTION

156. If a cartel or a dominant company sells its goods at supra-competitive prices, a direct purchaser, e.g. a wholesaler, suffers as a result of having paid a price that is in excess of the competitive price. However, the direct purchaser may be able to pass on all or some of the loss to the next purchaser in the chain, e.g. a retailer or a consumer. These purchasers, who are only indirectly linked with the seller, e.g. a cartelist or a dominant firm engaged in anti-competitive behaviour, in turn suffer a loss by paying a supra-competitive price which has been passed on to them.
157. This leads to two related questions:
- Firstly, if the direct purchaser brings a damages claim, should the court take account of the passing on of some or all of the loss to other purchasers down the line?
  - Secondly, should indirect purchasers be entitled to bring actions to compensate them in respect of their loss?
158. These questions are at the heart of the way in which a system for damages for breach of antitrust law, particularly in relation to overcharge claims, functions.

### B. THE PASSING ON DEFENCE

159. Price fixing (or other anti-competitive behaviour leading to an increase in price) in one market not only harms the purchasers in the subsequent downstream market. Harm can be inflicted upon purchasers and non-purchasers at all levels of the supply chain. The Study addresses the model where passing on and indirect purchaser standing are allowed. The example given is that of a cartel between manufacturers of a foodstuff which is refined by processors, then included by food manufacturers in various products sold to grocery retailers. It is stated that “*the analysis becomes considerably more difficult as pass through must be assessed at each stage of the supply chain.*” It is furthermore argued that if a passing on defence is allowed, this may also create conflicts between the claimants at the various levels of the supply chain.<sup>1</sup>
160. The Study gives an overview of the determinants of passing on.<sup>2</sup> In simple terms, the key determinants of passing on are the nature of competition in the claimant’s output market, and whether the overcharge affects the position of the claimant relative to its competitors. According to the Study, in general, the more competitive the downstream market (i.e. the market in which the claimant is operating), the greater the likelihood of passing on.
161. The Study addresses the crucial issue of measuring the impact of passing on.<sup>3</sup> Techniques include a “theoretical approach” which would start from a theoretical model of the claimant’s market and the structural determinants of pass-on, to an approach which directly estimates the extent of pass-on using a statistical study of the historical relationship between the claimant’s prices and the determinants of these prices. Both of these approaches are described in the Study. However, given their highly complex and technical nature they are not reproduced here. While a certain level of complexity is necessary in determining the total overcharge of the cartel, replicating this complexity at every stage of the supply chain would magnify the complexity and cost of actions

<sup>1</sup> See paragraph 4.3 of Part I of the Economics Report.

<sup>2</sup> Paragraphs 4.9 to 4.14 of Part I of the Economics Report.

<sup>3</sup> Paragraphs 4.15 to 4.21 of Part I of the “Economics Report”.

for damages. It does not appear possible to construct a model which accurately identifies, at reasonable cost, the harm suffered by players at different levels of the supply chain.

162. This great technical complexity associated with calculating the passing on of the overcharge along the supply chain has been a determining consideration in US law. In its Illinois Brick ruling, the US Supreme Court motivated as follows its decision not to permit the passing-on defence in federal US antitrust law:<sup>4</sup>

*“Permitting the use of pass-on theories ... essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge – from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.”*

163. In conclusion, having to calculate the total overcharge is already sufficiently complex and any attempt to go beyond this and apportion overcharge along the supply chain would greatly increase the complexity and cost of antitrust enforcement.

164. There is no detailed analysis of the passing-on defence in competition law in the case law of the Community courts. However, the ECJ has held as follows at paragraph 30 of the judgment in *Courage*:

*“The Court has held that Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them (see, in particular, Case 238/78 Ireks-Arkady v Council and Commission [1979] ECR 2955, paragraph 14, Case 68/79 Just [1980] ECR 501, paragraph 26, and Joined Cases C-441/98 and C-442/98 Michailidis [2000] ECR I-7145, paragraph 31).”*

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<sup>4</sup> Illinois Brick v Illinois, 431 US 720 (1977).

165. The passage from *Courage* set out above draws on previous case law of the ECJ. The possibility of the passing on defence has been acknowledged by the Court in actions for the non-contractual liability of the Community (Article 288(2) EC)<sup>5</sup> and actions for the recovery of illegally levied duties brought by undertakings against Member States.<sup>6</sup>
166. The existence and operation of the passing on defence in Community law is complex. Indeed, the Court itself has placed such conditions on the operation of the passing on defence that it could be argued that when it exists such a defence is in practice redundant.
167. Firstly, the majority of the Community case law is not in the field of competition. So far the Community courts have not examined the issue in depth in competition litigation. In particular, apportionment of damage as a result of the use of the passing on defence could be more complex in antitrust cases than in tax or subsidy refund cases because of the wider effects of the cartel globally.
168. Secondly, the existing case law of the Community courts is limited to stating that Community law does not preclude a rule of national law which seeks to prevent unjust enrichment. It does not establish the existence of the passing on defence as a matter of Community law. As AG Slynn stated in his Opinion in *Bianco*:
- “The Court [in Just] did not, however, hold that the fact that charges had been passed on must as a matter of Community law, e.g. pursuant to a general principle forbidding unjust enrichment, mean that the charges wrongly demanded and paid could never be recovered.”*<sup>7</sup>
169. The primary basis for the existence of the passing on defence in the reasoning of the Community courts is the prevention of the unjust enrichment of the claimant. This is the motivation referred to at paragraph 30 of *Courage*. However, passing on does not necessarily result in the unjust enrichment of the claimant because it can equally result in a reduced volume of sales as the trader has to raise prices.<sup>8</sup>

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<sup>5</sup> Case 238/78 Ireks-Arkady v Council and Commission [1979] ECR 2955, referred to in paragraph 30 of *Courage*.

<sup>6</sup> See *Just*, joined cases C-441/98 and C-441/98 Kapniki Michailidis v IKA [2000] ECR I-7145, referred to in paragraph 30 of *Courage*; see also *San Giorgio*, joined cases 331/85, 376/85 and 378/85 *Les Fils de Jules Bianco and J Girard Fils v Directeur général des douanes et droits indirects* [1988] ECR 1099 and *Comateb*, see also the Opinion of AG van Gerven in *Banks*, para 48: “Community law does not prevent the national court from ensuring, in accordance with national law, that the protection of rights guaranteed by the Community legal order does not result in the unjust enrichment of those entitled” and para 51: “In quantifying the damage it is necessary, in any event, in accordance with the (...) prohibition on unjust enrichment (...), to take account of the extent to which the damage has been passed on in the selling prices of the complainant undertaking.”

<sup>7</sup> *Bianco*, as note 6 above.

<sup>8</sup> The consideration as to a reduction in sales in cases where an overcharge is passed on also is suggested by the reasoning of the US Supreme Court in *Hanover Shoe v United Shoe Machinery*, 392 US 481 (1968).

170. Indeed, in the later case law of the Court of Justice passing on and actual unjust enrichment are expressed by the ECJ as cumulative conditions to be fulfilled for the reduction of the charge on the basis of passing on. As the Court held in *Comateb* at paragraph 27
- “Accordingly, a Member State may resist repayment to the trader of a charge levied in breach of Community law only where it is established that the charge has been borne in its entirety by someone other than the trader and that reimbursement of the latter would constitute unjust enrichment.”*<sup>9</sup>
171. More recently, the Court has held at paragraph 102 of its judgment in *Weber*
- “It must therefore be concluded on this point that the rules of Community law on the recovery of sums levied but not due are to be interpreted as meaning that they preclude national rules which refuse – a point which falls to be determined by the national court – repayment of a charge incompatible with Community law on the sole ground that the charge was passed on to third parties, without requiring that the degree of unjust enrichment that repayment of the charge would entail for the trader be established.”*<sup>10</sup>
172. The disconnection between passing on and the unjust enrichment of the claimant has evolved in the case law of the Court to the point where a presumption that passing on leads to unjust enrichment is so unfounded as to offend against the Community law principle of effectiveness (where the context is judicial protection of a Community law right, namely restitution of a charge levied in contravention of Community law).<sup>11</sup>
173. It can be said that there is no passing on defence in Community law; rather, there is an unjust enrichment defence which requires (1) proof of passing on (which can be difficult in itself – see below) and (2) proof of no reduction in sales or other reduction to income.
174. Furthermore, if the passing on defence were to be recognized, it would be extremely difficult to apportion damage as between the different claimants at the different levels of the production/distribution chain. The door to apportionment is opened by the Court’s recognition of partial passing on in *Comateb* and *Michailidis*.<sup>12</sup> This is correct as a matter of principle if one wishes to seek to try to estimate as precisely as possible the extent of any unjust enrichment. However, it does not open the same complexities when applied in the field of recovery of charges as the possibility of consumer actions in the latter does not appear to be of any relevance (though it could be a theoretical possibility).<sup>13</sup> This cannot be said of antitrust actions.
175. Finally, in *San Giorgio*<sup>14</sup> the ECJ held that a provision of national law which placed the burden of proof on the party claiming repayment to show that it had not passed on the charges to the final consumer was incompatible with Community law on the grounds that it made it virtually impossible or excessively difficult to secure repayment of the charge wrongly levied and paid. Under Community law the burden of proving passing on, where the issue arises under national

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<sup>9</sup> *Comateb*, repeated in case C-147/01 *Weber’s Wine World* [2003] ECR I-11365 at para 94.

<sup>10</sup> *Weber*, as note 9 above (emphasis added).

<sup>11</sup> See para 117 of *Weber*, as note 9 above.

<sup>12</sup> *Comateb*, paras 27 and 28 and *Michailidis*, as note 6 above, para 33. See also para 51 of the Opinion of Advocate General van Gerven in *Banks*

<sup>13</sup> See para 7 of the Opinion of AG Mancini in *San Giorgio*, “[i]t is absurd to think of a mass of consumers who, in a system in which the class action is unknown, would bring an action against the State in order to recover minimal amounts”.

<sup>14</sup> *San Giorgio*

law, is on the defendant. Passing on operates, where it does operate, as a *defence*.<sup>15</sup> It is a question of fact for the *defendant* to establish. The defendant's burden of showing passing on in the individual case will often be very difficult in practice to discharge.

### C. INDIRECT PURCHASER STANDING

176. As mentioned above, the question of standing of indirect purchasers and the question how, if these purchasers have standing, their claim can be calculated in situations where passing on has taken place, is intimately linked with the question of the availability of the passing-on defence as such and, where it exists, its operation.

177. The Community courts have not taken any position on the standing of indirect purchasers in antitrust actions. It has been argued that the ruling of the Court in *Courage* operates against any restriction on standing of indirect purchasers. Firstly, the Court reaffirmed at paragraphs 23 and 24 of its judgment in the *Courage* case that Articles 81 and 82:

*“produce direct effects in relations between individuals and create rights for the individuals concerned which the national courts must safeguard (...). It follows from the foregoing considerations that any individual can rely on a breach of Article [81](1) before a national court” (emphasis added).*

This is a reaffirmation of principles laid down in the Court's earlier jurisprudence.<sup>16</sup>

178. It is submitted that, looked at in isolation and applying the general principles set out in the foregoing case law, both direct and indirect purchasers have the right to bring a claim subject to proving infringement, injury suffered and causation. To depart from such a principle would deny those most likely to have suffered antitrust injury a remedy. It is equally clear that allowing all parties downstream of a competition infringement to claim damages creates additional complexities (how to calculate the level of passing on), disincentives (successful claimants will get less), and higher transaction costs (increase in number and complexity of cases following from the same infringement).

179. In designing any system for claiming antitrust damages the main objective must be the efficient and effective enforcement of the antitrust rules. Such a system would ideally be able to accommodate both the deterrence and the compensation aims to some degree. Therefore, providing an efficient system can be found to compensate indirect purchasers, and in particular final purchasers, then there is no reason why they should not also benefit from actions for damages. Given the above-mentioned complexities, it is, however, likely that a trade-off between justice (in the sense of full recovery for all those who have suffered a loss from an illegal practice) and efficiency is inevitable.

180. It is suggested that the determining factor could be the effective enforcement of Community law. If limiting the rights of certain individuals to claim is necessary to ensure a system which is more effective in safeguarding the enforcement of Articles 81 and 82, then it is submitted that such limitations should be acceptable under Community law. Therefore, it might be necessary to determine what rights must be facilitated to ensure an effective enforcement system rather than insisting on the absolute protection of all private rights. For the protection of the rights of consumers, a specific small claims procedure or collective action might be an efficient form of

<sup>15</sup> It should also be noted that according to Section 33 (3)(2) GWB as amended by the 7th Amendment, the passing-on defence is not excluded as a matter of German civil law, but that it operates as a defence and that the facts underlying that defence have therefore to be proven by the defendant.

<sup>16</sup> See BRT and SABAM, para 16; see also case C-282/95 P Guérin Automobiles v Commission [1997] ECR I-1503, para 39.

redress given the very low level of individual damage suffered in many of the cases (see further below in Section VI).

**D. POLICY OPTIONS FOR THE TREATMENT OF THE PASSING ON DEFENCE AND INDIRECT PURCHASER STANDING**

Option 21: The passing on defence is allowed and both indirect and direct purchasers can sue the infringer

181. Under this model, damages have to be apportioned between direct and indirect purchasers. This can involve difficulties in the assessment of passing on at the various stages in the production and distribution chain, as discussed above, though the system would adhere to the principle of compensatory damages for each party that has suffered injury. The actions would be in principle separate and independent though in practice there is no reason why parties could not seek to coordinate their actions and thereby possibly save costs and time through making use of appropriate procedural devices. In this regard, the use of joinder or group action mechanisms, as well as some form of collective or representative action at consumer level (see further below in Section VI), could be applied under this model.

Option 22: The passing on defence is excluded and only direct purchasers can sue the infringer

182. This option privileges direct purchaser recovery over recovery by other classes of potential litigant. This brings advantages principally in terms of the deterrent effect of actions for damages of competition law, since it can be anticipated that the direct purchaser normally has better access to the evidence necessary to establish the infringement and also to quantify damage, including damage suffered at lower levels of the production/distribution chain. The more one moves away from the infringer(s) and direct purchasers, the more difficult it becomes to assess effects. For these reasons the direct purchaser is usually the best placed claimant and so a system which encourages direct purchaser claims can be anticipated to achieve a greater degree of enforcement and deterrent effect.

183. It is arguable in addition that if the direct purchaser is operating in a competitive market, market dynamics may, in some cases, redress the alleged unjust enrichment made by the direct purchaser by forcing him to pass on the gain made in the form of any damages award to the next levels of the production/distribution chain.
184. In order to allow for the possibility of recovery at the consumer level and the protection of consumer interests, an exception would need to be created within this model to the reservation of standing to direct purchasers so as to allow for claims at the consumer level (see further section VI below).

Option 23: The passing on defence is excluded and both direct and indirect purchasers can sue the infringer

185. This model could lead to over-recovery from the infringer. On the other hand, this model promotes a strong form of deterrence against the infringer and increased incentives to sue for both direct and indirect purchasers.

Option 24: A two-step procedure<sup>17</sup>

186. This system could be structured as follows:
- (A) In initial proceedings the passing on defence is excluded and the infringer is sued for the total overcharge.
  - (B) In later proceedings damages are allocated as between all parties that have suffered a loss.
187. This system has the advantage of ensuring that the infringer pays (deterrence aim). The subsequent allocation proceedings ensure as far as possible that the compensation aim is achieved. This option raises some further questions as to the precise modalities in which it might operate, which would require further consideration.

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<sup>17</sup> See, for example, ABA Section of Antitrust Law, The State of Federal Antitrust Enforcement – 2001, Report of the Task Force on the Federal Antitrust Agencies - 2001 at page 24, and ABA Section of Antitrust Law, Report on Remedies (2004).

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## CHINESE TAIPEI

### 1. Introduction

#### 1.1 *Contents of the Private Antitrust Litigation*

The Fair Trade Act of Chinese Taipei (hereinafter “the Law”) has been promulgated since 1992, but Chapter V of the Law regarding private compensation for damages has not been amended since then. Chapter V of the Law consists of 5 articles, Article 30 to Article 34 of the Law, which respectively regulate a plaintiff’s right to claim compensation for damages, the responsibility of the defendant to compensate for damages, the assessment of the amount of damages to be compensated, the time limitation imposed on the plaintiff to claim the suit, and other remedies.

Any person injured by conduct constituting a violation of the Law may file a claim for damages with the civil court in accordance with the Law or related provisions of the Civil Code. The contents of Articles 30 to 34 are as follows:

- *Article 30*

If any enterprise violates any of the provisions of this Law and thereby infringes upon the rights and interests of another, the injured may demand the removal of such infringement; if there is a likelihood of infringement, prevention may also be claimed.

- *Article 31*

Any enterprise that violates any of the provisions of this Law and thereby infringes upon the rights and interests of another shall be liable for the damages arising therefrom.

- *Article 32*

In response to the request of the person being injured as referred to in the preceding article, a court may, after taking into consideration of the nature of the infringement, award damages in excess of actual damages if the violation is intentional; provided that no award exceeds three times the amount of damages that is proven.

Where the infringing person gains from the act of infringement, the injured person may request that the damages be assessed exclusively in accordance with the monetary gain to such an infringing person.

- *Article 33*

No claim for damages as prescribed in this Chapter shall be allowed unless the right is exercised within two years after the claimant knows the act and the person liable for the damages; nor shall the claim be allowed after ten years has lapsed from the time the infringing conduct took place.

- *Article 34*

In filing a suit with a court in accordance with this Law, the injured may request that the contents of the judgment be published in a newspaper at the expense of the infringing party.

## **1.2 *Related Research***

The Fair Trade Commission of Chinese Taipei (hereinafter “the Commission”) plays no role in a civil lawsuit for indemnification of damages. However, being the sole competent authority at the central government level to enforce the Law, the Commission has developed and published several studies to compile some significant case decisions by various civil courts and to review concerns over the applications of these Articles in the civil lawsuits. The studies have the following titles:

- “A Review of the Explanatory Notes of the Fair Trade Act, Volume III, Article 23 to Article 49,” Out-sourced research, 2004.
- “A Study on Overcharge Claims with Infringements Resulting from Concerted Actions or Abuse Dominance,” Joint research, 2001.
- “A Review of the Regulation Governing International Cartels by the Competition Authority and an Introduction to the System of Private Remedies as Stipulated in the Japanese Antimonopoly Act,” Staff report, 2000.

## **2. *Passing-on Defence/ Indirect Purchaser Standing***

### **2.1 *Passing-on Defence***

Mitigating circumstances are regulated in the Law for the Commission to determine the administrative punishments. According to Article 36 of the Enforcement Rules of the Law, the mitigating circumstances related to the administrative fines decided by the Commission shall take into consideration remorse shown and attitude toward cooperation in the investigation of the enterprises that violate the Law. To apply the mitigating circumstances, the enterprises, which violate the Law, shall meet each of the following conditions:

- Voluntarily surrendering or making a full confession on their own in the investigation,
- Providing effective compensation after the illegal conduct so as to keep the damages down to a minimum.
- Furthermore, if the above enterprises report to the Commission the other enterprises suspected in the same case and provide useful related evidence that helps the Commission to solve the case, the reporter’s liability in regard to the administration’s punishment may be mitigated or exempted.

However, the Law and its related regulations have no such rules that are concerned with the defendant’s ability to mitigate its liability in terms of establishing that the plaintiff has passed on some or all of the overcharges that resulted from the defendants’ anticompetitive conduct to the plaintiff’s customers. Thus, whether the defendant can raise the pass-on defense to mitigate its liability depends on Article 216-1 of the Civil Code. Under the regulation set forth in Article 216-1 of the Civil Code, the defendant may allege that the interests acquired by the plaintiff from the same reason of the injury shall be

deducted from the amount of the plaintiff's claim, but the court will make the final decision at its own discretion. The content of Article 216-1 of the Civil Code is as follows:

### **Article 216-1 of the Civil Code**

If there are injury suffered and interests acquired derived from the same reason, the interests acquired shall be deducted from the amount of the compensation claimed.

## **2.2 Indirect Purchaser Standing**

According to Article 31 of the Law, the infringing parties are liable for the damages, regardless of whether the damages directly affected the trading counterpart or other related purchasers indirectly. In other words, the court will decide whether causality between the infringement and the damages exists in the plaintiff's claim. Except for Article 31 of the Law, there are no other specific rules to regulate the direct or indirect purchasers at different levels of the supply chain who are seeking to claim damages through the court.

## **3. Definition of Damages**

### **3.1 Related Rules**

There is no exact rule to define the word "damages" in Chapter V of the Law, but all of the contents of this chapter are pertain to the regulations governing compensation for damage. Article 32 of the Law regulates the right of a claim for compensation from the plaintiff to the defendant, as well as the assessment of the amount of damages, and stipulates that the court may award the injured no more than three times the proven amount of damages when the violation is intentional in response to the request.

Although some scholars and lawyers hold the view that the threefold damage compensation clause could encourage more civil lawsuits, and even result in there being a larger number of eager victims, Article 32 was passed after the legislators added the limitation whereby the threefold damage compensation could only be awarded when the violation was intentional.

However, the Law and the Civil Code both regulate the claim for damage. Apart from Article 32 of the Law, Article 184, Article 216 and other related Articles of the Civil Code could also be applied to handle private antitrust cases. The contents of Article 184 and Article 216 of the Civil Code are outlined as follows:

- *Article 184 of the Civil Code*

A person who, intentionally or by his own fault, wrongfully injures the rights of another is obliged to compensate him for any damage arising therefrom. The same rule applies when the injury is done intentionally in a manner contrary to the rules of good morals.

- *Article 216 of the Civil Code*

Unless otherwise provided by law or by contract, damages shall only be for the injury actually suffered and for the profit, which has been lost.

Profit is deemed to have been lost if it would have normally been expected, either on the basis of the ordinary course of events, or according to the projects or preparations made, or on the basis of other special circumstances.

### **3.2 *Monetary Compensation for Private Antitrust Litigation***

Under the regulations of the Civil Code, ordering the defendant to restore to the former condition as a remedy is the major principle rather than monetary compensation. According to Articles 213 to 215 of the Civil Code, the infringing parties have the responsibility to make compensation for an injury by restoring conditions to their prior state. If the obligation to restore to the prior conditions cannot be fulfilled, payment of damages in money is due for the injury sustained. Thus, payment of damages in money is not the first priority for private remedies in the Civil Code. The contents of Article 213 and Article 215 of the Civil Code are as follows:

- *Article 213 of the Civil Code*

Unless otherwise provided by law or by contract, a person who is obligated to provide compensation for an injury must ensure the conditions of the injured party are restored to those which existed prior to the occurrence of the injury.

- *Article 215 of the Civil Code*

If the obligation to restore the conditions to their prior state cannot be fulfilled, or if this is obviously hindered by great difficulties, payment for the damages in money is due for the injury sustained.

However, except in cases involving unreasonable discrimination, the refusal to deal, or damage to reputation, in which the injured could be compensated by trading on fair terms, signing a contract, or correcting the false dissemination of information, most damages caused by anti-competitive behavior, such as losing comparative competitive advantages, trading opportunities, market share, profit, employees, raising the market price, or being excluded from entering the market, could not possibly result in the former condition being restored. Thus, for most competition cases, monetary compensation instead of restoration would be a good means of resolving damages claimed in private antitrust litigations.

### **3.3 *How to Assess the Value of Damages***

According to Article 32 of the Law, damages can be calculated by considering the loss suffered by the plaintiff and the gain made by the defendant. If the violation is intentional, the court may award the injured no more than three times the proven amount of the damages, but triple damage compensation can be decided on the basis of the court's discretion, but it is not mandatory.

Just the same, because plaintiffs seldom win in a civil lawsuit, based on Article 32 of the Law, any related information that can be analyzed is very restricted. In practice, plaintiffs usually request compensation that represents the difference between the possible revenue without the infringement and the actual revenue with the infringement. Then the court shall estimate possible revenue with the infringement at its own discretion and in accordance with Article 222 of the Code of Civil Procedure Law. The contents of Article 222 of the Code of Civil Procedure are as follows:

- *Article 222 of the Code of Civil Procedure*

Except where it is otherwise provided, the court, in rendering a judgment, shall decide on the truth or falsity of the facts according to its free moral conviction with due consideration given to all the points raised in the oral proceedings as well as the results of the examination of evidence.

The reasons on which the moral conviction is based shall be stated in the judgment.

### *Selected Cases*

One case of bid rigging, as decided by the Tainan District Court (No. 955, 1998): The district court held the concerted action by the defendants was sustained and that the defendants were obligated to compensate for the damages to the plaintiff. In the court's decision, it was determined that the plaintiff might have been trading with the bidder at a lower price without there being bid rigging on the part of the defendants; thus, the court awarded the plaintiff the difference between the bid rigging price with concerted action and the second highest price of the bid.

One case of misleading advertising, as decided by the Supreme Court (No.1812, 2002): The court held that because misleading advertising on the part of the defendant caused damages to the plaintiff, the defendant was obligated to compensate the plaintiff the amount of the difference between the value of the apartment for sale reported in the misleading advertisement and the real value paid by the plaintiff.

### **3.4 Use of Multipliers**

According to Article 32 of the Law, a court may award damages that exceed actual damages if the violation is intentional, provided that no award shall exceed three times the amount of damages that is proven in response to the request of the plaintiff.

There are several purposes behind the regulation for threefold damages in relation to private antitrust litigation:

- To encourage plaintiffs to make a claim in a civil lawsuit to deter future violations of the Law: When the value of the damages is small or it is difficult to prove such damages, the injured parties will usually have to give up their damage claim; thus, Article 32 should encourage plaintiffs to make a claim because of the potential increase in the compensation that can be awarded.
- To prevent the defendant from benefiting if the infringement exceeds the amount of the compensation for the damages paid.

The scholar who conducted the out-sourced research for the Commission recommended that a multiplier could be set for different types of cases to obtain the effect of deterrence. On one hand, for a violation that was difficult to find, as in a hard-core cartel, the multiplier could be set at a higher level. On the other hand, for a violation that is easy to find, the multiplier could be set at a lower level.

It also has been recommended that the necessary prerequisite rule of intentional violation be removed to apply the multiplier to the case. Instead of the removal, the multiplier of the violation that is intentional could be set at a higher level compared with the violation that is accidental.

Based on few cases decided by the courts, in private antitrust litigation cases, it seems that the courts are more concerned about issues pertaining to damage compensation than about those pertaining to the deterrence of further violations. In this regard, however, Article 32 of the Law has not been amended; nor have amendments been drafted.

### *Selected Case*

One case of misleading advertising, as decided by the Taiwan High Court (No.367, 2000): The court held the defendant had used a misleading advertisement as bait in order to cause the plaintiff to misunderstand and eventually sign a trading contract with the defendant; it was determined that this

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constituted the condition of an intentional violation and resulted in damages to the plaintiff; as a consequence, the plaintiff was awarded double compensation for the damages.

## LITHUANIA

### 1. Passing-on defence/indirect purchaser standing

#### 1.1 *Concerning the passing-on defence*

In Lithuania, in litigation for the purpose of claiming damages incurred through the anticompetitive actions plaintiff is obliged to prove the illegitimate conduct of the defendant, damages incurred by the plaintiff, their scope, and the existence of causal link between the illegal actions of the defendant and the damages incurred. The fault, contrary to other conditions for civil liability, is presumed therefore the plaintiff is under no obligation to prove it<sup>1</sup>. The allocation of the burden of proof is an important factor in relation to the application of the over-charges passing-on defence principle. First, the plaintiff himself must prove the amount of the loss incurred by the plaintiff. Where the amount of the loss is proven on the basis of the damages suffered by the plaintiff, the plaintiff should include into the claim only the immediately incurred damages that were not passed to anybody. In the case the plaintiff fails to do that and the amount of the loss is established on the basis of the benefit derived by the defendant, the defendant may object the calculation of the loss as presented by the plaintiff (direct purchaser), by arguing that the plaintiff has passed all or part of the loss to its purchasers (i.e., has not incurred the loss immediately by himself).

The Civil Code of the Republic of Lithuania stipulates that in cases where one and the same action has created both damages and benefit for the aggrieved person, the benefit may be included into damages to be indemnified. In such cases damages are indemnified only to the extent not covered by the benefit derived. However, the Court has discretion to decide concerning the application of the principle, therefore the Court, having considered all the specific circumstances of the case, may award all damages regardless of the gain of the aggrieved person where the consideration of the gain would be contrary to the principles of reasonableness, good faith and justice. Therefore the Court retains the right to decide, on a case-by-case basis, to apply or to refuse to apply the passing-on defence.

#### 1.2 *Concerning the standing of indirect purchasers*

Indirect purchasers are entitled to the same right to bring suit for damages and are subject to the same procedures as direct purchasers. In Lithuania the indirect purchasers are not entitled to any privileges in respect of litigation, or initiation of proceedings or the proving of the validity of the claims. The possibilities of the indirect purchasers to bring actions concerning the indemnification of claims is facilitated by the doctrine of flexible causal link provided for by the Civil Code which enables the Court in each specific case to duly consider the legitimate interests of the plaintiff and the defendant and numerous other important circumstances, such as the behaviour of the aggrieved person, the relative wealth of the parties, the degree of fault of the defendant and others. The behaviour of the defendant does not need to be the only reason for the occurrence of damages, therefore to establish the causal link it suffice to prove that the conduct of the person at fault is a sufficient reason for the occurrence of damages although being not a

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<sup>1</sup> 6.248 (1) of the Civil Code of the Republic of Lithuania.

sole one. The enforcement of such principles enables the indirect purchaser to appeal to court and claim damage from the person accused of a competition law violation.

The Competition Council of the Republic of Lithuania is not aware of a single case concerning damages resulting from the anti-competitive conduct with an indirect purchaser acting as a plaintiff. The judicial experience in this field is rather scarce due to a very small number of private litigations concerning the losses incurred through an anticompetitive behaviour. In addition there are objective reasons preventing the occurrence of such claims. For instance, the final consumer finds it difficult to present to the court the evidence substantiating damages incurred, and in view of very small damages incurred to each individual consumer the initiation of the process seems very unappealing due to the significant related time and financial costs.

### ***1.3 Concerning the allocation of damages between the direct and indirect purchasers***

Up till now there is no established practice in Lithuania concerning part of damages incurred through anticompetitive actions to be attributed to the direct and the indirect purchasers. Due to the applicable doctrine of the full compensation of losses whereby the civil liability performs the compensatory rather than punishing function, the assignment of the share of damages incurred by direct and indirect consumers shall be based on the specific amount of the damage suffered by the specific undertaking. In such cases the establishment of the amount of the damage on the basis of the gain derived by the persons infringing the competition rules would be difficult.

Although there is no institution of class actions in Lithuania, the Code of Civil Procedure of the Republic of Lithuania provides for a possibility to bring a joint action against the defendant in a single claim. Also a situation is possible where the direct and indirect purchasers file multiple claims for the indemnification of damages. However, in such cases the court may decide to consolidate the related suits into one single case where such consolidation may ensure a speedy and fair resolution of the dispute. Since in accordance with the provisions of the Code on Civil Proceedings the claims must be filed to the court of residence of the defendant (registration venue), such situation prevents the occurrence of multiple claims of direct and indirect purchasers in different courts.

## **2. Definition of damages**

### ***2.1 Concerning the definition of damages***

Art. 46(1) of the Law on Competition of the Republic of Lithuania provides that the undertakings that violate this Law must compensate for damages caused to other undertakings or natural and legal persons according to the procedure established by the laws of the Republic of Lithuania. However, the Law does not provide for any specific criteria underlying the assessment of damages resulting from the anticompetitive actions. Therefore damages incurred through unfair competition shall be assessed and proved on the basis of the general damages indemnification principles established in the Civil Code. Damages are not presumed therefore the aggrieved person must prove damages themselves and amount of them. In cases where the exact amount of damages is difficult to establish and the plaintiff requires the gain acquired by the defendant be recognised as damages suffered by the plaintiff, the latter shall have to prove the scope of the gain derived by the defendant through the illegal actions.

In the Lithuanian judicial practice the private suits for damages incurred due to anti-competitive actions are extremely rare. We are aware of only two cases whereunder the plaintiff applied to the court requesting the reparation of damages suffered by him due to actions of the undertaking recognised by the Competition Council as having abused the dominant position. One of the cases is still pending examination in the first instance court and in the second case (UAB *Siauliu tara* v. AB *Stumbras*) the main issue was

the assessment of the amount of damages inflicted. Both parties of the proceedings submitted the findings and conclusions on the amount of damages incurred by the plaintiff drawn up by well-known international audit companies. However, the assessment of damages commissioned by the plaintiff the amounts mentioned reached several million litas (about 800,000 euros), while the conclusions presented by defendant stated that the actions of the defendant did not inflict any damages to the plaintiff whatsoever. In this situation the court commissioned the special State expertise institution (the Lithuanian Court expertise centre) to perform the assessment of damages. Despite the fact that the experts of the centre performed two expert examinations (primary and the repeated), the first instance court chose to disregard the presented conclusions, as, in the opinion of the court, the experts mistakenly interpreted the Resolution of the Competition Council. In this particular case the court chose to be guided by the damage assessment presented by the plaintiff which at the same time took into consideration the slowdown of the growth in the plaintiff's trade volumes.

It should be noted that the above case is still pending the final ruling in the Appeal court. In general, however, the course of the examination of this particular case demonstrates the difficulties encountered in Lithuania while assessing the amount of damages. To a large extent such difficulties are caused by an extremely scarce experience in the litigation of the type.

In our opinion the difficulties related to the establishment of the occurrence of damages and their amount is one of the vital factors determining a very small number of the private suits for damages incurred due to anticompetitive actions. Guidelines of some general nature concerning the determination of the amount of damages in such cases could facilitate the growth of the number of cases of the kind and the formation of more just and uniform practice in this area. A facilitating factor to the benefit of the plaintiffs and the courts could be a more specific assessment of damages to the relevant market established in the resolutions of the Competition Council establishing the violations of the competition rules and the imposition of sanctions to the violators (given that for the purpose of imposing sanctions for the anticompetitive actions the competition authorities take into account the effect of the actions of the violator to the relevant market and the overall damages incurred to the market concerned).

## **2.2 *Concerning the application of multipliers for the assessment of damages to be indemnified***

The legal acts of the Republic of Lithuania do not authorise courts to apply at their own discretion the multipliers in the cases concerning the compensation of losses. One of the fundamental principles concerning the indemnification of damages is the full compensation of damages. The principle means that the plaintiff is under obligation to prove the fact of the damage and the amount of the damage, and the defendant may be obligated to indemnify the damage only to the extent of the damage actually incurred by the plaintiff. The principle of the total indemnification of the damage also implies and ensures that, on the one hand, the violator is prevented from gaining benefit through its illegal actions, and, on the other hand, the civil liability performs the compensatory, not the punishment function. In practice such approach prevents the application of multipliers in the damage indemnification cases.

In 2001, the new Civil Code of the Republic of Lithuania came into force, and in 2003 – the new Code of Civil Procedure was made operational which, however, did not introduce any major changes in the rules concerning the passing-on defence, determination of the status of indirect purchasers or the establishment of the amount of damages.

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## ROMANIA

As noted by Neelie Kroes, the Competition Commissioner, private enforcement of the competition rules has direct benefits for the functioning of the market as it has a strong deterrent effect and it promotes a culture of competition. It also provides direct justice for those who have suffered losses due to breaches of the competition rules.

### 1. Passing-on defence

As regards the use of "passing-on defence", this legal term is not covered by law in Romanian law system.

Theoretically, this type of defence could be used in a law suit by the defendant, but he will have the burden of proof, namely to prove that a transfer of losses took place from the plaintiff to subsequent buyers in the production/distribution chain.

Such a defensive argument could be invoked in order to prevent the plaintiff from getting unjustified revenues when transferring to his customers the extra costs generated by the defendant's anticompetitive practices.

Nevertheless, transfer of extra costs does not necessarily imply an unjustified enrichment, considering the fact that the defendant could be subject to other losses, such as reduction of total sales due to a decrease in the number of customers. Such a decrease would be generated by the price increase operated by the defendant as a direct buyer from the plaintiff.

However, if the courts would accept such a defence, it would be considerably more difficult to divide damages between various plaintiffs, located at different levels of the production/distribution chain. Also, it would create a useless complication of the damages actions.

According to the provisions of the Civil Code, any person that suffered a prejudice is entitled to reparation, once he was able to prove the illegal act, the existence of damage, the causality link between the illegal act and the damage caused, whether intently or negligently.

Theoretically, once these conditions are fulfilled, anyone, including indirect buyers, could file a law suit, therefore also a damage claim.

There have been no recent changes to the rules concerning the tort liability in Romanian legislation.

In the Romanian legislation currently in force there are no special provisions regarding damage allocation. However, the rules of the of the tort liability provide for full reparation of the damage caused to the plaintiff; this includes both the actual loss (*damnum emergens*) and the profit that should have been made (*lucrum cessans*).

According to the legal provisions, it is the task of the court to ascertain, based on the evidence submitted, the amount of damages caused to each plaintiff. In the same time, the obligation to fully recover the damage is maintained, irrespective of the financial status of both the wrongdoer and the victim.

## **2. Damages regarding the definition of damages:**

In the Romanian legislation, the compensatory character of damages is regarded as the most important; the person causing the damage is obligated to restore the prior financial status of the victim, by covering both the effective damage caused and the profit that would have been made otherwise. This obligation is irrespective of the sanctions applied for infringement of the competition rules. However, it is up to the victim to prove the extent of the damage caused.

Given this compensatory character of damages, the responsibility of the wrongdoer is limited to full restoration of damages caused; the courts have to establish the amount of damages being granted, based on the effective damage caused and not on appreciation made by the court.

As we said before, there have been no recent changes to the rules concerning the tort liability in Romanian legislation, which could be applied as general rule in competition-based damages cases.

Therefore, given the victim's obligation to prove the extent of its losses, it would be probably very difficult for indirect victims such as single consumers or even groups of consumers to specify the amount of overcharge incurred in downstream markets. Moreover in case of cartels covering large parts of the market and spanning over a large period of time, it becomes more difficult to calculate the hypothetical market price of a given product or service. Considering this, it is questionable whether such actions will ever play a major role in private antitrust enforcement before Romanian courts.

For a full restoration of damages suffered, the victim may request to the court that the wrongdoer should pay not only the equivalent of the damage, but also interest afferent until the damage is paid in full. In such case, the interest is calculated from the moment the court's decision is definitive, because only starting with that moment the claim has become uncontested and due.

## BIAC

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 Commission<sup>1</sup>. 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.

### 1. Introduction

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, 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”<sup>2</sup>.

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:

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<sup>1</sup> Green Paper presented by the European Commission on damages actions for the breach of EC antitrust rules, COM (2005) 672.

<sup>2</sup> Commission Staff Working Paper, Annex to the Green Paper, Damages actions for breach of the EC antitrust rules, COM (2005) 672, paragraph 12.

“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”<sup>3</sup>.

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”.

## **2. The passing-on defence and indirect purchaser standing**

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.

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.

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<sup>4</sup>. In our view the increased complexity and cost of such litigation is 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.

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.

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

## **3. Definition of damages**

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

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<sup>3</sup> 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.

<sup>4</sup> 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 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.

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.

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.<sup>5</sup>

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”<sup>6</sup>. Nevertheless, BIAC considers that exemplary awards are an inappropriate head of damages since this purpose is already served by any 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.

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”<sup>7</sup>.

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

<sup>5</sup> 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.

<sup>6</sup> Per Lord Devlin in *Rookes v Barnard* [1964] AC 1129.

<sup>7</sup> *Marshall v Southampton and South-West Hampshire Area Health Authority*, Case C-271/91.

<sup>8</sup> 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

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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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. Lorde "Are Antitrust "Treble" Damages Really Single Damages?" 54 Ohio St. L.J.155 (1993).

## POLICY CHOICES IN DEFINING THE MEASURE OF ANTITRUST DAMAGES

William H. Page\*

### 1. Introduction

A recent EC Green Paper<sup>1</sup> asks for comments on an array of possible reform measures aimed at encouraging private antitrust damage actions in the national courts of the EC's member states. One of the questions the Green Paper raises is "how should damages be defined?"<sup>2</sup> Under this heading, the Paper asks whether damages should be measured by "the loss suffered by the claimant as a result of the infringing behaviour" or by "the illegal gain made by the infringer"; whether courts should be able to award "[d]ouble damages for horizontal cartels" automatically, conditionally, or at the courts' discretion; and whether prejudgment interest should be permitted "from the date of the infringement or date of the injury."

In this short paper, I examine the issues raised by this section of the Green Paper from the perspective of the American experience over a century of private antitrust litigation. I begin with a brief history of the American treble damage remedy. In part II, to provide a framework for the discussion, I describe the theoretical measure of an optimal antitrust penalty. In part III, I show how the model of the optimal penalty can influence choices that affect the measure of damages, particularly through the doctrines of antitrust injury and standing. I also discuss the roles of the multiplier and prejudgment interest. In part IV, I draw on the earlier discussion to respond to the Green Paper's questions.

### 2. A Short History of the American Treble Damage Remedy

The legislative history of the Sherman Act is notoriously opaque, but one clear goal of Congress was to provide affirmative remedies for monopolization and agreements in restraint of trade.<sup>3</sup> English and American common law had condemned similar activities to varying degrees, but typically only to the extent of refusing to enforce illegal agreements. (Interestingly, at least one source suggests that the use of antitrust violations as a defense to actions for breach of contract is the most common form of private enforcement in Europe today.)<sup>4</sup> The Sherman Act's innovation was to create a system of public and private enforcement, a radical step in a period in which the laissez-faire orthodoxy resisted any direct governmental intervention in markets. Congress provided that someone harmed "by reason of anything forbidden" by the statute could recover "threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."<sup>5</sup> The trebling provision was apparently borrowed from the

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<sup>1</sup> European Commission Green Paper: Damages Actions for Breach of the EC Antitrust Rules, Brussels, December 19, 2005, SEC(2005) 1732, [http://europa.eu.int/comm/competition/antitrust/others/actions\\_for\\_damages/gp\\_en.pdf](http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/gp_en.pdf).

<sup>2</sup> *Id.* at 7. The paper properly distinguishes this issue from the methodologies for calculating damages.

<sup>3</sup> For background, see William H. Page, *Ideological Conflict and the Origins of Antitrust Policy*, 66 Tul. L. Rev. 1, 37 (1991).

<sup>4</sup> Wouter P.J. Wils, *Principles of European Antitrust Enforcement* 112-13 (2005).

<sup>5</sup> Act of July 2, 1890, ch. 647, § 7, 26 Stat. 210. This provision was superseded by the Clayton Act, § 4, 38 Stat. 731 (1914), 15 U.S.C. § 15. Senator Sherman's original draft had provided for double damages. Kenneth G. Elzinga & William Breit, *The Antitrust Penalties: A Study in Law and Economics* 64 (1976)

ancient English Statute of Monopolies.<sup>6</sup> During the congressional debates, some expressed some doubts that private parties would have adequate incentives or resources to sue the trusts; the trebling provision may have been a partial response to those concerns.

Yet, despite trebling, private antitrust suits were rare over the first several decades of the Sherman Act,<sup>7</sup> and only proliferated after the electrical equipment conspiracies of the late 1950s and early 1960s.<sup>8</sup> The number of private federal antitrust suits spiked from 378 in 1961 to over 2,000 in 1962.<sup>9</sup> The number returned to 380, but then rose through the 1960s, reaching 1,528 in 1977. Over the following ten years, however, the number dwindled to below 1,000, and has remained between 500 and 800 since then. Indirect purchaser class actions in state courts in recent years have added to the yearly totals, although exact data on those actions are not available.

This history confirms the obvious point that providing a damage remedy, even with mandatory trebling, is insufficient to stimulate private enforcement; there must also be some reasonable prospect of recovering damages to be trebled. It was only after the Supreme Court had established standards for proof of damages<sup>10</sup> and defined per se violations, and after procedural reforms enabled broad discovery and class actions, that treble damage actions became generally practical. The fluctuations in the number of suits in the modern era appear to correspond to the rise and fall of strict rules defining substantive offenses and related doctrines that limit the scope of damages. The number of actions rose during the 1960s as the Supreme Court adopted new rules of per se illegality,<sup>11</sup> and peaked in 1977, the year the Supreme Court decided *Sylvania*,<sup>12</sup> which overruled the per se illegality of vertical territorial restraints.<sup>13</sup> That same term also saw the decisions in *Brunswick*,<sup>14</sup> which limited recovery to antitrust injury; *Illinois Brick*<sup>15</sup> which denied indirect purchasers the right to sue; and *Fortner II*,<sup>16</sup> which limited the per se rule against tying arrangements. These decisions, particularly *Brunswick*, recognize that private antitrust litigation can

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He later suggested the statute should authorize recovery of “full consideration,” a measure used in a few state laws to this day. Tenn. Code Ann. § 47-25-106. B&E interpret this phrase to mean single damages, but in state antitrust law it means recover of the full amount paid for goods tainted by price fixing.

<sup>6</sup> 21 Jam. I, c. 3 (1623) (Eng.).

<sup>7</sup> K. Elzinga & W. Breit, *supra* note 5, at 68 (citing one study that found that 175 private suits had been filed in the first 50 years of the Sherman Act, and only 13 were successful).

<sup>8</sup> Richard A. Posner, *Antitrust Law* 46 (2d ed. 2001)

<sup>9</sup> *Id.*

<sup>10</sup> *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 124 (1969); *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931).

<sup>11</sup> See e.g., *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). For discussion, see William H. Page, *Legal Realism and the Shaping of Modern Antitrust*, 44 *Emory L.J.* 1, 29-42 (1995).

<sup>12</sup> *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58- 59 (1977).

<sup>13</sup> See Douglas H. Ginsburg, *Comparing Antitrust Enforcement in the United States and Europe*, 1 *J. Competition L. & Econ.* 427, 438 (2005).

<sup>14</sup> *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489-90 (1977).

<sup>15</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977);

<sup>16</sup> *United States Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610 (1977).

actually be used to inhibit competition.<sup>17</sup> Not coincidentally, the two leading books of the Chicago School of antitrust analysis were published the year before and the year after the watershed 1977 term.<sup>18</sup> In the ensuing years, the Court began to set further restrictions on liability, and to limit the kinds of harms that are compensable.<sup>19</sup>

Public antitrust enforcement choices also affect of the level and type of private antitrust litigation. We have already seen that the first major wave of private lawsuits followed the prosecutions of the electrical equipment manufacturers in the 1950s. Similar patterns of follow-on litigation have occurred after the Antitrust Division's recent actions against international cartels<sup>20</sup> and Microsoft,<sup>21</sup> and the Federal Trade Commission's actions challenging settlements of patent litigation in the pharmaceutical industry.<sup>22</sup> Unlike the earlier waves of follow-on litigation, these recent ones have occurred in both federal and state courts, and have typically involved both direct and indirect purchaser class actions. These developments have significantly changed the potential penalties for antitrust violations. Criminal fines have increased dramatically, as have settlements in indirect purchaser litigation. The FTC may also seek disgorgement of illegal gains in antitrust cases. These changes may affect policy choices in the design of private remedies.<sup>23</sup>

### 3. The Optimal Deterrence Model

In interpreting antitrust rules, including provisions that define the measure of damages, courts are guided by the purpose of the law. In the United States, courts and policymakers have turned to the standard of economic efficiency or consumer welfare. The corresponding standard for antitrust penalties is optimal deterrence.<sup>24</sup> Although the law recognizes that penalties may provide both compensation and deterrence, the deterrence goal should be primary, for three reasons. First, if deterrence is effective, compensation, which is itself costly, is unnecessary.<sup>25</sup> Second, given the limitations of the legal system, it

<sup>17</sup> Baumol & Ordover, *Use of Antitrust to Subvert Competition*, 28 J. Law & Econ. 247 (1985). See also R. Preston McAfee, et al., *Private Antitrust Litigation: Procompetitive or Anticompetitive?*, August 22, 2005, [http://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID784805\\_code389408.pdf?abstractid=784805&mirid=1](http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID784805_code389408.pdf?abstractid=784805&mirid=1); R. Preston McAfee, et al., *Private v. Public Antitrust Enforcement: A Strategic Analysis*, Aug. 1, 2005, [http://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID775245\\_code389408.pdf?abstractid=775245&mirid=1](http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID775245_code389408.pdf?abstractid=775245&mirid=1).

<sup>18</sup> Robert H. Bork, *The Antitrust Paradox: A Policy at War With Itself* 91 (1978); Richard A. Posner, *Antitrust Law: An Economic Perspective* 4 (1976).

<sup>19</sup> See William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75 Va. L. Rev. 1221 (1989).

<sup>20</sup> See generally Donald I. Baker, *Revisiting History--What Have We Learned About Private Antitrust Enforcement that We Would Recommend to Others?*, 16 Loy. Consumer L. Rev. 379, 382-83 (2004).

<sup>21</sup> William H. Page, *Class Certification in the Microsoft Indirect Purchaser Litigation*, 1 J. Competition L. & Econ. 303, 314-16 (2005).

<sup>22</sup> *Collusion and Other Anticompetitive Practices: A Survey of Class Action Lawsuits Against Drug Manufacturers*, 3d ed., Jan. 2004, available at [http://www.familiesusa.org/assets/pdfs/3rd\\_edition\\_lawsuit\\_surveys\\_pmd30c3.pdf](http://www.familiesusa.org/assets/pdfs/3rd_edition_lawsuit_surveys_pmd30c3.pdf).

<sup>23</sup> Edward Cavanagh, *Antitrust Remedies Revisited*, 84 Or. L. Rev. 147 (2005).

<sup>24</sup> William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. Chi. L. Rev. 652 (1983). See also Robert H. Lande, *Why Antitrust Damage Levels Should Be Raised*, 16 Loy. Consumer L. Rev. 329 (2004) (observing that the Landes model of optimal deterrence "is almost universally accepted, even by those who are not of a Chicago School orientation"). See also William H. Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. Chi. L. Rev. 467 (1980).

<sup>25</sup> Page, *supra* note 24, at 474-76.

is impractical to compensate many classes of injured parties, particularly consumers.<sup>26</sup> Finally, providing compensation will necessarily deter in one way or another, so any right of action for compensatory damage should be shaped by the larger societal goal of the remedy, in order to avoid the danger of overdeterrence. As we will see, the American system of antitrust remedies only very imperfectly accomplishes compensation, in part because courts have defined compensable harm with an eye toward deterrence.

Under the standard model, the optimal penalty for antitrust violations is the “net harm to persons other than the offender”<sup>27</sup>—that is, the wealth transfer to the offender (a net harm to purchasers, even though it is not necessarily a social cost) plus the deadweight welfare loss. If a cartel, for example, restricts output and raises prices, the optimal penalty is the overcharge paid by purchasers plus the loss in surplus value from the offenders’ failure (by restricting output) to produce marginal units that purchasers value more than the cost of production. If the demand curve is linear and marginal cost is constant, admittedly heroic assumptions, this deadweight loss would be equal to one half of the overcharge.<sup>28</sup>

It would not be optimal to impose a penalty equal only to the social cost, as in most tort cases, because the antitrust offenses generate a monopolistic wealth transfer that would give firms an ample incentive to offend in spite of the penalty.<sup>29</sup> Nor would merely depriving the offender of the overcharge be sufficient. Because the offense may involve cost savings that increase the offenders’ profit, a penalty equal to the overcharge would not deter an offense, even when the cost savings were less than the deadweight social loss. On the other hand, an arbitrarily large penalty would also be inappropriate, because it would deter even nominal offenses that create more social wealth than they destroy—efficient offenses. Imposing a penalty equal to both the social cost *and* the wealth transfer deters antitrust offenses if and only if the social cost of the offense exceeds any cost savings that the offense makes possible.

A multiplier is necessary if the probability of detecting and penalizing the offense is less than one.<sup>30</sup> In such a case, to raise the potential offender’s expected penalty to the amount of the expected net harm to others, one must divide the net harm by the probability of detection (or multiply the harm by the reciprocal of the probability of detection). Thus if the probability of detection were one-half, the fine would be doubled.

Under the optimal deterrence model, the probability of detection should be determined separately for each offense. The probability of detection is less than one primarily for concealable offenses like cartels.<sup>31</sup> One study published in 1991 estimated that the probability that a firm would get caught if it fixed prices was .15.<sup>32</sup> If that figure were accurate, it would yield an optimal multiplier of over 6. It is possible that the

<sup>26</sup> See John E. Lopatka & William H. Page, *Indirect Purchaser Class Actions and the Consumer Interest*, 48 *Antitrust Bull.* 531 (2003).

<sup>27</sup> Landes, *supra* note 24, at 656

<sup>28</sup> Frank Easterbrook, *Detrebling Antitrust Damages*, 28 *J.L. Econ.* 445, 454-55 (1985).

<sup>29</sup> Posner calls this amount the “social cost of the offense,” even though it includes a wealth transfer. R. Posner, *supra* note 3, at 267-70. See also Keith N. Hylton, *Antitrust Law: Economic Theory & Common Law Evolution* 46-47 (2003);

<sup>30</sup> Landes, *supra* note 24, at 657. See also Wouter P.J. Wils, *The Optimal Enforcement of EC Antitrust Law* 24-26 (2002).

<sup>31</sup> Easterbrook, *supra* note 28, at 450.

<sup>32</sup> Peter G. Bryant and E. Woodrow Eckhard, *Price Fixing: The Probability of Getting Caught*, 73 *Rev. Econ. & Stat.* 531 (1991) estimates a probability of .15, which would yield a multiplier of over 6. See also Lande, *supra* note 24, at 336 n.24 (citing the-Assistant Attorney General Douglas Ginsburg’s estimate that only 10 percent of cartels are detected).

recent prevalence of amnesty programs and high criminal fines has increased the probability detection as well as the magnitude of the total expected penalty in the United States.<sup>33</sup>

#### 4. Optimal Penalties and Private Damages

Identifying the optimal penalty does not tell us what sort of system of remedies should be adopted to implement it. One could, in principle, calculate the optimal penalty directly and impose it as a fine. Some scholars have argued that, because antitrust policy is a public good, only public enforcers should challenge antitrust violations and establish the appropriate fine.<sup>34</sup> A similar position has been voiced in Europe as well.<sup>35</sup> These proposals rest primarily on the recognition that private enforcement creates perverse incentives to use antitrust actions to suppress competition. One must also recognize, however, that public enforcement is not necessarily motivated entirely by the public interest.<sup>36</sup> Others have suggested that antitrust penalties could be enforced through *qui tam* actions, in which private attorneys general sue for a bounty, but the amount of the penalty is calculated independently of the enforcer's award.<sup>37</sup> These proposals recognize that, from the point of view of optimal deterrence, the penalty imposed and the compensation paid to the enforcer need not be the same.<sup>38</sup>

The American antitrust laws provide both for public fines and for private sanctions measured by the harm to plaintiffs. The reliance on harm to plaintiffs as the basis for privately enforced sanctions mirrors the standard of net harm to persons other than the offender, but with important qualifications. The largest part of the optimal penalty is the wealth transfer to the offender, which corresponds to the damage to purchasers from the output restriction. But once we move beyond this element of private damages, the correspondence between private harm and the optimal penalty becomes more problematic. The allocative inefficiency from the violation is a harm to *nonbuyers*—those who stop purchasing the product because of higher prices; although theoretically a basis for damages, no one, apparently, has ever been able to prove this type of harm in an antitrust case.<sup>39</sup> Equally important, the definition of the optimal standard refers to

<sup>33</sup> Baker, *supra* note 20, at 382. One implication of the optimal deterrence model is that a system of penalties in which there is a low probability of detection combined with a high multiplier is less costly than one in which there is a high probability of detection and a low multiplier. Easterbrook, *supra* note 28, at 454-58. The cost of detection is one element of the social cost of the offense. If it is possible to achieve the same level of deterrence at a lower direct cost of detection, then the social cost of antitrust violations is lower. There are limits to this logic, of course. At some point, price fixers may not be able to pay the fine. Moreover, because of the risk of error, particularly in civil litigation, much higher multiples may overdeter if firms are risk averse and fear that benign cooperation may expose them to enormous fines. Michael Block & Joseph Gregory Sidak, *The Cost of Antitrust Deterrence: Why Not Hang Price Fixer Now and Then*, 68 Geo. L.J. 1131, 1137 (1980).

<sup>34</sup> K. Elzinga & W. Breit, *supra* note 5, ch. 7. For response to this argument, see Easterbrook, *supra* note 28, at 453 n.22. Posner suggests that the Department of Justice be given a right of first refusal to bring damage actions, to give a basis for evaluating case selection. R. Posner, *supra* note 3, at 275-76.

<sup>35</sup> W. Wils, *supra* note 4, at 118-27.

<sup>36</sup> The Causes and Consequences of Antitrust: The Public-Choice Perspective 255 (Fred S. McChesney & William F. Shughart, eds. 1995).

<sup>37</sup> Thomas C. Crumplar, *An Alternative To Public and Victim Enforcement of the Federal Securities and Antitrust Laws: Citizen Enforcement*, 13 Harv. J. Legis. 76 (1975). Easterbrook, *supra* note 28, at 452, discusses the agency cost and other perverse incentives created by such an arrangement.

<sup>38</sup> Cf. A. Mitchell Polinsky, *Detrebling versus Decoupling Antitrust Damages: Lessons from the Theory of Enforcement*, 74 Geo. L.J. 1231, 1231-36 (1986).

<sup>39</sup> Lande, *supra* note 24, at 338 n.20, citing David C. Hjelmfelt & Channing D. Strother, Jr., *Antitrust Damages For Consumer Welfare Loss*, 39 CLEV. ST. L. REV. 505 (1991).

*net* harm: it implicitly offsets harms to one group of actors with benefits to another group.<sup>40</sup> For example, an illegal merger that creates a firm with a dominant market share may injure competitors by making the firm more efficient and allowing it to charge *lower* (nonpredatory) prices. To award rivals' lost profits as damages in such a case would represent overdeterrence, because it reflects neither an overcharge nor a social cost. Thus, to make private damages correspond to the optimal penalty, there must be some way to approximate this netting function. Moreover, because the costs of enforcement are social costs, providing a damage remedy may encourage an unnecessarily costly number of suits.

American antitrust law has recognized doctrines that permit courts to shape damage awards more closely to approximate the optimal penalty. The antitrust injury doctrine limits harm to injuries that are connected to an anticompetitive effect of a practice.<sup>41</sup> The clearest example of antitrust injury is the overcharge produced by the monopolistic output restriction.<sup>42</sup> In addition, if an illegal exclusionary practice raises the costs of the offender's rivals, those increased costs are a social cost of the offense, and the lost profits associated with them should be viewed as antitrust injury.<sup>43</sup> But the sort of harm I described in the last paragraph--lost profits because a horizontal merger makes a rival more efficient--would not be antitrust injury.<sup>44</sup> In such a case, the harm to rivals bears no relationship to any net social harm. This example demonstrates the need for the antitrust injury doctrine: private plaintiffs, particularly rivals, will sue for any harms for which they can recover damages, even if those that are the result of increased efficiency.<sup>45</sup> If the law is to permit competitors' suits, courts must be scrupulous in identifying practices that are actually exclusionary and assuring that the harms alleged are causally linked to the exclusionary aspect of the practice.

The doctrine of antitrust standing limits the direct costs of enforcement. It may deny recovery entirely to some classes of plaintiffs that are remote from the offense, and may allow other classes to recover damages in excess of their actual harm.<sup>46</sup> The clearest example of these latter effects is the *Illinois Brick*<sup>47</sup> rule, which denies recovery to indirect purchasers, even if they paid 100% of an illegal overcharge, and the *Hanover Shoe*<sup>48</sup> rule, which allows direct purchaser to recover 100% of the overcharge, even if they passed it all on by raising prices. Even when a category of injured parties has the right to sue, they may not, as a practical matter, be the ones to recover the award. Often in class action litigation, the amounts of injury to each class member is too small to justify the costs of distributing a settlement fund, so courts resort to various cy pres distributions to other worthy causes, like schools and libraries.<sup>49</sup>

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<sup>40</sup> Landes, supra note 24, at 656 n.6.

<sup>41</sup> See William H. Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445 (1985). See also John E. Lopatka, *Antitrust Injury*, in *Issues in Competition Law and Policy* (forthcoming 2006).

<sup>42</sup> Page, supra note 41, at 1465.

<sup>43</sup> Id. at 1475-79. See also Roger Blair & William H. Page, *Controlling the Competitor Plaintiff in Antitrust Litigation*, 91 Michigan L. Rev. 111 (1992); William H. Page, *Optimal Antitrust Penalties and Competitors' Injury*, 88 MICHIGAN L. REV. 2151 (1990).

<sup>44</sup> Page, supra note 41, at 1470-71. See *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 113 (1986).

<sup>45</sup> Some have argued that rivals should not be permitted to sue for antitrust violations. Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 Mich. L. Rev. 551 (1991).

<sup>46</sup> Page, supra note 41, at 1483-85.

<sup>47</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

<sup>48</sup> *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968).

<sup>49</sup> Lopatka & Page, supra note 26, at 552-56.

These departures from a strict compensation regime are defensible if they are made with an eye to the optimal penalty. I have argued that the antitrust injury and standing doctrines should be interpreted to approximate the optimal penalty. Limiting recovery to antitrust injury is a first approximation, because it links the damage award to the inefficiency the practice creates. It thus assures that the measures of damages are at least connected or proportional to the elements of the optimal penalty—the overcharge and the deadweight social cost. Standing rules provide a second approximation by limiting recovery to efficient enforcers.<sup>50</sup> I recognize that the antitrust injury doctrine contains ambiguities and its actual application has been far from ideal.<sup>51</sup> Nevertheless, properly interpreted, the doctrine is essential to a rational system of antitrust damages

Other aspects of the American system depart from strict compensation for other reasons that may cause the award to depart from the optimal penalty.<sup>52</sup> First, the four-year statute of limitations constricts the period for which damages can be calculated,<sup>53</sup> although this time may be extended if defendants fraudulently concealed the offense.<sup>54</sup> Moreover, even if the full damage period is included in the calculation, American law does not permit awarding prejudgment interest to account for the time value of money lost as the result of a violation.<sup>55</sup> The combination of these two rules may significantly limit recovery. Suppose, for example, a firm pays an illegal overcharge of \$100 in year 1, and only recovered damages in year 7. If we assume an interest rate of 10%, the damage award with prejudgment interest would be almost \$200. Under the American standards, however, the plaintiff would recover at most \$100, and may recover nothing if the claim is barred by the statute of limitations.

One might conceive of the trebling feature of the American system as an imperfect substitute for prejudgment interest.<sup>56</sup> Whatever its original intent, however, trebling is now usually justified as a way of accounting for the risk of detection. Automatic trebling, however, is questionable as a way of accomplishing this goal. First, the optimal deterrence model assumes that the probability of detection will be determined on a case-by-case basis. Once that element of the model is discarded, then an across-the-board multiple of damages is unlikely to be optimal.<sup>57</sup> Trebling almost certainly sets the multiplier too low for concealable antitrust offenses, particularly cartels.<sup>58</sup> First, as we have seen, the probability of detection in the case of cartels is probably far lower than one-third. Moreover, the only practical measure of damages for a cartel is the overcharge. The multiplier is applied to this figure rather than to the optimal

<sup>50</sup> Page, *supra* note 41, at 1483-85. See also, *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391 (7th Cir.1993); *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1449 (11th Cir. 1991).

<sup>51</sup> Ronald W. Davis, *Standing on Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury*, 70 *Antitrust L.J.* 697, 723 (2003); Joseph P. Bauer, *The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing*, 62 *U. Pitt. L. Rev.* 437 (2001).

<sup>52</sup> See generally, Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 *Ohio State L.J.* 115 (1993).

<sup>53</sup> 15 U.S.C. § 15B. ABA Section of Antitrust Law, *Proving Antitrust Damages: Legal And Economic Issues* ch. 3 (William H. Page ed. 1996).

<sup>54</sup> *Id.* at 74-78.

<sup>55</sup> *Id.* at 43-45. *Fishman v. Estate of Wirtz*, 807 F.2d 520, 5661-62 (7th Cir. 1987).

<sup>56</sup> Cf. *Cook County, Illinois v. United States ex rel. Chandler*, 538 U.S. 119, 131 (2003) (characterizing treble damages under False Claims Act as in part compensatory, noting that the Act does not provide for prejudgment interest). Indeed, some U.S. reform proposals have suggested trading one for the other. Cavanaugh, *supra* note 23, at 174.

<sup>57</sup> Richard Craswell, *Deterrence and Damages: The Multiplier Principle and its Alternatives*, 97 *Mich. L. Rev.* 2185 (1999).

<sup>58</sup> R. Posner, *supra* note 3, at 272; Frank H. Easterbrook, *Treble What?*, 55 *Antitrust L.J.* 95, 95 (1986)

penalty, which also includes nonbuyers' loss in surplus value. Thus, even if the plaintiffs recovered the full amount of the overcharge, trebling the overcharge would result in an award equal to only double the optimal penalty.<sup>59</sup> Moreover, as we have seen, plaintiffs often do not recover the full amount of the overcharge, because of the four-year statute of limitations and the unavailability of prejudgment interest, among many other obstacles.<sup>60</sup> Some academics have suggested setting higher multiples for concealable offenses, even on a case-by-case basis,<sup>61</sup> but these proposals have gained little traction.

On the other hand, trebling may set the multiple too high for offenses, like tying arrangements, that are not concealable. Proposals to detreble damages have succeeded in a few limited instances. Congress has detrebled damages for research or production joint ventures submitted for review by the Antitrust Division,<sup>62</sup> for standard-setting organizations,<sup>63</sup> and for firms participating in the DOJ's Amnesty Program.<sup>64</sup>

## 5. The Green Paper Proposals

The foregoing discussion provides a basis for considering the issues raised in the Green Paper about the measure of damages.

*Harm to Victims Versus Illegal Gain.* The Green Paper first asks whether damages should be measured by the harm to the victim or by the illegal gain. As we have seen, the optimal penalty is the net harm to persons other than the offender. Thus, under the optimal deterrence model, it is clear that harm to the victim is the theoretically preferable standard. First, if "illegal gain" is understood to be limited to the monopoly overcharge, a penalty measured by that amount would underdeter. If an offense generates any cost savings, a firm will offend in spite of a penalty measured by the overcharge, even when the deadweight loss from the offense far exceeds the cost savings. Estimation errors may magnify this tendency to underdeter.<sup>65</sup> Second, assuming that the overcharge is a component of the penalty, the court should measure it by the harm to victims.<sup>66</sup> The overcharge to purchasers and the gain to the offender are not necessarily equal, because the offender may dissipate all or part of the overcharge by incurring costs associated with the offense. In such a case, the court should calculate the penalty based on the overcharge paid by purchasers, not by the net gain to the offender.<sup>67</sup> Finally, if the illegal gain were understood to

<sup>59</sup> Easterbrook, *supra* note 28, at 456-57. Richard A. Epstein, *Monopoly Dominance or Level Playing Field: The New Antitrust Paradox*, 72 U. Chi. L. Rev. 49, 52-53 (2005) notes that trebling also results in an award equal to six times the social loss. But in the optimal penalty model, the relevant multiplicand is the full optimal penalty, not simply the social loss.

<sup>60</sup> Lande, *supra* note 52.

<sup>61</sup> R. Posner, *supra* note 3, at 272.

<sup>62</sup> 15 U.S.C. § 4301 (2000).

<sup>63</sup> Antitrust Criminal Penalty Enhancement Reform Act of 2004, Pub. L. No. 108-237, §§ 201-221, 118 Stat. 661, 665-69 (2004) (codified in scattered sections of 15 U.S.C. and accompanying notes). §§ 212-221

<sup>64</sup> See § 213(a).

<sup>65</sup> See W. Wils, *supra* note 30, at 22-24, discussing A. Mitchell Polinsky & Steven Shavell, *Should Liability Be Based on the Harm to the Victim or the Gain to the Injurer?*, 10 J.L. Econ. & Org. 427 (1994).

<sup>66</sup> It is sometimes said that forfeiture of illegal gain is one goal of a system of private antitrust damages. Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 Tul. L. Rev. 777, 783 (1987).

<sup>67</sup> Landes, *supra* note 24, at 665-66. If the offender were to dissipate the overcharge by costs associated with policing the cartel, under the illegal gain standard, there would be no penalty. Yet the cartel may nevertheless be formed, if it allows the cartel to achieve productive efficiencies. Where those productive

include increased profit to the offender from cost savings, then the resulting penalty would overdeter, because a firm would not commit an offense that created more social wealth than it destroyed.

Illegal gain is sometimes the measure of fines imposed by public agencies.<sup>68</sup> For example, the Federal Trade Commission may seek a remedy for disgorgement of illegal gains for antitrust offenses<sup>69</sup> and the staff working paper accompanying the EC Green Paper suggests that the German competition authority has a similar power.<sup>70</sup> But, because the private remedy also measures damages based on the overcharge, public pursuit of disgorgement poses obvious dangers of duplicative recovery. Consequently, the FTC has indicated, that it will seek disgorgement in antitrust cases when “other remedies are likely to fail to accomplish fully the purposes of the antitrust laws or when such a monetary remedy may provide important additional benefits.”<sup>71</sup>

If damages are measured by harm to victims, facilitating the right to relief should be accompanied by recognition of the antitrust injury doctrine.<sup>72</sup> The Green Paper does not mention the doctrine, but any eventual legislation facilitating private damage actions should correct this oversight. As the American experience indicates, private plaintiffs do not consider the public interest in their decision to sue, and have strong incentives to exploit antitrust actions to disadvantage larger rivals. The need for such a doctrine may be even more acute in the EC. It is my understanding that EC antitrust law is more regulatory and more solicitous of the interests of rivals in its interpretation of abuse of dominant position and in merger regulation. Expansive rules of liability can be mitigated by prosecutorial discretion. So long as public agencies do the lion’s share of enforcement, this characteristic of EC antitrust may not be particularly costly. If reforms greatly facilitate private actions, however, every injured rival will sue, exploiting every ambiguity in the reach of coverage. Rivals can be expected, for example, to sue in every instance of abuse of dominant position, and even in cases in which mergers enhance productive efficiency.

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efficiencies are smaller than the social cost (the cost of policing the cartel plus the deadweight loss), the cartel is inefficient, and should be deterred. As Landes states, “one does not have to know the gain to the offender to set the optimal fine.” *Id.* at 665. He adds that “the profitability of a violation is not a separate factor in setting the optimal fine” but is “relevant only insofar as it conveys information about net harm.” *Id.*

<sup>68</sup> As an alternative to the Sherman Act’s maximum criminal fine for corporation (\$100 million), the U.S. Sentencing Guidelines provide for a fine equal to twice the gain or twice the loss. 18 U.S.C. § 3571(d) (2000).

<sup>69</sup> 15 U.S.C. § 53(b).. See, e.g., *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 36 (D.D.C. 1999), amended on other grounds, 99 F. Supp. 2d 1 (D.D.C. 1999).

<sup>70</sup> Commission Staff Working Paper, Annex to the Green Paper, Damages Actions for Breach of the EC Antitrust Rules, Dec. 19, 2005, ¶ 115 (hereinafter *Staff Paper*), [http://europa.eu.int/comm/competition/antitrust/others/actions\\_for\\_damages/sp.html](http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/sp.html).

<sup>71</sup> “Policy Statement on Monetary Equitable Remedies in Competition Cases,” <http://www.ftc.gov/os/2003/07/disgorgementfrn.htm>. It added that “We will take pains to ensure that injured persons who recover losses through private damage actions under the Clayton Act not recover doubly for the same losses via FTC-obtained restitution.” *Id.* This result is consistent with studies that suggest removal of illegal gain is most common, and makes most sense economically, for offenses that do not have clearly defined victims who can receive direct compensation. Roger Bowles, et al., *Economic Analysis of the Removal of Illegal Gains*, 20 *Int’l Rev. L. & Econ.* 537, 543 (2000). See also, Roger Bowles, et al., *Forfeiture of Illegal Gain: An Economic Perspective*, 25 *Oxford J. Legal Stud.* 275 (2005). It is possible, however, that in the case of hardcore cartels, duplicative penalties could be justified by the need for a higher multiplier.

<sup>72</sup> Ginsburg, *supra* note 13, at 436; Baker, *supra* note 20, at 390.

Despite its ambiguities, the antitrust injury has two important functions. First it allows courts, including lower courts, to limit the costs of overly expansive rules of liability. Second, the antitrust injury inquiry is a mechanism for law reform. It forces courts to reexamine the purpose of substantive rules, and the effects of violations of those rules on various economic actors. That inquiry can lead to reevaluation of the rules themselves.

Of course, the antitrust injury doctrine only limits damages to those that are connected to the “anticompetitive” aspect of an offense. The broader the law’s definition of harm to competition the more lawsuits the antitrust injury doctrine will permit. To the extent EC law values the interests of rivals over those of consumers, courts can expect to hear the argument that rivals should be allowed to sue, even if they are harmed only by enhanced efficiency. Adoption of private remedies thus may require a reconsideration of the substantive law as well.

*Double Damages for Cartels.* The staff working paper recognizes that most of the member states do not recognize punitive damages. Nevertheless, it asks “whether it would be appropriate to allow the national court to award more than single damages in case of the most serious antitrust infringements” in order to “create a clear incentive for claimants to file a damages claim.”<sup>73</sup> The incentive would be greatest if the damages were automatic, but they could be made dependent “on the existence of predefined conditions” or made discretionary with the court. Option 29 would de-double damages for applicants for leniency programs of competition authorities.<sup>74</sup>

The optimal deterrence model clearly supports the double damage measure for cartels. As we have seen, the damage multiplier is most justified for practices that are concealable, mainly cartels. Moreover, even trebling probably understates the appropriate multiplier, first, because the probability of detection is less than one-third, and, second, because the multiplier is normally applied only to the overcharge, not to the deadweight welfare loss from the offense. Doubling is even more clearly justifiable, and may even be necessary.

Limiting the multiplier to cartels makes sense, because exclusionary practices and mergers are ordinarily not concealable, and thus do not warrant a multiplier.<sup>75</sup> In addition, exclusionary practices are most likely to be challenged by rivals, which are more likely than consumers to use the antitrust laws for strategic purposes. Limiting recovery in those cases to single damages will reinforce the role of the antitrust injury doctrine in mitigating the strategic use of the private remedy by rivals. Cartels, on the other hand, harm only purchasers. Rivals of a classic cartel actually gain as the result of the cartel’s raising of their price umbrella. If the cartel uses exclusionary practices against rivals, those would be the basis for the lawsuit, not the cartel itself, and thus the multiplier would not apply.

Doubling should be automatic rather than discretionary or conditional. One might object that the term “cartel” is ambiguous and might be interpreted to include productive joint ventures, which might be deterred by the threat of double damages. But it is highly unlikely that any such arrangement would increase prices. If a joint venture made the participants more efficient, it would not result in an overcharge to be doubled. It might harm rivals, but they would be barred from suit by the antitrust injury doctrine. Other more ambiguous horizontal price-related restraints, like information-exchange programs, should also

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<sup>73</sup> *Staff Paper*, supra note 70, at ¶ 121.

<sup>74</sup> *Id.*, at ¶ 235.

<sup>75</sup> Easterbrook, supra note 28, at 458-61.

be covered. If such an arrangement is illegal and results in increased prices, it is probably a mechanism for a tacit cartel, even if the exchanges themselves are public.<sup>76</sup>

*Prejudgment Interest.* Any system of private damages should provide for prejudgment interest to account for the time value of money.<sup>77</sup> It may be that double damages will be against public policy in many of the EC's member states, even if it is presented as in part compensatory.<sup>78</sup> If so, allowing prejudgment interest is even more appropriate because it provides a more realistic measure of harm. Prejudgment interest also reduces the incentive of offenders to prolong litigation.<sup>79</sup> One should recognize, however, that systems that provide for prejudgment interest have been plagued with uncertainties about many elements in the calculation.<sup>80</sup> Consequently, if the proposal for prejudgment interest were adopted, the law should also include rules governing the calculation that are clear and consistent with financial principles.

The Green Paper asks whether interest should be determined from the date of the infringement or the date of the injury. If these times differ, the latter is the appropriate one, because the interest calculation is designed to make the damage award correspond to the real injury, that is, to put the victim in same position as if the offender had compensated him for his injury as soon as it occurred.<sup>81</sup> Some systems calculate prejudgment interest from the time of filing the lawsuit, on the theory that such a rule encourages earlier filing. This approach, however, departs from the principle of awarding actual damages, and makes little sense for concealable offenses like cartels.

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<sup>76</sup> Even if every aspect of the arrangement is public, doubling would probably not overdeter, because the overcharge alone is less than the optimal penalty, which includes the deadweight welfare loss from the offense, a harm that is usually not recovered as damages. This consideration also applies to exclusionary practices that result in output restrictions, but in those instances both purchasers and excluded rivals may suffer antitrust injury, so the need for multiplying actual damages is less obvious.

<sup>77</sup> Clifford A. Jones, *Exporting Antitrust Courtrooms to the World: Private Enforcement in a Global Market*, 16 Loyola Consumer L Rev 409, 423 (2004).

<sup>78</sup> *Staff Paper*, supra note 70, ¶ 121.

<sup>79</sup> Michael S. Knoll, *A Primer on Prejudgment Interest*, 75 Texas L. Rev. 293, 297 (1996).

<sup>80</sup> *Id.* at 299-301.

<sup>81</sup> *Id.* at 353-54.



Corrected Version

**BEFORE THE ANTITRUST MODERNIZATION COMMISSION****Panel II: “State Indirect Purchaser Actions: Proposals for Reform”****Federal Trade Commission, Washington, D.C.****June 27, 2005****Prepared Remarks of****Professor Andrew I. Gavil<sup>1</sup>****1. Introduction**

I would like to thank the Commission and its staff for this opportunity to share my thoughts on proposals for reform related to the rights of direct and indirect purchasers to sue for treble damages under state and federal antitrust laws. Management of the litigation that has been spawned by the split treatment of direct and indirect purchasers in federal and state courts is a topic that I have written about in the past<sup>2</sup> and one that I continue to study.<sup>3</sup> It is surely one that is worthy of the Commission’s consideration and possible action.

In keeping with the spirit of the Commission’s invitation that I direct my comments to proposals for reform, and in recognition of the fact that the literature and commentary on indirect purchaser standing is extensive, I have endeavored to limit these remarks to a discussion of some options for substantive and procedural reform. I have not undertaken to present a detailed account of the evolution of the *Illinois Brick* line of cases and the substantive arguments for and against maintaining the rule of *Illinois Brick* in federal court, except as it directly relates to specific reform proposals.

**2. Summary of Recommendations**

The current split of direct and indirect purchaser rights has led to significant litigation management issues, and may well be creating a more significant risk of the kinds of damage apportionment issues that

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<sup>2</sup> See, e.g., Andrew I. Gavil, *Federal Judicial Power and the Challenges of Multijurisdictional Direct and Indirect Purchaser Antitrust Litigation*, 69 GEO. WASH. L. REV. 860 (2001) (“*Federal Judicial Power*”).

<sup>3</sup> See, e.g., Andrew I. Gavil, *Antitrust Remedy Wars Episode I: Illinois Brick from Inside the Supreme Court*, 79 ST. JOHN'S L. REV. 3 (forthcoming 2005) (“*Bernstein Lecture*”). The article will present my research on the papers of Justices Lewis F. Powell, Jr., Harry A. Blackmun, William J. Brennan, Jr., and Thurgood Marshall concerning *Illinois Brick*.

the Court most feared in *Illinois Brick*. That, in turn, probably increases the risk of duplicative recoveries, at least in theory, and arguably amplifies rather than alleviates federalist tensions.

There are two basic approaches that the Commission could recommend to improve the current situation – procedural and substantive – although in the latter category there are hybrid substance-procedure options that could be considered. Rather than attempt to canvass all of the possibilities B there are many – I have focused on two proposals.

**A Procedural Solution.**<sup>4</sup> As Congress recently attempted through the Class Action Fairness Act of 2005, the Commission could recommend an integrated package of reforms, jurisdictional and procedural, that would more readily facilitate the removal from state court of indirect purchaser actions related to pending federal actions, and then promote their transfer and consolidation.<sup>5</sup> By expanding federal jurisdiction over state indirect purchaser suits to the constitutional maximum (*e.g.* minimal diversity and no minimum amount in controversy), plaintiffs would have the option of suing originally in federal court, and defendants would have greater authority to remove cases filed in state court. Once in federal court, such cases would be subject to transfer and consolidation under existing Federal Rules and MDL procedures. The package also could include new, antitrust-specific procedures, and reconsideration of *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), which would in essence make the transfer permanent, permitting joint trial.

**A Hybrid Substantive-Procedural Solution.** A more comprehensive solution would have to come to grips with the underlying difference of opinion between federal and state authorities about indirect purchaser rights. The substantive choice has often been framed as one between preemption of state *Illinois Brick* repealers and overruling *Illinois Brick*.

For reasons I more fully explain below, I vehemently oppose making *Illinois Brick* the law of the land, *i.e.* federal preemption of state indirect purchaser suits. Some of the most basic assumptions of the Court in *Illinois Brick* were simply wrong and have not been borne out by time and experience. Moreover, legislation extending *Illinois Brick* would enshrine those errors and represent a major rejection of state autonomy. It would arguably be among the most potentially anti-consumer, pro-antitrust offender, antitrust legislative Acts ever conceived.

But I also oppose simply over-ruling *Illinois Brick*. First, it is too late in the day to solve the jurisdictional split between federal and state courts by simply permitting indirect purchasers to now sue in federal court. Owing to potential differences in federal and state standards of all kinds, such an Act would not necessarily put an end to forum shopping and the consequent challenges of multi-forum, multi-jurisdictional direct and indirect purchaser litigation. Also, although greatly overstated, some of the concerns about indirect purchaser suits expressed by the Court in *Illinois Brick* are legitimate and warrant attention. To secure the maximum benefit of overruling *Illinois Brick*, therefore, it would have to be done in tandem with preemption of state indirect purchaser rights and other procedural safeguards.

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<sup>4</sup> This proposal is a further evolution of the one discussed in Gavil, *Federal Judicial Power*, *supra* note 2.

<sup>5</sup> For a variety of reasons, I oppose the inclusion of federal and state government cases in this process. See Gavil, *Federal Judicial Power*, *supra* note 2, at 896-97.

### 3. Some Preliminary Observations

#### 3.1 *Putting the Discussion of Indirect Purchaser Rights in a Broader Context (i.e. “Don’t Panic”<sup>6</sup>)*

I am frankly concerned that the perceptions of some members of the antitrust bar of the extent of the *Illinois Brick* “problem” are exaggerated and outmoded. Although there are certainly areas of antitrust B including indirect purchaser litigation – that are in need of improvement at the margins, there is no crisis generally in antitrust today, and none in the area of indirect purchaser litigation.

Even a casual observer could quickly grasp that the last 30 years has produced a major shift in antitrust standards and priorities that has enormously reduced the chances for either truly meritless antitrust litigation or successful litigation that unambiguously should not have been, i.e. false positives.<sup>7</sup> Indeed, it is probably more difficult today to prevail in an antitrust case than at any time in the 100+ years of modern American antitrust enforcement. The burdens of proving antitrust violations have been largely re-written, *per se* rules of liability have been greatly circumscribed, and screens for isolating and disposing of weak antitrust claims are more abundant than ever. Those screens include antitrust injury requirements, limits on the admissibility of expert testimony, a more robust summary judgment device, difficult to satisfy class certification standards, more rigorous standards for proving damages, and aggressive appellate review, especially of those very few cases that make it to trial and result in plaintiff’s verdicts. These developments have had an enormous impact on the incentives of plaintiffs to sue and of defendants to settle.

To the extent, therefore, that the Court in *Illinois Brick* was influenced in its decision to restrict access to the private right of action by concern that the substantive rules of antitrust were far too restrictive in 1977, the contours of the antitrust landscape today are far different. A “correction” might well be in order.

For the Commission’s reference I have assembled four tables that I thought would be of interest generally, and particularly with respect to indirect purchaser and related issues. (See Appendix A, hereto.)

Several facts are illuminating. First, over the last decade, the typical number of federal antitrust cases is roughly half of what it was only 20 years ago. Table 1, drawn from data collected by the Administrative Office of the United States Courts, shows that over the last eight years the total number of civil antitrust cases filed annually in the federal courts has ranged from a low of 580 (1998) to a high of 858 (2000). The average per year was 718.<sup>8</sup> In decided contrast, Table 2 shows the number of antitrust cases – civil and

<sup>6</sup> For any sci-fi fans on the Commission who are fond of the work of Douglas Adams, it is worth remembering that the cover page of THE HITCHHIKER’S GUIDE TO THE *ANTITRUST* GALAXY prominently displays the cautionary note: “Don’t Panic.”

<sup>7</sup> In the rare case in which a defendant loses it is often because it failed to provide sufficient evidence of justifications for its conduct. See, e.g., Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking A Better Balance*, 72 *ANTITRUST* L.J. 3, 27-29 (2004). These are not true “false positives.” Monday morning quarter-backing of antitrust cases has become something of a sport in which better defenses can be imagined following losses in court. But courts decide antitrust cases like all cases based on the evidence provided by parties and their counsel. If we are to respect the rule of law, therefore, losses owing to failure to satisfy a burden of production should not be categorized as “false positives” B even by those who disagree with the outcomes.

<sup>8</sup> The average total number of civil cases filed in the federal courts over the last five years has been roughly 264,000. See Administrative Office of the United States Courts, *Judicial Business of the United States Courts, Annual Report of the Director, 2004*, Table S-7, available at <http://www.uscourts.gov/judbus2004/tables/s7.pdf>. As is shown in Table 1, during that same five year period (2000-2004), the average number of civil antitrust cases filed was 784 B less than .3% of the federal docket.

criminal – filed in the federal courts for a comparable period two decades ago. During that period, the total number of antitrust cases filed in federal court ranged from a low of 1148 (1982) to a high of 1689 (1977). The average was 1389.<sup>9</sup> So from the vantage point of even recent history, the level of antitrust activity in the federal courts today is very modest, at best.

The tables also suggest some patterns that are especially relevant to any discussions of direct and indirect purchaser litigation. First, the level of government activity appears to influence the corresponding level of federal civil private antitrust activity – and that includes the number of civil class actions filed.<sup>10</sup> Second, the level of both government and private activity seems to have reached a contemporary peak in 2000, and has been steadily in decline since – and that is especially true of civil class actions. Perceptions of the volume of antitrust activity formed in response to the events of just a few years ago – especially about the level of private treble damage class actions – are already out-of-date.

Table 3 shows that the number of antitrust cases filed by the Antitrust Division crested between 1998 and 2000 relative to the period before and after.<sup>11</sup> Although a more specific study could be done to determine whether the specific cases filed directly correlate with the increased number of civil cases filed in federal court, it seems quite likely. Note that the total number of *private* civil antitrust cases filed in federal court increased from 608 in 1999 to 811 in 2000, a 33% increase. Perhaps more striking is the increase in civil class actions from 100 in 1999 to 213 in 2000, an increase of 113%. Those 213 class actions constituted 26% of all private civil antitrust actions filed in 2000. If there is a correlation between the increased government activity and the increased private activity – which seems likely – it is no wonder some antitrust watchers noted these increases with concern.

But those numbers were historically unremarkable and quickly trailed off. In 2001, the total number of private civil actions dropped from the 811 in 2000 to 707. More striking is the decrease in class actions from the recent high of 213 in 2000 to 122 just a year later. Also striking is the decrease in civil enforcement actions brought by the Antitrust Division over the last several years.<sup>12</sup> My point is simply this: any perception that the volume of antitrust litigation is substantial or on the rise is uninformed. Admittedly, the figures I have presented only reflect activity in the federal courts, and indirect purchaser actions today are most likely to be filed in state courts. But given the likelihood that many indirect purchaser actions are complementary follow-ons to government cases, it seems likely that state antitrust cases are on the relative decline as are federal cases.<sup>13</sup>

I urge the Commission, therefore, to move cautiously in this area as in others, casting a wary eye on anecdotal evidence. My research into the papers of the justices in *Illinois Brick* demonstrates that the policy issues presented by indirect purchaser litigation were challenging in 1977 and they remain so

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<sup>9</sup> Table 1 does not include criminal cases filed. According to the Antitrust Division's workload statistics, collected in Table 3, there were 48 criminal cases filed per year on average over the same period. Including criminal cases would raise the average total number of federal antitrust cases filed during the 1997-2004 period from 718 to 766.

<sup>10</sup> Of course, Section 5 of the Clayton Act was designed to promote that very end.

<sup>11</sup> The average total number of antitrust cases (criminal and civil) filed by the Antitrust Division between 1995 and 1997 was 71. The average between 1998 and 2000 was 86. From 2001 to 2004 the average dropped to 50. Roughly two thirds of the cases filed between 1998 and 2000 were criminal.

<sup>12</sup> The average number of civil antitrust cases filed by the Antitrust Division between 1995 and 2000 was 25. From 2001-2004 it dropped to ten.

<sup>13</sup> I am unaware of any source of data for state court antitrust filings that is comparable to the information collected by the Administrative Office of the U.S. Courts and would confirm these intuitions.

today.<sup>14</sup> Hence, reasonable minds could differ then and now on how best to strike the balance among compensation, deterrence, and complexity.

On the other hand, the intervening years have produced a body of cases and experiences that warrant study and may permit the Commission to move beyond a debate limited to anecdotal evidence and opinion towards a truly informed and balanced consensus position. Although this Commission has formally concluded that it will not undertake a major empirical review of the antitrust laws, it could consider undertaking some focused empirical research to answer some of its own thoughtful questions concerning *Illinois Brick*. Do direct purchasers sue frequently, as *Illinois Brick* assumed? Are there any real examples of “multiple” liability judgments, or does it remain largely a theoretical concern? If the mere threat of multiple recovery enhances the settlement value of cases, do the settlements actually paid out approach even single damages? If the threat of difficult apportionment and duplicative recovery are real, are they inherent in indirect purchaser standing, or more a function of the current division of cases between state and federal courts? Is there a correlation between government enforcement activity and the incidence of indirect purchaser litigation? These are questions that may well be answerable with some modest efforts at data collection and would lend greater legitimacy to the Commission’s recommendations, if any.

### 3.2 *Appreciating the Substantive and Procedural Dimensions of Illinois Brick*

The rights of direct and indirect purchasers to sue under Section 4 of the Clayton Act present two sets of issues that can conveniently be viewed as “substantive” and “procedural.” The substantive question is the issue first posed in the Supreme Court’s 1977 decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) – whether indirect purchasers should be permitted to sue under Section 4 of the Clayton Act to redress injuries they have suffered as a consequence of overcharges or other antitrust injuries “passed-on” to them from direct purchasers from the antitrust offender.<sup>15</sup> Most often, that offender is a member of a cartel accused or found to have engaged in price fixing – the most severe of antitrust offenses. Indeed, many of these offenders have been indicted for criminal violations of Section 1 of the Sherman Act. In a far smaller group of cases, the offender is a firm accused or adjudicated to be a monopolist who has been accused or found guilty of monopolizing or attempting to monopolize in violation of Section 2 of the Sherman Act.

I emphasize the nature of the defendant-offender because I fear that the significance of the defendant’s status under law as an “offender” is often lost or downplayed in discussions of the challenges of managing direct and indirect purchaser cases in the state and federal courts. Proven antitrust offenders are not owed our sympathy. Instead, they are owed a level of remedial exposure that will deter them and others who would consider similar conduct. They also must be prepared to forfeit the fruits of their wrongdoing to compensate those harmed by reason of their conduct.

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<sup>14</sup> The initial vote in the case was 6-3 to affirm, i.e. to permit indirect purchasers to sue in federal courts. After an intense week of exchanges among the Justices a second conference was held and the vote changed from 6-3 to affirm to 6-3 to reverse. See Gavil, *Bernstein Lecture*, *supra* note 3.

<sup>15</sup> The Court viewed this issue as intertwined with the question it had faced nearly a decade earlier in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). That case presented the question whether a defendant who had already been found guilty of an antitrust violation (monopolization in that case) should be permitted to defend a subsequent private treble damage action by arguing that the direct purchaser suffered no injury because it “passed on” its damages to firms further down the chain of distribution. A majority of the Court in *Illinois Brick* was persuaded that offensive pass-on should be treated like defensive pass-on. In my forthcoming article on the justices papers in *Illinois Brick*, I argue that this assumption B that symmetry was required B was one of the fundamental errors in the reasoning of the Court. See Gavil, *Bernstein Lecture*, *supra* note 3; See also pp. 13-14, *infra*.

In my study of the papers of the Supreme Court Justices in the *Illinois Brick* case, I found the following exchange between Justice Lewis F. Powell, Jr. and one of his clerks. The clerk, lamenting the seeming intractability of the policy issues posed by indirect purchaser rights remarked to Justice Powell in a Bench Memo prepared prior to oral argument that he would permit indirect purchasers to sue and “leave the rest of the problem to be solved by Congress.” He continued: “If it really is costly for these firms, you can be sure they will let Congress know about it.” Powell’s hand written response followed: “Getting relief from Congress by corps. guilty of anti-trust violations is unlikely!”

Justice Powell ultimately voted in *Illinois Brick* to preclude indirect purchasers from suing in federal court.<sup>16</sup> The significance of his insight, however, should not be lost on this Commission: the serious antitrust offender is hardly a sympathetic figure. Arguments by those offenders, or their regular counsel, that emphasize the burden of facing multiple law suits from direct and indirect purchasers, yet ignore or downplay the potentially extraordinary benefits they have enjoyed from their illegal conduct at the expense of economic progress and consumer welfare should be accorded little weight. Indeed, that was a critical message of *Hanover Shoe*.

Second, *Illinois Brick* cannot be considered in isolation. Before it was decided, as well as after, many states elected to endorse the rights of indirect purchasers to sue, and in *California v. ARC America Corp.*, 490 U.S. 93 (1989), a unanimous Supreme Court upheld their right to do so, rejecting any notion of federal preemption. Ironically, taken together, *Illinois Brick* and *ARC America* may well have amplified the risk of the very evils that *Illinois Brick* sought to forestall. By effectively commanding indirect purchasers to state court, and direct purchasers and others to federal court, the Court precluded any possibility of litigation efficiencies owing to consolidation and joint case management. It also amplified – at least in theory – the risk of complex apportionment issues, which can lead – in theory – to duplicative recoveries. Judicial capacity to neutralize these risks is arguably diminished absent some form of consolidation and coordination that unites all related direct and indirect purchaser cases before a single court.

The *Illinois Brick* “quartet” – *Hanover Shoe*, *Illinois Brick*, *ARC America*, and *Kansas v. Utilicorp* – thus pose two distinguishable issues, which in turn suggest two paths to reform. The substantive question asks whether and to what extent the rule of *Illinois Brick* should continue. The procedural question accepts to some degree the present circumstance: related antitrust litigation today is being pursued in parallel in state and federal courts. But it asks whether, in lieu of changes to *Illinois Brick* and related cases, procedural options exist for better managing the division of cases.

The price of the division of cases between state and federal courts cannot be measured simply by its impact on the strategic wars among plaintiffs and defendants. Duplication of effort likely takes its toll on public judicial and related resources. It also poses a risk of inconsistent results in related cases – an outcome that mars public confidence in the rule of law. These two concerns – duplication of effort and the threat of inconsistent results – have long been recognized as justifications for joinder under the Federal

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<sup>16</sup> Powell and other members of the Court also expressed particular reservations about the risks of embracing any per se rule against indirect purchasers. Like all per se rules, it posed the risk of over-inclusion and, in this instance, under-compensation and under-deterrence. Justice Byron White, who authored the majority opinions in *Hanover Shoe*, *Illinois Brick*, and *ARC America*, expressed that very concern when he dissented in *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990). Joined by the three dissenters in *Illinois Brick* B Justices Blackmun, Brennan, and Marshall, White noted Section 4's “expansive remedial purpose” and pointed out that its language “does not distinguish between classes of customers.” 497 U.S. at 219-20 (White, J., dissenting). He went on to describe *Illinois Brick* as an “exception” that should not be “extended” in cases where it could undermine the “twin antitrust goals of ensuring recompense for injured parties and encouraging the diligent prosecution of antitrust claims.” *Id.* at 226. I urge the Commission to review Justice White’s dissenting opinion with interest.

Rules of Civil Procedure. It is imperative, therefore, that any analysis of direct and indirect purchaser litigation take into account the potential institutional price of the current regime.

### *Some Proposals for Reform*

Proposals for reform can be usefully divided into “procedural” and “substantive” options, although as noted above, there are many variations of each that could be imagined, and hybrid substance-procedure options might also be considered.

The most obvious two substantive options have been debated for years through many ABA Antitrust Section Reports<sup>17</sup> and extensive commentary: (1) Pre-empt State *Illinois Brick* repealers, or (2) overrule *Illinois Brick*. As noted above, I oppose both options.

I vehemently oppose any effort to force *Illinois Brick* on the states through preemption of state indirect purchaser rights. Doing so would surely diminish the number of follow-on class actions and alleviate any threat of duplicative and difficult to apportion damages – but that would be true of any legislative effort to diminish the scope of Section 4 and would come only at a high price for compensation and deterrence. Diminishing case load alone is surely not a basis for cutting back on access to remedial rights. The broader policies of deterrence, compensation, and federalism also must be weighed. Preemption of all indirect purchaser rights would produce a field day for antitrust offenders and little more.

Moreover, a reexamination of *Illinois Brick* – on its own terms and in light of the experience of the last 28 years – strongly suggests that the Supreme Court majority erred in *Illinois Brick* in a number of its most critical assumptions.

**Symmetry.** A major factor motivating the Court to preclude offensive pass-on in *Illinois Brick* was the idea that plaintiffs and defendants had to be treated alike. The argument is prevalent in the papers of the Justices as it is in the decision, itself. A majority of the Court concluded that for reasons of fairness, as well as doctrinal consistency, *Hanover Shoe* would have to apply “both ways.”

But *Hanover Shoe* and *Illinois Brick* are strange bedfellows indeed. *Hanover Shoe* was a product of the same Court that decided *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) and *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), whereas *Illinois Brick* was a product of the Court that decided *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) and *Continental TV, Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). These were two vastly different Courts<sup>18</sup> and philosophically, the two cases are in truth irreconcilable. *Hanover Shoe* was a decidedly “pro-plaintiff” decision, animated by the twin aims of maximizing deterrence and minimizing the possibility that guilty antitrust defenders could escape liability and retain the fruits of their unlawful activity. *Illinois Brick* was a decidedly “pro-defense” decision, concerned about the undue threat of treble damage exposure to businesses and the administration of the treble damage remedy. They couldn’t be any more asymmetrical, and the result in *Illinois Brick* was certainly not compelled by *Hanover Shoe*, as the Court maintained.

<sup>17</sup> For a more complete discussion of these Reports up through 2001, see Gavil, *Federal Judicial Power*, *supra* note 2, at 878-79.

<sup>18</sup> In the decade that transpired from 1967 to 1977 the Supreme Court had been transformed. Gone were Chief Justice Earl Warren, as well as Justices Douglas, Black, Harlan, and Fortas. Taking their places on the Court were Chief Justice Warren Burger, and Justices Blackmun, Powell, Rehnquist, and Stevens. When *Illinois Brick* was decided, only Justices White, Stewart, Brennan, and Marshall remained from the Court that decided *Hanover Shoe*. White drafted the majority opinion in both, but Brennan and Marshall, who had joined him in *Hanover Shoe*, dissented in *Illinois Brick* and were joined by Justice Blackmun. Stewart, who had dissented in *Hanover Shoe*, joined White in *Illinois Brick*.

True symmetry between *Illinois Brick* and *Hanover Shoe* would have required greater deference to the rights of consumers and greater concern for deterrence, i.e. retaining indirect purchaser rights, even if indirect purchasers were subjected to strict standards of proof. In truth, the use of pass-on as a defense, and the use of pass-on by plaintiffs, serve vastly different purposes from the point of view of both compensation and deterrence. Permitting offensive pass-on, but precluding defensive pass-on, would have in fact been more consistent than treating both alike B and that remains true today.

**Direct Purchaser Incentive to Sue.** Two critical presumptions of *Illinois Brick* were that (1) direct purchasers would “most often” absorb any overcharges; and (2) they would therefore have sufficient incentive to sue the antitrust offenders with whom they dealt. Based on these two presumptions, the Court concluded that nothing would be lost to either compensation or deterrence if indirect purchasers were entirely deprived of any federal antitrust right of action. Hence, the Court placed all of the compensation and deterrence eggs in a single basket labelled “direct purchasers.”

It is important to fully digest the magnitude of these two critical presumptions because the Court invoked them to virtually bar all indirect purchasers from federal court. If either proves to be wrong, there is *no* compensation whatsoever<sup>19</sup> and deterrence will be left to government enforcement and/or, in the case of monopolization, suits by injured rivals.

As noted above, although the Commission has decided not to undertake a major empirical study of the antitrust laws, some focused research and data collection could help to determine whether these critical assumptions of *Illinois Brick* have proven to be so correct that they justify continuation of a per se ban of indirect purchaser standing.

Although I have not undertaken such a study, I note that there is some evidence to date that at the very least casts doubt on *Illinois Brick's* assumption that direct purchasers will have an adequate incentive always to sue.<sup>20</sup> While it is true that some, perhaps many sue,<sup>21</sup> it is not clear that they universally do so, and they have failed to do so in some very significant cases.

Perhaps more so today than in 1977, private treble damage lawsuits are major and uncertain undertakings, and direct purchasers may be less inclined than ever to risk rupturing their relationships with suppliers, even those who have fixed prices. That fear may be particularly acute in the rare case of

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<sup>19</sup> And of course the wrongdoer retains all of the fruits of its unlawful conduct and hence the full financial incentive to continue or repeat it.

<sup>20</sup> In recognition of that fact, the Ninth Circuit has sought to carve an exception to *Illinois Brick*, permitting “indirect purchasers ... [to] sue for damages if there is no realistic possibility that the direct purchaser will sue its supplier over the antitrust violation.” See *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1145-46 (9<sup>th</sup> Cir. 2003). Another variation of this is the “co-conspirator” exception B where direct purchasers are alleged to be co-conspirators with cartel members, indirect purchasers may be permitted to sue. See, e.g., *Paper Sys. Inc. v. Nippon Paper Indus.*, 281 F.3d 629, 631-32 (7<sup>th</sup> Cir.2002). There is some difference of opinion among the courts, however, as to the application of this “exception.” *Dickson v. Microsoft Corp.*, 309 F.3d 193, 214-15 (4<sup>th</sup> Cir. 2002).

<sup>21</sup> Some recent examples include: *In re Automotive Refinishing Paint Antitrust Litigation*, 358 F.3d 288 (3d Cir. 2004); *In re Linerboard Antitrust Litigation*, 305 F.3d 145 (3d Cir. 2002); *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651 (7<sup>th</sup> Cir. 2002); and *In re Baby Food Antitrust Litigation*, 166 F.3d 112 (3d Cir. 1999). There are also a number of examples of consolidations of federal direct and state indirect purchaser suits that were filed in and later removed from state court under currently available procedures. See, e.g., *In re Cardizem CD Antitrust Litigation*, 332 F.3d 896 (6<sup>th</sup> Cir. 2003). Thus the federal courts have had some significant experience managing combined direct and indirect purchaser actions, albeit under the most complex of conditions, having to apply a mix of federal and state standards.

challenges to dominant firm conduct under Section 2, precisely because the offender is a dominant firm and the purchaser may have few alternatives if the relationship sours.

As noted, in *Illinois Brick* the Court stated: “*Hanover Shoe* does further the goal of compensation to the extent that the direct purchaser absorbs at least some *and often most* of the overcharge.” 431 U.S. at 746 (emphasis added). First, even if that were true of the prohibition of defensive pass-on in *Hanover Shoe*, it was not necessarily true of offensive pass-on, which specifically enables compensation. By precluding a defense of pass-on, *Hanover Shoe* eliminated the possibility that an antitrust wrongdoer could in effect avoid liability on a “technicality.” “Who sued” was less important to the Court than what the offender had done.

More importantly, there was and remains no support for the Court’s presumption that “often most” of the overcharge will be borne by the direct purchaser. Pass-on may or may not occur in any given case. Under *Illinois Brick*, single products simply sold through minimal levels of distribution are lumped together and treated the same as component products sold through many. Such a “one size fits all” per se rule is ill-fitting to the broad range of possible circumstances.<sup>22</sup>

Even if it were true that direct purchasers frequently “absorb” overcharges, other factors might well lead the direct purchaser to hesitate before suing the supplier that feeds it – a point argued to the Court but downplayed in *Illinois Brick*. There is at least some experience since 1977 to suggest that the point is worthy of greater consideration. There are significant examples of major antitrust violations being challenged only or substantially by rivals, government, and indirect purchasers – but not by significant direct purchasers.<sup>23</sup>

First, if borne out by a more thorough study, that may well suggest that in fact the opposite of the Court’s assumption is true B that “often most” direct purchasers do pass-on all or part of the overcharge to their customers rather than “absorb” it. There are two important points to consider here. First, *Illinois Brick* may not have considered that whether the offender is a monopolist or a cartel, by definition it likely possesses market power. Hence, the direct purchaser may have few if any alternative sources of supply. Under such circumstances, direct purchasers may be especially reluctant to risk rupturing their relationships with their suppliers by initiating major antitrust litigation against them. Retaliation could be costly. Second, it may well be that if all competing direct purchasers face the same overcharge, they are more, not less likely, to pass it on, precisely because they know that all others have faced the same price increase. In a sense, a cartel problem has been solved, and they themselves may act as a cartel.

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<sup>22</sup> Use of a rigid indirect purchaser ban also places a premium on characterization: to be characterized as an “indirect purchaser” is to be banned from federal court. Hence, in unusual circumstances, characterization debates can themselves complicate litigation. See, e.g., *Blades v. Monsanto Co.*, 400 F.3d 562, 568 n.4 (8<sup>th</sup> Cir. 2005). Characterization debates also can lead to arguably perverse applications of *Illinois Brick*. One example may be *Campos v. Ticketmaster Corp.*, 140 F.3d 1166 (8<sup>th</sup> Cir. 1998), which concluded that purchasers of music concert tickets from Ticketmaster were *indirect*, not direct purchasers, and were hence barred from suit. Yet it was not at all clear from the court’s analysis who other than the concert ticket purchasers could be defined as a “direct” purchaser and hence who might ever have standing to sue to challenge the alleged antitrust violations of Ticketmaster.

<sup>23</sup> By definition, these cases are difficult to identify precisely because they have *not* been filed. One example may be *In re Warfarin Sodium Antitrust Litigation*, 391 F.3d 516 (3<sup>d</sup> Cir. 2004). Another example is the *Microsoft* follow on litigation. Although the district court certified a class of direct purchasing consumers, see *In re Microsoft Corp. Antitrust Litigation*, 214 F.R.D. 371 (D.Md. 2003), and a number of Microsoft rivals sued in their individual capacities, none of the major OEM direct purchasers of Microsoft Windows initiated treble damage actions against Microsoft.

Even if direct purchasers elect to sue, their litigation goals, strategies, and incentives may not necessarily align with those of indirect purchasers. Repairing their relationship with their suppliers and securing more favorable future terms may be more important to them than vindicating the consumer welfare policies of the antitrust laws. Settlements controlled solely by the priorities of direct purchasers, therefore, could lead to sub-optimal compensation and deterrence.

So much of the logic of *Illinois Brick* depends on the accuracy of these assumptions that their potential weakness should not be ignored. If direct purchasers lack the incentive to sue B either because of pass-on or fears of rupturing valuable relationships with their suppliers – there will be little or no compensation and greatly diminished deterrence. In such circumstances, state *Illinois Brick* repealers may provide the sole means of recourse to injured consumers.

**Apportionment as Per Se Complex.** *Illinois Brick* further suffers from the same infirmity as do all *per se* rules. It assumes that “always or almost always” pass-on will be immeasurable. If that is not the case, the *per se* rule will seriously under-deter.

As Justice White argued in dissent in *Kansas v. Utilicorp.*, a sensible application of his opinion in *Illinois Brick* would treat it as an “exception”, applicable only in circumstances where the plaintiff can offer no readily provable damages:

In sum, I cannot agree with the rigid and expansive holding that in no case, even in the utility context, would it be possible to determine in a reliable way a pass-through to consumers of an illegal overcharge that would measure the extent of their damage. There may be cases, as the Court speculates, where there would be insuperable difficulties. But we are to judge this case on the basis that the pass-through is complete and provable. There have been no findings below that this is not the fact. Instead, the decision we review is that consumers may not sue even where it is clear and provable that an illegal overcharge has been passed on to them and that they, rather than the utility, have to that extent been injured.

None of the concerns that caused us to bar the indirect purchaser's suit in *Illinois Brick* exist in this case. For that reason, rather than extending the *Illinois Brick* exception to '4's grant of a cause of action to persons injured through anticompetitive conduct, I would hold that the petitioners in this case have standing to sue. This result would promote the twin antitrust goals of ensuring recompense for injured parties and encouraging the diligent prosecution of antitrust claims.<sup>24</sup>

I agree with the sentiment that not all indirect purchasers are created equal. There may be some – perhaps many – instances in which a class of indirect purchasers cannot assemble an economically sound model for apportioning damages. In those cases summary judgment may be appropriate for the defendant. But there was and remains no basis for presuming, without any opportunity to at least offer evidence, that that will “always or almost always” be the case.

**Multiple Recovery as a Genuine Threat.** My research has disclosed that some of the Justices in *Illinois Brick* were seriously perturbed by the lack of evidence that any defendant had in fact been ordered to pay out duplicative recovery. Nearly thirty years later, that has not changed. Duplicative recovery remains a theoretical problem.<sup>25</sup> Even if it has perhaps become a more viable theoretical problem as a

<sup>24</sup> *Kansas v. Utilicorp. United, Inc.*, 497 U.S. at 225-26 (White, J., dissenting).

<sup>25</sup> In a somewhat unique circumstance, defendants in the follow-on private litigation to the FTC's case against Mylan argued that the FTC's procurement of a settlement on behalf of indirect purchasers precluded certification of a later class of direct purchasers on the ground that duplicative recovery would result. See *In re Lorazepam & Clorazepate Antitrust Litigation*, 289 F.3d 98 (D.C. Cir. 2002).

consequence of the split of cases between federal and state courts, actual examples of multiple recoveries through verdicts seem to be difficult to identify.

It has nevertheless been argued that the mere theoretical threat of multiple recovery may enhance the settlement value of related cases. Even so, it seems largely implausible that any firm or group of firms has ever agreed to a settlement that can be equated with “multiple recoveries”, i.e. six-fold damages. If so, it could only have been the most serious antitrust offender. In any event, eliminating the split of cases between state and federal courts and facilitating joint management of related direct and indirect purchaser litigation would likely all but eliminate this “risk.”

In conclusion, legislative preemption of *Illinois Brick* repealers would be “beneficial” only in the same sense that repeal of Section 4 would be – of course, with no right of action, there would be less litigation and no evidentiary challenges. But such an Act would amount to the single most profoundly anti-consumer antitrust enactment in history, cutting off as a matter of law any hope of consumer recovery even in the most “clear and provable” cases of pass-on.

As noted above, the second major substantive option often mentioned is overruling *Illinois Brick*. Despite my strong views on the continued importance of indirect purchaser rights, I do not support a simple overruling of *Illinois Brick*. We are far beyond the point where simply overruling *Illinois Brick* can solve the management problems created by parallel federal and state proceedings. Even if the federal courts were re-opened to indirect purchasers, forum shopping could well continue in the state courts owing to differences in pleading requirements, class certification standards, summary judgment standards, and proof standards. Hence, I reject the idea that the substantive choice is between preempting *Illinois Brick* repealers and overruling *Illinois Brick*. The real choice is between permitting indirect purchasers to continue to sue in state courts, or re-establishing their right to sue in federal courts, albeit with added procedural safeguards designed to address the legitimate, even if overstated, concerns expressed by the Court in *Illinois Brick*.

#### *Procedural Reform Options*

As noted above, if a substantive solution cannot be secured, procedural solutions are available that can ameliorate much, if not all, of the negative consequences of remedial diversity. The Class Action Fairness Act of 2005, Pub. L. No. 109-2, may be a useful model, although it does not go far enough and is simply not tailored to the problems of indirect purchaser litigation.

Section 4 of the Act, “federal District Court Jurisdiction for Interstate Class Actions”, amends 28 U.S.C. ' 1332 (the diversity statute) to expand federal jurisdiction and hence expand removal jurisdiction. It does so by altering several long-standing rules affecting diversity class actions.<sup>26</sup>

In *Snyder v. Harris*, 394 U.S. 332 (1969), the Court held that class representatives and class members cannot aggregate their damages in order to satisfy the minimum amount in controversy requirement of the diversity statute. In *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973), the Court went further, holding that even where the class representative meets the minimum amount in controversy, supplemental jurisdiction

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Other sections of the Act provide for increased scrutiny of coupon settlements, attorneys fees petitions in coupon settlement cases, and class member payments to counsel, all of which apply to all class actions filed in federal court.

cannot be used to include class members in a diversity class action – each and every member of the class must meet the minimum amount in controversy.<sup>27</sup>

Two additional rules concerning the determination of citizenship also affect class actions. The long-standing general rule is that diversity must be “complete”, i.e. each and every plaintiff must be diverse from each and every defendant. *Strawbridge v. Curtiss*, 3 Cranch 267 (1806). In the case of class actions, the Court has long held that the citizenship of the class must be determined by looking solely at the class representative. *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921). Hence the class representative cannot be a citizen of the same state as any adverse party.

The Class Action Fairness Act expands federal court jurisdiction by loosening most of these requirements, although it imposes others. Under the Act, class members may aggregate their damages and only minimal diversity is required. Moreover, diversity of citizenship can be based on the class representative or any class member. On the other hand, the Act only applies to plaintiffs classes of more than 100, and the aggregate minimum amount in controversy must exceed the sum or value of \$5 million. Also, the federal courts must decline jurisdiction in some circumstances and have the discretion to decline in others.

The Class Action Fairness Act thus may apply to some indirect purchaser class actions filed in state court – but its conditions, limitations, and exceptions, designed with certain kinds of torts in mind, may limit its utility for antitrust.

An “Antitrust Procedural Improvements Act of 2006” could borrow some of the methodology of the Class Action Fairness Act, but more specifically provide for better procedural options for removing and thereafter coordinating related state and federal indirect and direct purchaser suits. Some such removal and transfer is already being accomplished through existing jurisdiction and procedure rules, but significant numbers of cases probably remain beyond the scope of federal removal statute.

As I have previously outlined,<sup>28</sup> such a proposal would include the following basic features:

- removal authority over related indirect purchaser actions would be expanded to the constitutional limits;
- federal courts would be granted antitrust-specific expanded authority to use MDL procedures to transfer and consolidate related direct and indirect purchaser actions for pre-trial and trial.

There are many details to these proposals that are discussed at length in my 2001 article, and I refer the Commission to that article for a more complete exposition of this approach.

Compared to current practice, such an approach would concentrate more related cases in a common forum. Although bigger is not always better - combining many cases, even related ones, could

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<sup>27</sup> Until recently, there had been a split of authority in the federal courts as to whether the 1990 Supplemental Jurisdiction Statute, 28 U.S.C. ' 1367, effectively overruled *Zahn*. See Gavil, *Federal Judicial Power*, *supra* note 2, at 870-76. That split was resolved on June 23, 2005 by *Exxon Mobil Corp. v. Allapattah Svs., Inc.*, 125 S.Ct. 2611 (2005). By a 5-4 margin the Court held that Section 1367 did in fact overrule *Zahn*. Hence, it will now be possible to initiate a diversity class action in federal court B or remove one filed in state court B provided that any single plaintiff meets the minimum amount in controversy. This will make it easier for some indirect purchaser actions to be originally filed in federal court, or removed from state court.

<sup>28</sup> See Gavil, *Federal Judicial Power*, *supra* note 2, at 887-901.

increase the complexity of the management of the collected cases – it could have the advantage of diminishing duplicative discovery and litigation, and facilitating consistent pre-trial treatment of related direct and indirect purchaser suits. If concentration continued through trial, it would also facilitate damage apportionment and hence allow for specific controls over the possibility of multiple recoveries.

Procedural solutions, however, are a compromise. On the one hand, they could greatly improve the management of related direct and indirect purchaser cases and perhaps lessen the incentives to forum shop. A procedural solution might also permit states to retain a sphere of autonomy in the matter of indirect purchaser rights. That autonomy can express itself not only in the definition of the scope of indirect purchaser rights, but in many other ways, such as pleading, class action, summary judgment, and expert witness standards. On the other hand, retaining that autonomy may come at a significant price. Differences between federal and state standards on such issues add their own level of complexity to consolidated litigation, multiply proceedings, and reintroduce the possibilities of inconsistency. When direct and indirect purchaser cases are consolidated in federal courts, federal judges can be called upon to interpret and apply the laws of many states on a variety of pre-trial issues. And if transfer under MDL proceedings remains limited to pre-trial under *Lexicon*, the ultimate decisions on aggregate and apportioned damages may be beyond coordination.

#### *Hybrid Substance-Procedure Options*

Another legislative approach would be directed at resolving the substantive tension generated by *Illinois Brick* and *ARC America*. It would consist of three components: (1) overrule *Illinois Brick*; (2) preempt all state antitrust laws conferring rights on indirect purchasers except in substantially intrastate matters and establish *exclusive* federal jurisdiction over related direct and indirect purchaser claims that affect interstate commerce in federal court; and (3) establish an antitrust specific interpleader statute that would allow for all direct and indirect purchasers to sort out allocation issues in a single proceeding once liability and aggregate damages have been established.

First, *Illinois Brick* would be expressly overruled, restoring indirect purchaser rights in federal courts. This alone might lead many indirect purchasers to elect to file in federal court. But others might not. As a result, the mere availability of indirect purchaser rights in federal court would not foreclose the kind of forum shopping, management, and consistency problems that exist today.

Second, to address that contingency, indirect purchasers would not merely be permitted to sue in federal court, they would be *required* to do so when their suits meet a threshold test of interstate commerce and are related to other direct or indirect purchaser suits pending in other state or federal courts.<sup>29</sup> In other words, state indirect purchaser rights would be pre-empted in favor of federal rights.

Third, because overruling *Illinois Brick* and preempting all state indirect purchaser rights<sup>30</sup> alone might still not resolve all of the issues now extant in the federal and state courts, new procedures would also be needed to guide courts in managing the consolidated cases in a way that specifically addresses and

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<sup>29</sup> This would be analogous to current Federal Rule of Civil Procedure 13(a), which makes certain counterclaims compulsory - i.e., they must be brought or they are later precluded.

<sup>30</sup> There would have to be three important exceptions to preemption. First, in the rare case of overwhelmingly intrastate antitrust violations, it would be hard to make the case for an exclusive federal remedy as a matter of constitutional authority. Second, absent pending and related cases in federal court or in other state courts, there would be no justification of such an invasion of state prerogative. Finally, cases initiated by the state on its own behalf or on behalf of its citizens would be permitted to go forward in state court.

diminishes the concerns voiced in *Illinois Brick* about apportionment, multiple damages, and the burdens on defendants forced to litigate these complex issues.

A critical factor in the success of this approach would be trifurcation. Phase I proceedings would focus on liability, and might well be relatively abbreviated in follow-on suits due to Section 5 of the Clayton Act. In Phase II, the plaintiffs – as a group – would litigate with defendants the aggregate amount of damages, for example, the “overcharge.” In Phase III, absent unusual circumstances, the defendants would be excused. As is true in interpleader, they would have no specific interest in litigating how the shared fund should be allocated. Hence they would be relieved of the responsibility and costs of litigating allocation issues. Like the typical interpleader action, the parties vying for portions of the fund would alone litigate – or settle – the allocation issue. Direct and indirect purchasers would be put to the test of evidence in establishing their respective claims to the “common fund” created by the first two phases.<sup>31</sup>

For the competing claimants, failure to establish either liability or aggregate damages would end all litigation and render the phase three proceeding unnecessary. A combination of a dedicated statute of limitations and preclusion doctrine also would help to define the window during which direct and indirect purchasers could initiate actions of their own or intervene in the consolidated action. Failure to file or intervene within the specified time period would, as with compulsory counterclaims, preclude any subsequent action over related events.

This proposal, too, is a compromise, but one that strikes a more reasonable balance among compensation, deterrence, federalism, and concerns about litigation management and fairness to defendants.

Subject to uniform standards of proof that would now develop in the federal courts, the rights of direct and indirect purchasers would be equalized and rationalized. Both compensation and deterrence would be served, as would institutional interests in avoiding overlapping and inconsistent litigation. Far fewer judicial and litigant resources would be consumed. Defendants would be relieved of the burdens of defending related actions in multiple forums, state and federal, but would not as readily be in a position to retain the spoils of their anticompetitive conduct in those cases where direct purchasers fail to sue.

Federalism also will be served in the end. The generation old federal-state battle over indirect purchaser rights would come to an end, and it would be a consequence of healthy federal-state dialogue. Those who have advocated preemption based on *Illinois Brick* would have to be satisfied with preemption of state indirect purchaser rights. And state officials concerned about the fate of their indirect purchasing consumers should find some solace in seeing those rights restored in federal court. Hopefully, all of those who have been affected, or will be, by direct and indirect purchaser litigation will find common ground in the new, unified procedures available in federal court to resolve all related direct and indirect purchaser litigation – by far a preferable method to resolving these disputes than the current split between state and federal courts.

#### **4. Conclusion**

Today we are the victims of circumstance. As Justice Blackmun argued in dissent in *Illinois Brick*, in this area of law, timing is everything. Had *Illinois Brick* come to the Court before *Hanover Shoe*, he predicted, it would have been an easy case, and would have been decided the other way.<sup>32</sup> Similarly, today

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<sup>31</sup> One option might be to retain the traditional civil burden of proof – “preponderance of the evidence” for establishing the aggregate amount of damages, typically the overcharge, but to impose an elevated burden of proof, such as “clear and convincing evidence,” on indirect purchasers seeking apportionment.

<sup>32</sup> *Illinois Brick*, 431 U.S. at 765 (Blackmun, J., dissenting).

we face the world created by *Illinois Brick* and *ARC America*. Ironically, it is a world in which the fears of the majority in *Illinois Brick* are more likely to be realized.

The solution is not to be found in the seductively simple invitation to pre-empt state laws granting indirect purchaser rights. Those laws correctly viewed *Illinois Brick's* per se rule with skepticism. Neither is a solution to be found in simply overruling *Illinois Brick*, while leaving its state progeny in place.

The better route, even though it may take some time to fully unfold, is to embrace the opportunity for productive federal-state dialogue and bring indirect purchasers back into the fold, but with safeguards that recognize the concerns expressed by the Court in *Illinois Brick*.

Sadly, the combination of *Illinois Brick* and *ARC America* robbed the federal courts of a generation of opportunities to develop clear and nationally uniform standards of proof for apportionment of damages among indirect and direct purchasers. By returning those cases to federal court, we can reinitiate an orderly process of development, hopefully striking a more reasonable balance between the interests of consumer welfare that are so fundamental to our antitrust laws and the real challenges of managing modern, multi-party, multi-forum antitrust litigation.

Appendix to Gavil Prepared Remarks**Antitrust Case Statistics  
Federal Filings**Table 1 – Administrative Office of the United States Courts  
Civil Antitrust Cases Filed 1997-2004<sup>1</sup>

	<b>Total # Federal Civil Antitrust Cases Commenced</b>	<b>Commenced by U.S.<sup>2</sup></b>	<b>Private</b>	<b>Class Actions</b>	<b>Class Actions as % of Private Cases Filed</b>
<b>1997</b>	598	28	570	78 <sup>3</sup>	14%
<b>1998</b>	580	32	548	60	11%
<b>1999</b>	645	37	608	100	16%
<b>2000</b>	858	47	811	213	26%
<b>2001</b>	723	16	707	122	17%
<b>2002</b>	826	20	806	126	16%
<b>2003</b>	762	33	729	97	13%
<b>2004</b>	752	21	731	116	16%

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<sup>1</sup> These statistics are for civil cases only, reported on a September to September year. Source: Administrative Office of the United States Courts, Judicial Business of the United States Courts, Annual Report of the Director, Tables C-2; C-2A & X-5, available at <http://www.uscourts.gov/judbususc/judbus.html>.

<sup>2</sup> The U.S. statistics are broken down further by the Administrative Office into “plaintiffs” and “defendants” cases, but it is unclear what the reference to the U.S. as a defendant in an antitrust case might mean.

<sup>3</sup> The class actions statistics are further broken down into government and private, although all years are private except for 1997, where one of the 77 was listed as U.S..

Table 2: Federal Antitrust Cases Commenced  
1977-1984<sup>4</sup>

	<b>U.S. Cases</b>	<b>Private</b>	<b>Totals</b>
<b>1977</b>	78	1611	1689
<b>1978</b>	72	1435	1507
<b>1979</b>	78	1234	1312
<b>1980</b>	78	1457	1535
<b>1981</b>	142	1292	1434
<b>1982</b>	111	1037	1148
<b>1983</b>	95	1192	1287
<b>1984</b>	101	1100	1201

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<sup>4</sup> This data is excerpted from Steven C. Salop & Lawrence J. White, *Private Antitrust Litigation: An Introduction and Framework*, in LAWRENCE J. WHITE, ED., PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING 3, 4 (1988). Salop and White's data covers 1941-1984 and was assembled from multiple sources. "U.S. Cases" includes criminal and civil cases.

Table 3 – United States Department of Justice, Antitrust Division  
Workload Statistics: Cases Filed 1995-2004<sup>5</sup>

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
# Criminal Cases Filed	60	42	38	62	57	63	44	33	41	42
# Civil Cases Filed	26	27	21	23	29	23	10	7	14	8
<b>Totals</b>	86	69	59	85	86	86	54	40	55	50

Table 4 - Federal Trade Commission  
Antitrust Nonmerger Cases 1990-2002<sup>6</sup>

1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002
6	6	10	12	12	12	6	4	13	7	10	3	10

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<sup>5</sup> United States Department Justice, Antitrust Division, Workload Statistics, FY 1995-2004, available at <http://www.usdoj.gov/atr/public/workstats.htm>. Note that the DOJ Statistics appear to differ from the Administrative Office's. This could be due in part to the reporting period utilized or other factors.

<sup>6</sup> This data is excerpted from William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Norms*, 71 ANTITRUST L.J. 377, 478 (2003) ("Appendix A"). Professor Kovacic's data on FTC antitrust nonmerger cases covers January 1961-July 2003.

## SUMMARY OF DISCUSSION\*

The Chair opened the program and asked Mr. Philip Lowe to present the views expressed in the Commission's Green Paper on private remedies on passing on defence, indirect purchaser standing, and definition of damages. Mr. Lowe explained that Community law did not recognize a passing-on defence, but there could be a claim of unjust enrichment. Community law did not contain specific rules on indirect purchaser standing, although the recent *Courage v. Creehan* judgment could be read as ruling out any restrictions on indirect purchaser standing. The questions for Community law were (i) should there be any rules on the passing-on defence; (ii) should indirect purchasers have standing; and (iii) what criteria should be used when assessing the impact of different options on efficiency and effectiveness of antitrust damages claims? Answering these questions would require balancing of a number of factors, including deterrence, compensation, and efficient administration of justice. Mr. Lowe then explained the four policy options for indirect purchaser standing and passing-on defence that the Green Paper had identified.

As to damages, the Green Paper explained that damages should at least compensate for loss suffered, including overcharges, lost sales, and interest. Victims would be more encouraged to bring actions if they could expect more than just simple compensation. High interest or compound interest would create such an incentive. The damage suffered by the victim might be lower than defendant's unlawful gain which would suggest that the damage awards could be based on the defendant's gain. The issue of multipliers remained controversial in Europe. According to the Green Paper, introducing a multiplier of two could be considered for victims of hard core cartels. Quantification of damages could be difficult, and it should therefore be considered to introduce a two-step procedure with separate procedures for the finding of liability and the determination of damages.

### 1. Passing-on Defence & Indirect Purchaser Standing

Professor Gavil started his presentation by emphasizing that several issues related to passing-on defence and indirect purchaser standing involved difficult trade-offs and balancing, and that there was very little empirical evidence on some of the critical points. Professor Gavil next discussed *Illinois Brick* and *Hanover Shoe*, two landmark decisions on private action in U.S. antitrust law. He explained that the two cases addressed to distinct sides of a particular issue. *Hanover Shoe* ruled out a passing-on defence; *Illinois Brick* barred suits by indirect purchasers in federal courts under federal antitrust laws. The *Illinois Brick* Court reasoned that the rules on indirect purchasers should be symmetrical to the *Hanover Shoe* rule on passing on defence. The Court was also concerned about multiple damage awards and the complexity of proceedings, and that deterrence would be impaired if indirect purchaser actions were allowed. The Court also reasoned that compensation could be addressed by damage awards to direct purchasers. Professor Gavil pointed out that the symmetry argument appeared to be flawed. *Hanover Shoe* was a pro plaintiff case consistent with the then prevailing philosophy of the Court, but the *Illinois Brick* Court had a different, more restrictive philosophy and handed down a pro-defendant decision.

Professor Gavil reported that several states adopted *Illinois Brick* repealer statutes that authorized actions by indirect purchasers at the state level, a practice authorized by the Supreme Court in *ARC America*. The result was multi forum and multi district litigation with overlapping and duplicative actions

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\* This discussion was held in February 2006.

in state courts by indirect purchasers and in federal courts by direct purchasers. Removal from state courts to federal courts was possible, but limited even after recent reforms. The situation encouraged forum-shopping as plaintiffs would seek the path of least resistance to bring their suits. The system created significant deterrence, but at huge costs. For example, the U.S. government's case against Microsoft was followed by more than 180 follow-on class actions. The United States had several policy options: It could continue the current remedial diversity, or use federal pre-emption to either confirm or repeal *Illinois Brick*. A possible consensus might emerge that it would be preferable to repeal *Illinois Brick* at the federal level and allow indirect purchaser suits back into federal courts.

Concerning *Illinois Brick's* assumption about incentives to bring actions, there was a real question whether direct purchasers would sue. In many cases they did, but in significant cases they did not because they did not have the incentive or were concerned about the reaction of their suppliers. This situation could have significant consequences in terms of deterrence and compensation. Other important issues included the level of evidence required to prove pass-on, the allocation of damages, and how real the threat of multiple recovery was. These factors would influence the question whether it was better to keep the *per se* rule of *Illinois Brick* or whether there was a sufficient number of exceptions where direct purchasers did not sue. Professor Gavil pointed out that in the past 30 years there had not been a single documented case where multiple damages had been awarded. The fear of multiple recovery, however, could influence settlements. There was also no court judgment concerning the allocation of damages. These issues would be settled among the parties.

Professor Gavil argued that *Hanover Shoe* and *Illinois Brick* could have been reconciled around the idea of deterrence. Deterrence would have been maximized if passing-on defence would have been ruled out and indirect purchasers suits would have been allowed in federal courts. The current rule precludes large classes of customers (mostly, but not only consumers) from recovering for damages. This was particularly troublesome from a consumer welfare perspective. Professor Gavil emphasized that deterrence and compensation are determined by a number of factors that form an organic competition policy "system." It would be difficult to change only one of the factors without taking account of the others. Substantive standards, evidentiary rules, and procedural rules would all be part of a broader "mix." Professor Gavil closed with five recommendations: First, it would be worthwhile to keep records of case filings, not only of judgments, in order to obtain better information about the level of private enforcement. Second, fears of uncertainty should be addressed by adopting clear substantive rules and by requiring significant standards of proof. Strict proof standards would be preferable to *per se* rules. Third, rules should be flexible, but consensus should be sought over time. Fourth, the adequacy of procedural infrastructure was crucial. Fifth, it was important to think in terms of competition policy systems.

Mr. Baron explained that one goal of competition law reform in Germany had been to make private litigation more effective, focusing on damages claims and follow-on suits. Public enforcement would remain the main pillar of enforcement and private enforcement was viewed as complement with a focus on compensation. Issues like optimal penalty or optimal levels of deterrence should be left to public enforcement. Mr. Baron explained that the initial draft amendment to the Competition Act explicitly excluded passing-on defence. The Ministry of Justice initially opposed this solution as it saw this issue as a matter of civil law, not a competition law specific issue. Ultimately, the passing on defence was excluded in the new German act, although with a small exception in exceptional circumstances. Passing-on was a controversial issue. Especially business representatives argued against the exclusion of the passing-on defence. They argued that there might be enrichment of direct purchasers and that consumers would be discriminated against. But in the government's view, even if there was a risk of enrichment of direct purchasers, this was still better than enrichment of a defendant who had infringed competition law.

Germany had not adopted an explicit rule as to indirect purchaser standing. The prevailing view in Germany assumed that this issue has not been decided by the Court of Justice in *Crehan*. In the few cases

where direct purchasers do not bring an action, indirect purchaser should be entitled to sue. But these would be exceptional cases, and necessary rules could be developed by courts. Legislation should focus on most typical cases. In any event, indirect purchaser actions were unlikely because of the difficulty of proof and the very small amounts involved. As an example, Mr. Baron referred to two private actions that were brought in Germany. Both were follow-on suits to the vitamins cartel, one concerning baby food, the other sweets. In both cases it would have been virtually impossible for individual consumers to prove damages based on individual purchases of items which incorporated vitamins many years earlier. Collective actions would not necessarily help because they would only combine the problems of individual claims. The German solution was to allow the Cartel Office to skim the unlawful gains of a competition law infringement. Consumer association were not entitled to bring disgorgement actions.

Mr. Baron also mentioned that forum shopping already existed to some extent in Europe: In one recent case, an English court accepted an action brought by a German company against another German company.

The Chair highlighted the differences between an approach that would emphasize a more systemic view of a private enforcement system and an approach that would separate various issues and look at each individually.

Professor Page commented on the presentations by emphasizing that private remedies should be primarily a device of deterrence and that compensation should be viewed as a by-product. This view was based on the experience with indirect purchaser class actions in the United States. One of the primary thresholds to determine whether a class action can proceed was whether it could be established by class-wide proof that each individual was harmed; proof for one is proof for all. Some states took a stricter view, others have taken a more lenient view on this issue. In states with stricter rules, many classes will not be certified. Allowing in this situation indirect purchasers to sue will not affect much. In states where class certification is more lenient, cases almost immediately settle. But frequently the damage awards did not reach consumers that were harmed and the money is given to public causes. The result would be an almost complete waste of resources since compensation of those who suffered harm did not actually occur. A focus on deterrence would therefore be preferable. Thus, maintaining *Illinois Brick* was preferable, whether or not it would bring a windfall to the direct purchaser, because it brings greater deterrence.

Italy raised the question whether direct and indirect purchasers can bring suits together, and if so, what mechanism was in place to avoid double-counting in awarding damages.

Professor Gavil explained that following the Class Action Fairness Act actions by indirect and direct purchaser can be more easily coordinated and consolidated. Even when cases could not be consolidated in the past, the defendants would usually refuse to settle direct purchaser cases unless they can also settle with indirect purchasers. Thus, to some extent they worked informally outside the system to coordinate their cases. There has not been any case where a court actually had to decide on the allocation of damage awards between the two groups. Experts have developed economic models to do such an allocation for settlement purposes, but these were not part of the public record.

Ireland explained that the area of private litigation was not much developed and that there had been very few private actions. But rules are being adopted for private competition cases. The Competition Act used the concept of the "aggrieved person" to define who would have standing to bring an action. Although the term was used in a number of Irish statutes, its meaning was not entirely clear and the issue did not receive much attention when the law was adopted.

The United Kingdom noted that there was no case law on the passing-on defence, although it likely would be recognized. In any event, it would be a defence and therefore the defendant would have to prove

that there was passing on. Secondly, referring to the discussion about compensation and deterrence, the United Kingdom raised the question whether there should be a rule requiring that settlements be published to increase their deterrent effects.

Norway reported that when the new competition law act was adopted in 2004, rules concerning passing on defence and indirect purchaser standing were not considered. There was no case law on these issues, but it was likely that passing on defence was allowed, and that indirect purchasers had standing. When the new law was adopted, a report was commissioned on these issues. The report proposed that the passing on defence should be excluded and that indirect purchasers should not have standing. The report's author reasoned that competition damage cases frequently would be very complex, and that indirect purchaser suits would not be very practical.

Switzerland explained that no clear procedural rules or doctrine existed concerning the passing-on defence and indirect purchaser standing. The competition law included a provision concerning damage claims, but it did not cover actions by end consumers. The general rules of private law suggested that direct purchasers who passed on an overcharge had not been harmed and therefore could not bring an action. Indirect purchasers could bring a damage claim, but the complicated issues arising in this situation meant that the likelihood of successful claims would be reduced to zero. The Swiss system did not look favourably at the use of multipliers.

Netherlands explained that a lower court had held in one case that the passing-on defence was not allowed. But the court found that there was a duty on the plaintiff to limit damages which could have the same effect as a passing-on defence. The Netherlands also asked how many of the more than 800 reported private cases in the United States were independent cases, and how many were follow-on cases after a competition authority had adopted a decision.

BIAC commented that business would look at these issues from both the plaintiff and the defendant side. It would be necessary to balance various policy factors, including efficacy, deterrence, compensation, interaction between public and private enforcement, and the need for harmonization. Excessive deterrence should be avoided and at least outside of the United States private enforcement should be viewed as complement to public enforcement. It would be important to avoid significant burden on business. Germany's reforms could be seen as an example for a balanced approach and for making the right judgments.

The United States emphasized the importance of monitoring settlements in private litigation. It would be useful for public enforcement agencies to monitor settlements because there might be instances where the interests of class counsel might diverge from the interests of the members of the class. The United States also pointed out that deterrence could come from detection as well as from punishment. The main deterrence element of private action comes from punishment. It could be instructive to look at known cartel cases to better understand incentives to bring an action, such the Vitamins cartel or the Electrical Equipment cartel. These cases suggested that the direct purchasers may not be willing to bring an action because of their supplier relationship, but also because they are mostly concerned about how much their rivals were charged. Purchasers also were satisfied when they knew that the suppliers' prices were not subject to negotiation. In the Electrical Equipment cases, there was evidence that the purchasers knew that bid rotation was going on but decided not to sue.

Mr. Baron pointed out that there might be a difference between theory and practical solution. Theory might be the same across countries, but practical solutions might differ and be more country specific. In Germany, punishment was not the goal of private enforcement. If punishment was insufficient, the Cartel Office could impose higher fines. The key challenge was a change in attitudes. People did not feel guilty

for participating in cartels and claimed that they did not inflict any damage on others. Private enforcement can highlight the harm cartels can cause for consumers.

In response to Italy's question, Professor Gavil explained that aggregation models existed as they were used in some settlements, but they would not be part of the public record. He agreed that the Hanover Shoe/Illinois Brick model was simpler and would create less litigation, but that would be true of every per se rule. Opposition to efforts to overrule Illinois Brick came mostly from defendants and the defence bar, which suggested that the current system has some deterrent value. Concerning the publication of settlements to increase deterrence, Professor Gavil mentioned that settlements in the United States were confidential. In class actions more information tends to be on public record because court approval was required for a settlement. He also explained that reliable statistics that estimated the number of follow-on cases and independent cases were not available. But there were indications that the number of follow-on cases was significant. For example, in 2000 the number of civil actions including class actions spiked, almost certainly as a result of private cases brought as follow-on actions after public enforcement in major cartel cases.

Professor Page mentioned that even though models used by economists to estimate and allocate damages were not public, important insights could be gained from class certification procedures; in these procedures, economists must disclose enough information to convince a court that they would be able to offer evidence that could prove overcharge. For example, indirect purchaser certification decisions in Microsoft follow-on litigation give a good picture of the testimony of economists. Courts also had to approve final settlements from which one can understand the allocation of damage awards. As to the question of follow-on or independent action, Professor Page pointed out that a follow-on suit can be substantially different from the public enforcement case. In Microsoft, for example, the theory of harm in follow-up cases was substantially different from the government's case and the government case provided almost no support for the private cases.

Mr. Lowe observed that there were two important messages emerging from the discussion. First, it would be important to formulate the fundamental objective of the reforms. From there, the best methodology could be developed. The objective of the system should be to discourage anticompetitive conduct whether it harms direct or indirect customers. Private remedies should complement public enforcement. But private action can enlarge the scope and go beyond public enforcement. With respect to deterrence, taking a systemic view was important. Many factors would have to be taken into account. The German system had come down in favour of simplifying the process. It found that allocating damages was too complex for an effective judicial system and favoured actions brought by direct purchaser. But this would leave open the question about the ultimate effect on consumer interests. Engaging consumers in actions where they believe that they have been harmed should not be neglected.

The Chair added that judicial process should lead to legal certainty. That would raise the question as to how one could bring economic expertise to court proceedings, without replicating a US style system with a battle of economists. If that issue could be resolved, judges would be more comfortable as they would feel that they can control and understand the issues before them.

## **2. Damages**

Professor Page began his presentation with an overview of treble damage actions under the Sherman Act. He explained that the number of cases increased after the Electric Equipment cartel cases, and peaked in 1977. Since then they declined which reflected changes in substantive rules, decisions concerning antitrust damages and the *Illinois Brick* rule. There were three lessons to be learned from this brief history: First, the creation of treble damages alone would not result in a large number of actions. There had to be a system of procedural and substantive rules to make private action effective. Second, treble damages

actions could go too far. Plaintiffs would act only in their own best interest and not the public interest, and would sue whenever they have the opportunity. Third, it was possible to shape private remedies through legal reforms (*e.g.*, standing, summary judgment, antitrust injury and standing) so that private action can function within a system that has realistic economic goals.

The model of optimal deterrence should be used to evaluate a system of private remedies. Private remedies should contribute to goal of antitrust laws, which is increasing consumer welfare. In this view, deterrence should be the overriding goal, and compensation should be secondary. Of course, the distinction between deterrence and compensation could be overdrawn. Damages based on compensation to those that were actually injured can be used to motivate an effective enforcement mechanism. In the model of optimal deterrence, the penalty could be defined by the net harm of the offence to persons other than the offender. Professor Page explained that antitrust offences could have three effects: a transfer of wealth from consumers to producers; a reduction in output, *i.e.*, the deadweight cost; and sometimes actions that violate antitrust laws can increase social welfare. For example, horizontal practices could create benefits. Penalties should deter only conduct that reduces social wealth more than increases it.

The remedy should reflect the level of harm to consumers and social cost. Whatever amount that was, it should be multiplied depending on the likelihood that the offence would be detected. The treble damages system in the United States tried to replicate a model that accounted for the likelihood of detection. But it was a rather crude mechanism and did not accomplish that goal very well because it made no distinction based on whether the offence was concealable or not. In addition, pre-judgment interest usually could not be awarded, so that the damage award usually did not reflect the level of harm caused by the offence. Despite some arguments to the contrary, there was a place for private actions. Public enforcement could be influenced by factors other than the public interest, and private enforcement could harness incentives for discovering offences, gathering evidence, and creating theories of liability. Private remedies could be constrained by rules that shape the measure of damages to approximate the optimal remedy. One example would be the antitrust injury doctrine.

Professor Page also commented on several issues raised in the European Commission's Green Paper. He suggested that according to the optimal deterrence model the measurement of damages should focus on the harm to victims. This would be more in line with the net harm concept. For example, a damage award should not be reduced because the costs of running a cartel have decreased the cartel participants' gains. At the same time, if the cartel reduced cost, the damages award should not be larger. However, in certain cases, such as consumer class action, it may be easier to measure the defendant's gain than the plaintiff's harm. In those cases awarding damages based on unjust enrichment might be justifiable. In jurisdictions where a remedy of public disgorgement was available (such as in Germany or in the United States), it should be used judiciously to avoid duplicative recovery, unless duplicative recovery was intended.

Professor Page emphasized the important role of the antitrust injury doctrine. Without the appropriate limitations, plaintiffs would seek any opportunity to bring actions wherever private harm was caused. In Europe, substantive rules might be more expansive which might magnify these dangers. For example, there might be more room to argue that the interests of competitors are protected in mergers or abuse of dominance cases, and thus there might be more incentives for competitors to bring damage actions. The antitrust injury doctrine also could become the basis for reform as it forces courts to focus on reasons for liability rules and re-examine such rules. In the United States, when courts applied the antitrust injury doctrine and sought to identify those that were legitimately harmed by an anticompetitive practice, they had an opportunity to examine the substantive rules as well.

Professor Page also pointed out that multipliers should be adopted. To do so primarily in cartel cases would make sense: cartels were concealable offences and in these cases rivals were the least likely to sue. In cartel cases, there was little risk of over-deterrence by applying multipliers too widely. First, legitimate

cooperative practices would normally not result in increased prices and reduced output. Second, in cases of exchanges on information, if there was an increase in price, it probably was the result of a tacit cartel. De-doubling damage awards in case of cooperation in leniency programs would make sense in order to increase the incentive to defect from a cartel. But it was not certain whether this was necessary before the multiple damage awards were a real threat. Prejudgment interest should be used, in particular if double damages were not available. But one should be aware that where pre-judgment interest was available in the United States, such as in patent cases, substantial disagreement could exist between parties over the appropriate calculation.

Mr. Baron explained that in Germany the definition for damages was considered a key issue in private damages system. A system of multipliers in damage actions would conflict with the general system of liability based on restitution and compensation. The German Monopolkommission had proposed the introduction double damages. But since deterrence should be achieved mainly by public enforcement, issues such as optimal deterrence should be answered by public enforcers. The use of multipliers also has been considered as a violation of the *ordre public*. The public opinion and Ministry of Justice also resist the idea of multipliers in damage actions as this would deviate from the deeply rooted system of liability. The solution adopted in Germany was an emphasis on prejudgment interest, which was compulsory from the moment the injury occurred. As there could be a significant time lag between the harmful act and the competition authority's decision or court judgment, the pre-judgment interest could frequently be substantial. The system was accepted by the industry which appeared to be satisfied that multipliers would not be used.

As to the definition of damages, Mr. Baron explained that the general rules of civil law would be applicable. Specific rules for damages in competition case were rejected. Damages are calculated based on the harm to consumers. This can be a more difficult calculation than using the gain of offender as basis for calculation. However, new provisions can facilitate the plaintiff's task. For example, profits of offender can be considered to estimate the plaintiff's damages. Germany was suspicious of using economic criteria to assess the level of damages. In "normal" cases, these methods would be difficult to apply. They could make it more difficult for plaintiffs to calculate damages. Private enforcement would not be enhanced. The German approach of using "*ex aequo et bono*" estimates of damages would be simpler and workable in practice.

In sum, German reforms should facilitate private action, but further changes will be towards a compensation culture was necessary. There were already encouraging signs: In the cement cartel case, for example, fines of € 700 million were imposed, and for the first time numerous follow-on suits for damages of €120 million were already launched.

The European Commission commented that deterrence should not be the prerogative of public enforcement, but should also be considered with respect to private enforcement. Public enforcement did not reach large number of competition law violations. The public authority would not be effective for other reasons as well. For example, in cartel cases, it was the role of public enforcement to specify the level of damages in the calculation of fines. There was a question, however, whether fines imposed by public enforcers were sufficiently high to effectively deter without additional element which goes much deeper into the question of real harm resulting from cartels. Second, there were other areas like unilateral conduct cases. Operators in the market can serve a useful role in supervising markets as competition authorities cannot go after all anticompetitive practices. Another example was information exchanges. This was not an easy area, but there were cases where information exchanges were blatantly anticompetitive, but again the competition authority could not pursue every case.

The Green Paper proposed doubling of damages only for cartels and not for other competition law violations. In the area of cartels, there was no harm to have parallel systems which could overall increase

deterrence. Double damages should not be looked at as punitive damages because simple damages would not provide enough incentive for plaintiffs to bring actions. Thus, double damages were merely a required financial incentive to support the purpose of compensation. The concept of prejudgment interest was considered an excellent idea. The Commission understood that settlements in the United States frequently were based on simple damages plus prejudgment interest.

Denmark commented that in some cartel cases, defendants claimed that cartels had no price effects and asked about experiences in cases where price effects were uncertain. Using rule of thumb calculations to assess damages may sound useful, but might not work in practice. What have courts accepted in practice if damage calculation was uncertain? Second, it would perhaps be useful to divide harm from cartels into static and dynamic effects. The static effect would focus on increased price. But the dynamic effects such as less R&D and less innovation can be even more damaging. Would courts be able to recognize also dynamic effects?

Lithuania explained that it had not much experience with private actions, although there were some cases pending. In one case, the court required plaintiffs to identify the amount of damages, but there were no clear rules as to how to calculate them. As to the concept of optimal penalties, it might be difficult to find the right balance between private and public enforcement.

The United Kingdom commented on a point made by Mr. Baron that optimal enforcement cannot be ensured through private action. A system of optimal enforcement should be comprised of both public and private enforcement, and that was a model that needed to be worked on. As to the use of economic criteria in assessing damages, the United Kingdom agreed that these methods can be difficult, in particular in an adversarial system. But using economic criteria would be necessary in the framework of an economics based competition system. The only alternative was criminal enforcement.

A system based purely on simple compensatory damages was unlikely to encourage private litigation. At least four add-ons could be used: pre-judgment interest; exemplary damages in the discretion of the court; double damages; and special rules concerning litigation costs, in particular for small plaintiffs.

Portugal raised a question about the interface between leniency program and private enforcement. Was the current system in the United States where leniency applicants were liable only for single damages a perfect solution?

BIAC commented that private enforcement should not be viewed as a cure for failures of public enforcement, but should be a complement. Compensation could be seen as part of deterrent effects. But treble damages were not necessarily an effective deterrent if only one in ten cases was detected. As concerns the theory of optimal harm, this concept had recently been rejected by European courts since it provided no workable framework. Prejudgment interest should not be viewed as double damages through the back door, but reflected only the time value of money. Rights of third parties in public enforcement cases had not been mentioned, but could be used to bring private party interests into public enforcement. Interim remedies could also be used much more effectively which could also improve the enforcement system. BIAC reminded delegates that there was a balance between more private action and the risk of spurious claims.

The United States asked the speakers how much in their views the effectiveness of private enforcement in the United States was tied to method by which plaintiff attorneys were paid. Would symmetrical fee shifting make any difference? As to criminal enforcement, would in a system of optimal deterrence criminal sanctions be viewed as substitute for damages, or as complements? How could personal criminal liability be factored into a system of optimal deterrence?

Philip Lowe commented that compensation of victims should not be seen as an end in itself, but part of an overall strategy to enhance deterrence. One would have to be careful as regards the antitrust injury doctrine. Competition authorities define the scope the cartel and the scope of the damage, and thus follow-on litigation was to some extent circumscribed. But theories of harm which did not comply with agency guidelines could get hijacked by plaintiffs who would apply them without the same degree of discipline and coherence as can be expected from public enforcement agency. Characterization of agreements as cartels would require judgment calls and careful analysis. Without that, there was the risk that efficient agreements would be attacked, which would create uncertainty and a serious deterioration for the business community.

Professor Page responded to the questions on the optimal balance between private and public enforcement that private actions should contribute to an adequate multiplier which may not be assured by either public enforcement or private enforcement alone. There therefore was a value in private enforcement from the view of optimal deterrence. Private enforcement could also add new theories of liability that had not been picked up by public enforcement.

As to criminal fines, his perception was that the risk of imprisonment can most effectively motivate individuals to comply with the law. The theory that there is no need for individual fines because corporations will punish their employees was not true in reality. Criminal fines can correct for agency costs, for example when lower level management was involved in cartel activity and senior management was not aware of the conduct.

In certain areas, an exclusive role for public enforcement was justified, such as mergers and single firm conduct cases where structural relief is being sought. As to the interface between public and private enforcement, there has not yet been much experience with the new detrebling provisions. But the incentive to avoid criminal sanctions likely was much more effective than detrebling of civil liability. The added incentive would be marginal and therefore there was a question whether detrebling was absolutely necessary. As regards attorney compensation, Professor Page opined that a one way fee shifting system would result in more antitrust suits than a loser pays system. Concerning the antitrust injury doctrine, Professor Page stated that if the offence was defined narrowly, the opportunities for abuse were more limited. But even if the offence was narrowly defined, there was still be the risk of spurious claims and therefore there was a role for the antitrust injury doctrine.

Mr. Baron explained that public enforcement should establish the infringement, and private enforcement the amount of damage. Whether private enforcement would be assessed under the notion of compensation or deterrence should not matter too much. It would be optimal that private enforcement would discover and pursue cover cartel cases, but the first step would be encouragement of follow-on suits. Concerning double damages, the discussion with other ministries showed that there would be a need to establish a difference between competition cases and other areas where tort actions are brought. As regards the assessment of damages, the goal was a step-by-step development. There might be better ways to assess damages, but the focus was on establishing a workable solution in the first place.

Professor Gavil added that many factors added to the deterrent effects of private actions such as the cost of publicity, litigation cost. On de-trebling, he opined that there was no empirical support for detrebling civil liability. It created the risk of decreasing deterrence, although it could increase the likelihood of detection. It was not clear what factor would dominate. It might encourage more people to try to form cartels in the hope of avoiding liability later by seeking leniency. The issue was not sufficiently discussed.

Professor Gavil noted that there had to be incentives for attorneys to take up cases as well. Antitrust cases were difficult and required substantial expertise. Separating private parties from their expert

attorneys that can represent them would ignore an important piece in the overall system. There was the perception that the United States had a problem with frivolous law suits. But it was not certain whether there was a real problem. A study for the Federal Judicial Center had suggested that the problem was not frivolous law suits, but frivolous litigating. Filing an antitrust law suits was a major undertaking, and plaintiff attorneys understand that.

The Chair concluded the discussion by noting the different views on some fundamental issues such as whether deterrence or compensation was the ultimate goal of an enforcement system. He also noted that the focus appeared to be on practical problems that lead to under-enforcement, and not so much on over-enforcement. Principal/agent issues could be an important factor because they may complicate efforts to come up with optimal solutions.

## RESUMÉ DE LA DISCUSSION\*

Le Président ouvre le programme et demande à M. Philip Lowe de présenter les opinions exprimées dans le Livre blanc de la Commission sur les actions civiles en ce qui concerne l'argument de défense de la répercussion des surcoûts, la situation de l'acheteur indirect et la définition des dommages. M. Lowe explique que le droit communautaire ne reconnaît pas l'argument de défense de la répercussion des surcoûts, mais que l'on peut invoquer l'enrichissement injustifié. Le droit communautaire ne comporte pas de règles spécifiques sur la situation de l'acheteur indirect, mais on peut considérer que le jugement récent de l'affaire *Courage contre Creehan* exclut toutes restrictions sur la situation de l'acheteur indirect. Les questions relatives au droit communautaire sont les suivantes : (i) faut-il réglementer l'argument de défense de la répercussion des surcoûts ; (ii) faut-il prévoir que les acheteurs aient un droit d'agir ; et (iii) sur quels critères faut-il se fonder pour évaluer l'impact des différentes options sur l'efficacité et l'efficacités des demandes de dommages-intérêts civils au titre du droit de la concurrence ? Pour répondre à ces questions, il convient de mettre en balance plusieurs facteurs, dont la dissuasion, le dédommagement et l'administration efficiente de la justice. M. Lowe explique ensuite les quatre options identifiées dans le Livre blanc concernant la situation de l'acheteur indirect et l'argument de défense de la répercussion des surcoûts.

Quant aux dommages-intérêts, le Livre blanc prévoit qu'ils permettent au moins de couvrir les pertes subies, y compris les prix abusifs, les ventes manquées et les intérêts. Les victimes seront davantage incitées à porter des affaires devant la justice si elles peuvent espérer plus qu'un simple dédommagement. Le recours à des intérêts élevés et composés contribuera à les y inciter. Le préjudice subi par la victime peut être inférieur au gain illégitime du défendeur, ce qui semble indiquer que les dommages-intérêts peuvent être calculés à partir du gain du défendeur. La question des coefficients de multiplication reste controversée en Europe. Selon le Livre blanc, l'introduction d'un coefficient de multiplication de deux peut être envisagée pour les victimes d'ententes injustifiables. Le calcul des dommages-intérêts peut s'avérer délicat et on doit donc envisager d'introduire une procédure à deux étapes avec des actions distinctes pour l'établissement des responsabilités et la détermination des dommages-intérêts.

### 1. L'argument de la défense fondée sur la répercussion des surcoûts et la situation de l'acheteur indirect

Le Professeur Gavil débute son exposé en soulignant que plusieurs questions relatives à l'argument de défense de la répercussion des surcoûts et à la situation de l'acheteur indirect comportent des avantages et des inconvénients, et qu'il existe très peu d'éléments empiriques sur certains aspects fondamentaux. Le Professeur Gavil évoque ensuite les affaires *Illinois Brick* et *Hanover Shoe*, qui constituent deux jalons dans l'histoire des actions civiles relevant du droit américain de la concurrence. Il explique que les deux affaires ont traité deux aspects distincts d'un litige donné. Dans le cadre d'*Hanover Shoe*, l'argument de défense de la répercussion des surcoûts a été écarté, tandis que pour *Illinois Brick*, ce sont les poursuites relevant du droit de la concurrence intentées par des acheteurs indirects devant les tribunaux fédéraux qui ont été rejetées. Le tribunal chargé de l'affaire *Illinois Brick* a estimé que les règles relatives aux acheteurs indirects devaient être symétriques à celle de l'argument de défense de la répercussion des surcoûts pour *Hanover Shoe*. Le tribunal était également préoccupé par les dommages-intérêts multiples et par la

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\* Cette discussion a eu lieu en février 2006.

complexité des procédures. Il craignait en outre de diminuer l'effet de dissuasion si les actions intentées par des acheteurs indirects étaient autorisées. Le tribunal a également estimé que la question du dédommagement pouvait être réglée par l'attribution de dommages-intérêts aux acheteurs directs. Le Professeur Gavil souligne que l'argument de la symétrie semble bancal. *Hanover Shoe* est une affaire donnant lieu à une décision en faveur du plaignant, cohérente avec la philosophie des tribunaux de l'époque, tandis que le tribunal jugeant l'affaire *Illinois Brick* avait une philosophie différente, plus restrictive et favorable au défendeur.

Selon le Professeur Gavil, plusieurs États ont adopté la jurisprudence issue de l'affaire *Illinois Brick* qui autorise les recours des acheteurs indirects au niveau de l'État, pratique autorisée par la Cour suprême dans l'affaire *ARC America*. En conséquence, les procès sont intentés devant plusieurs tribunaux et dans plusieurs juridictions, avec des poursuites qui se chevauchent et se répètent devant les tribunaux d'État par les acheteurs indirects et devant les tribunaux fédéraux par les acheteurs directs. Le dessaisissement des tribunaux d'État au profit des tribunaux fédéraux est possible, mais il reste limité malgré des réformes récentes. Cette situation encourage la recherche de la juridiction la plus favorable par les plaignants. Ce système a créé une dissuasion sensible, mais à un prix élevé. Par exemple, l'affaire des États-Unis contre Microsoft a été suivie de plus de 180 actions collectives complémentaires. Les États-Unis avaient plusieurs possibilités : maintenir la diversité des recours ou faire valoir un droit de préemption fédéral pour confirmer ou abroger l'arrêt faisant jurisprudence d'*Illinois Brick*. Un consensus pourrait consister à juger préférable d'abroger l'arrêt rendu dans l'affaire *Illinois Brick* au niveau fédéral et d'autoriser de nouveau les poursuites engagées par les acheteurs indirects devant les tribunaux fédéraux.

En ce qui concerne l'hypothèse de l'affaire *Illinois Brick* concernant les incitations à porter plainte, il reste à déterminer si les acheteurs directs intenteront des procès. Ils l'ont fait dans de nombreux cas, mais non dans d'autres situations notoires faute de motivations ou par crainte de la réaction de leurs fournisseurs. Cette situation peut avoir des conséquences significatives en termes de dissuasion et de dédommagement. Parmi d'autres aspects importants figurent la norme de preuve requise pour démontrer la répercussion des surcoûts, l'attribution de dommages-intérêts et l'ampleur réelle des risques de réparations multiples. Ces facteurs influenceront la question de savoir s'il vaut mieux maintenir la décision faisant jurisprudence de l'affaire *Illinois Brick* en tant que telle ou s'il existe un nombre suffisant d'exceptions dans lesquelles les acheteurs directs n'ont pas engagé de poursuites. Le Professeur Gavil souligne qu'au cours des 30 dernières années, aucune affaire documentée ne s'est soldée par l'attribution de dommages-intérêts multiples. La crainte de réparations multiples peut néanmoins influencer les règlements des litiges. Aucune décision de justice n'a concerné l'attribution de dommages-intérêts. Ces aspects font l'objet d'un accord à l'amiable entre les parties.

Selon le Professeur Gavil, les affaires *Hanover Shoe* et *Illinois Brick* auraient pu être réglées autour de l'idée de la dissuasion. Celle-ci aurait été optimale si l'argument de défense de la répercussion des surcoûts avait été écarté et si les poursuites engagées par des acheteurs indirects avaient été autorisées devant les tribunaux fédéraux. Aux termes de la législation actuelle, des grandes catégories de clients (essentiellement, mais pas uniquement des consommateurs) ne peuvent obtenir de dommages-intérêts. C'est particulièrement gênant du point de vue du bien-être des consommateurs. Le Professeur Gavil souligne que la dissuasion et le dédommagement sont déterminés par de nombreux facteurs formant un « système » fondamental de politique de la concurrence. Il sera difficile de modifier un seul facteur sans tenir compte des autres. Les normes de fond, les règles en matière de preuve et de procédure feraient partie d'un « compromis » plus large. Le Professeur Gavil conclut avec cinq recommandations : premièrement, il sera utile de garder une trace des dépôts de plaintes et pas seulement des décisions, afin de disposer d'informations plus précises sur le niveau des actions civiles. Deuxièmement, il convient de réduire les risques d'incertitude en adoptant des règles de fond claires et en imposant des normes de preuve substantielles. Des normes de preuve strictes seront préférables à une règle *per se*. Troisièmement, les règles doivent être souples, mais à terme, il convient de rechercher un consensus. Quatrièmement,

l'adéquation de l'infrastructure procédurale est cruciale. Cinquièmement, il faut réfléchir en termes de systèmes de politique de la concurrence.

M. Baron explique que l'un des objectifs de la réforme du droit de la concurrence en Allemagne est d'améliorer l'efficacité des procès civils, en privilégiant les demandes de dommages-intérêts et les procès complémentaires. L'action publique restera le pilier principal de l'application de la loi et les poursuites civiles sont considérées comme complémentaires, l'accent étant mis sur le dédommagement. Les questions comme la sanction optimale ou les niveaux optimaux de dissuasion doivent être laissées à l'action publique. M. Baron explique que la première proposition de modification du droit de la concurrence écarte explicitement l'argument de défense de la répercussion des surcoûts. Le ministère de la Justice s'est d'abord opposé à cette solution car il s'agissait selon lui d'une question relevant du droit civil, et non d'un problème spécifique de droit de la concurrence. En fin de compte, l'argument de défense de la répercussion des surcoûts a été exclu de la nouvelle loi allemande, avec une exception minimale recevable dans des circonstances exceptionnelles. L'argument de défense de la répercussion des surcoûts est sujet à controverse, et son exclusion est notamment contestée par les représentants d'entreprises. Selon eux, cela peut engendrer l'enrichissement des acheteurs directs et porter préjudice aux consommateurs. En revanche, selon le gouvernement, il vaut mieux courir ce risque que l'enrichissement d'un défendeur qui a enfreint le droit de la concurrence.

L'Allemagne n'a pas adopté de règle explicite concernant la situation de l'acheteur indirect. Selon l'opinion dominante dans ce pays, cet aspect n'a pas été tranché par le tribunal dans l'affaire *Crehan*. Dans les quelques affaires où les acheteurs directs n'engagent pas de poursuites, les acheteurs indirects doivent pouvoir le faire. Il s'agit toutefois de cas exceptionnels et des règles nécessaires peuvent être élaborées par les tribunaux. La législation doit se concentrer sur les affaires les plus courantes. Dans tous les cas, les poursuites engagées par les acheteurs indirects sont peu probables compte tenu de la difficulté de la preuve et des montants très limités impliqués. M. Baron cite l'exemple de deux actions civiles intentées en Allemagne. Il s'agissait dans les deux cas de procès complémentaires à l'encontre du cartel des vitamines : l'un concernait des aliments pour bébé et l'autre des sucreries. Dans les deux cas, il aurait été quasiment impossible pour les consommateurs individuels de prouver leur droit à des dommages-intérêts d'après leurs achats individuels réalisés plusieurs années auparavant de ces produits contenant des vitamines. Les actions collectives n'apporteraient pas nécessairement d'amélioration car elles ne feraient que conjuguer les problèmes des procès individuels. La solution allemande a donc consisté à autoriser l'Office fédéral des ententes à priver les défendeurs des gains illégitimes relevant d'une infraction au droit de la concurrence. Les associations de consommateurs n'ont pas été autorisées à engager des actions en restitution.

M. Baron indique également que la recherche de la juridiction la plus favorable existe déjà dans une certaine mesure en Europe : un tribunal anglais a récemment accepté un recours engagé par une société allemande à l'encontre d'une autre société allemande.

Le Président souligne les différences entre une conception plus systémique d'un dispositif de poursuites civiles et une approche distinguant les divers problèmes pour les analyser un par un.

Le Professeur Page commente les présentations en soulignant que l'application du droit par voie d'action civile doit être essentiellement un outil de dissuasion et que le dédommagement doit être considéré comme un produit dérivé. Il fonde son opinion sur l'expérience des actions collectives intentées par des acheteurs indirects aux États-Unis. Pour déterminer si une action collective est recevable, il faut essentiellement établir la preuve à l'échelle du groupe de plaignants que chaque individu a subi un préjudice. La preuve pour un plaignant est valable pour tous les autres. À cet égard, certains États ont une approche plus stricte, d'autres une démarche plus indulgente. Dans les premiers, de nombreuses actions collectives ne sont pas jugées recevables. Dans ces circonstances, autoriser les acheteurs indirects à engager des poursuites n'aura pas de conséquences notables. Dans les États plus indulgents, les affaires

donnent lieu à un règlement quasi immédiat. Toutefois, les dommages-intérêts ne sont généralement pas attribués aux consommateurs lésés et sont reversés au profit de causes publiques. En conséquence, on constate un gâchis quasi complet des ressources car le dédommagement de ceux qui ont subi un préjudice n'a en réalité pas lieu. C'est pourquoi il convient de privilégier la dissuasion. Il était donc préférable de maintenir l'arrêt rendu dans l'affaire *Illinois Brick*, qu'il constitue ou non une aubaine pour l'acheteur direct, car il permet de renforcer la dissuasion.

L'Italie se demande si les acheteurs directs et indirects peuvent engager des poursuites ensemble et si oui, quel mécanisme est en place pour éviter que des dommages-intérêts ne soient accordés deux fois.

Le Professeur Gavil explique que depuis l'entrée en vigueur de la loi dite d'équité des actions collectives (Class Action Fairness Act), les actions engagées par les acheteurs indirects et directs peuvent être coordonnées et jointes plus facilement. Même si, par le passé, les affaires ne pouvaient pas être jointes, les défenseurs refusaient généralement de traiter avec les acheteurs directs à moins de pouvoir également le faire avec les acheteurs indirects. En conséquence, dans une certaine mesure, ils coordonnaient leurs poursuites hors du système, de manière informelle. Il n'y a pas eu d'affaire où un tribunal a dû décider de la répartition des dommages-intérêts entre les deux groupes. Les experts ont mis au point des modèles économiques pour ces répartitions à des fins de règlement négocié, mais ceux-ci ne sont pas accessibles au public.

L'Irlande explique que le domaine des procès civils n'est pas très développé et qu'il y a eu très peu d'actions civiles. Des règles sont cependant en train d'être adoptées pour les actions civiles dans les affaires de concurrence. Le droit de la concurrence évoque le concept d'individu « lésé » pour définir qui a droit d'engager des poursuites. Bien que ce terme soit utilisé dans de nombreuses lois irlandaises, sa signification n'est pas totalement claire et cet aspect n'a pas bénéficié d'une grande attention lors de l'adoption de la loi.

Le Royaume-Uni constate qu'il n'y a pas de jurisprudence concernant l'argument de défense fondée sur la répercussion des surcoûts, même si cet argument serait probablement reconnu. En tout état de cause, il s'agirait d'un argument de défense et il appartiendrait donc au défendeur de prouver que les surcoûts ont été répercutés. Par ailleurs, en faisant référence au débat sur le dédommagement et la dissuasion, le Royaume-Uni se demande si une législation est nécessaire pour imposer la publicité des règlements négociés afin de renforcer leur effet dissuasif.

La Norvège explique que lorsque la nouvelle loi sur la concurrence a été adoptée en 2004, il n'a pas été tenu compte de règles concernant l'argument de défense fondé sur la répercussion des surcoûts et la situation de l'acheteur indirect. Il n'y a aucune jurisprudence sur ces questions, mais il est probable que l'argument de défense fondé sur la répercussion des surcoûts ait été accepté et que les acheteurs indirects aient droit d'agir. Lorsque la nouvelle loi a été adoptée, un rapport a été demandé sur ces questions. Ce dernier s'est prononcé contre cet argument de défense et le droit d'agir des acheteurs indirects. Selon l'auteur du rapport, les affaires de préjudice relevant du droit de la concurrence seront souvent très complexes et les poursuites engagées par des acheteurs indirects seront très délicates.

La Suisse explique qu'aucune règle procédurale ou doctrine claire n'existe pour l'argument de défense fondé sur la répercussion des surcoûts et la situation de l'acheteur indirect. Le droit de la concurrence comprend une disposition concernant les demandes de dommages-intérêts, mais il ne couvre pas les poursuites engagées par les consommateurs finals. Les règles générales du droit privé suggèrent que les acheteurs directs ayant répercuté les surcoûts n'ont pas subi de préjudice et ne peuvent donc pas porter plainte. Les acheteurs indirects peuvent en revanche engager des poursuites pour préjudice, mais compte tenu de la complexité d'une telle situation, la probabilité de victoire des plaignants est réduite à néant. Le système suisse n'est pas favorable à l'utilisation des coefficients de multiplication.

Les Pays-Bas expliquent qu'un tribunal de première instance a estimé dans une affaire que l'argument de défense fondé sur la répercussion des surcoûts n'était pas recevable. Le tribunal a cependant estimé qu'il avait le devoir de limiter les dommages-intérêts en faveur du plaignant, ce qui peut avoir le même effet qu'un argument de défense fondée sur la répercussion des surcoûts. Sur les 800 actions civiles répertoriées aux États-Unis, les Pays-Bas demande combien d'affaires étaient indépendantes, et combien étaient des procès complémentaires suivant une décision adoptée par l'autorité de la concurrence.

Le BIAC déclare que les entreprises doivent considérer ces questions du point de vue du plaignant et du défendeur. Il sera nécessaire de mettre en balance plusieurs facteurs, dont l'efficacité, la dissuasion, le dédommagement, les influences réciproques de l'action publique et des poursuites civiles, et la nécessité d'une harmonisation. Il convient d'éviter la dissuasion excessive et, du moins hors des États-Unis, les poursuites civiles doivent être considérées comme un complément de l'action publique. Il est important d'éviter de faire peser une charge importante sur les entreprises. Les réformes mises en œuvre en Allemagne peuvent être considérées comme un exemple d'approche équilibrée et de décisions appropriées.

Les États-Unis soulignent l'importance du contrôle des règlements négociés dans les procès civils. Il sera utile que les autorités compétentes contrôlent les règlements négociés car il peut y avoir des cas où les intérêts du défenseur du groupe de victimes peuvent diverger de ceux des membres représentés. Les États-Unis déclarent également que la dissuasion peut provenir autant de la détection que de la sanction. Le principal élément de dissuasion des actions civiles, c'est la sanction. Il peut être instructif d'analyser des affaires d'entente connues pour mieux comprendre ce qui motive le dépôt d'une plainte, comme pour le cartel des vitamines ou des équipements électriques. Ces affaires tendent à montrer que les acheteurs directs peuvent ne pas souhaiter entamer des poursuites du fait de leurs relations avec leur fournisseur, mais également parce qu'ils sont surtout préoccupés par les prix que leurs concurrents paient. Les acheteurs sont également satisfaits lorsqu'ils savent que les prix pratiqués par leurs fournisseurs ne sont pas négociables. Dans le cas des équipements électriques, il a été prouvé que les acheteurs connaissaient l'existence d'une rotation des soumissions mais qu'ils ont décidé de ne pas entamer de poursuites.

M. Baron souligne qu'il peut y avoir une différence entre solution théorique et solution pratique. La théorie peut s'appliquer à tous les pays, tandis que les solutions pratiques peuvent différer et être spécifiques à chaque pays. En Allemagne, la sanction n'est pas l'objectif des poursuites civiles. Si elle s'avère insuffisante, l'Office fédéral des ententes peut infliger des amendes supérieures. L'enjeu est une évolution des attitudes. Les gens ne se sentent pas coupables de participer à une entente et estiment qu'ils ne portent pas préjudice à autrui. Les poursuites civiles permettent de mettre en évidence le tort causé par les ententes aux consommateurs.

En réponse à la question de l'Italie, le Professeur Gavil explique que des modèles de regroupement existent et ont été utilisés dans certains règlements négociés, mais ils ne sont pas accessibles au public. Il admet que le modèle Hanover Shoe/Illinois Brick est plus simple et qu'il engendrerait moins de poursuites, mais que c'est également le cas de chaque règle en tant que telle. L'opposition aux efforts visant à annuler le modèle Illinois Brick provient essentiellement des défendeurs et de leurs défenseurs, ce qui indique que le système en place a un certain effet dissuasif. En ce qui concerne la publicité des règlements négociés en vue de renforcer la dissuasion, le Professeur Gavil explique qu'aux États-Unis, les règlements négociés sont confidentiels. Dans les actions collectives, un volume plus important d'informations tend à être rendu public car le tribunal doit donner son accord pour les règlements négociés. Il explique également qu'il n'existe pas de statistiques fiables estimant le nombre de procès complémentaires et d'actions indépendantes. Certains éléments indiquent toutefois que le nombre de procès complémentaires est significatif. En 2000 par exemple, le nombre d'actions civiles et d'actions collectives a atteint un niveau record, du fait sans doute du nombre de procès civils complémentaires de l'action publique dans les grandes affaires d'entente.

Le Professeur Page explique que bien que les modèles utilisés par les économistes pour estimer et allouer les dommages-intérêts ne soient pas rendus publics, on peut obtenir des informations importantes dans les procédures d'agrément des actions collectives. Dans ces procédures, les économistes sont tenus de dévoiler suffisamment d'informations pour convaincre un tribunal qu'ils seront en mesure de fournir des preuves de prix abusifs. Par exemple, les décisions d'agrément du procès complémentaire intenté par des acheteurs indirects à l'encontre de Microsoft donnent une idée claire du témoignage des économistes. Les tribunaux ont également dû approuver les règlements négociés, à partir desquels on peut comprendre l'allocation des dommages-intérêts. En ce qui concerne les procès complémentaires ou actions indépendantes, le Professeur Page souligne qu'un procès complémentaire peut différer sensiblement d'un cas d'action publique. Pour Microsoft par exemple, la théorie du préjudice dans les procès complémentaires était sensiblement différente des poursuites menées par les États-Unis et ces dernières n'ont pratiquement été d'aucun secours pour les affaires civiles.

M. Lowe observe que deux messages importants ressortent de la discussion. Premièrement, il sera important de formuler l'objectif fondamental des réformes. À partir de là, la méthodologie optimale pourra être élaborée. L'objectif du système doit être de décourager le comportement anticoncurrentiel, qu'il nuise aux clients directs ou aux clients indirects. L'application du droit par voie d'action civile doit compléter l'action publique. Les actions civiles peuvent toutefois avoir une portée élargie et aller au-delà de l'action publique. En ce qui concerne la dissuasion, il est important d'adopter une approche systémique. De nombreux facteurs doivent être pris en compte. Le système allemand en est venu à favoriser la simplification du processus. Partant du constat que l'allocation de dommages-intérêts est trop complexe pour que le système judiciaire soit efficace, il favorise les poursuites engagées par les acheteurs directs. Selon cette approche, la question de l'impact ultime sur les intérêts des consommateurs reste cependant ouverte. Il convient de ne pas négliger les poursuites engagées par des consommateurs qui estiment avoir subi un préjudice.

Le Président ajoute que le processus judiciaire doit mener à la certitude juridique. Il convient alors de déterminer comment apporter de la compétence économique dans les procédures judiciaires, sans reproduire un système à l'américaine et ses batailles d'économistes. Si cet aspect peut être résolu, les juges seront davantage à l'aise car ils auront le sentiment de pouvoir maîtriser et comprendre les problèmes qui leur sont soumis.

## **2. Dommages-intérêts**

Le Professeur Page commence sa présentation par un tour d'horizon des procès en dommages-intérêts triples en vertu de la loi américaine Sherman. Il explique que le nombre de procès a augmenté après les affaires du cartel des équipements électriques et a atteint un niveau record en 1977. Il a depuis reculé compte tenu des modifications apportées aux règles de fond, des décisions concernant les dommages-intérêts relevant du droit de la concurrence et du modèle *Illinois Brick*. Il convient de tirer trois leçons de cette courte page d'histoire. Premièrement, à elle seule, la création des dommages-intérêts triples ne devrait pas provoquer d'augmentation sensible du nombre d'actions. Un système de règles procédurales et de fond est nécessaire pour rendre les actions civiles efficaces. Deuxièmement, les procès en dommages-intérêts triples risquent d'aller trop loin. Les plaignants agiront seulement dans leur meilleur intérêt et non dans l'intérêt général, et ils engageront des poursuites dès qu'ils en auront l'occasion. Troisièmement, il est possible d'élaborer des mesures correctrices civiles par le biais de réformes juridiques (*ex.* : droit d'agir, non-lieu, préjudice et droit d'agir aux termes du droit de la concurrence) de telle manière que les actions civiles fassent partie d'un système dont les objectifs économiques sont réalistes.

Il convient de recourir au modèle de la dissuasion optimale pour évaluer un système d'application du droit par voie d'action civile. Ce système doit contribuer à l'objectif du droit de la concurrence, à savoir améliorer le bien-être des consommateurs. Dans ce cas, la dissuasion doit être l'objectif primordial et le

dédommagement doit être un but secondaire. Bien entendu, la distinction entre dissuasion et dédommagement peut être exagérée. Les dommages-intérêts fondés sur le dédommagement de ceux qui ont réellement subi un préjudice peuvent servir à motiver un mécanisme efficace d'application du droit. Dans le modèle de la dissuasion optimale, la sanction peut être définie par le préjudice net de l'infraction affectant les individus autres que le contrevenant. Le Professeur Page explique que les infractions relevant du droit de la concurrence peuvent avoir trois conséquences : un transfert de richesse des consommateurs vers les producteurs ; une réduction de la production, et donc des frais improductifs ; et parfois, les infractions au droit de la concurrence peuvent accroître le bien-être social. Par exemple, les pratiques horizontales peuvent avoir des répercussions positives. Les sanctions doivent servir uniquement à dissuader le comportement qui contribue davantage à réduire le bien-être social qu'à l'augmenter.

La mesure correctrice doit correspondre au niveau de préjudice subi par les consommateurs ainsi qu'au coût social. Quel que soit son montant, elle doit être multipliée en fonction de la probabilité de détection de l'infraction. Aux États-Unis, le système de dommages-intérêts triples tente de reproduire un modèle qui tient compte de la probabilité de détection. Il s'agit cependant d'un mécanisme plutôt sommaire qui ne permet pas vraiment d'atteindre cet objectif car il ne fait pas la distinction entre le caractère dissimulable ou non de l'infraction. En outre, il est généralement impossible d'inclure des intérêts avant jugement, de telle manière que les dommages-intérêts reflètent rarement le niveau de préjudice causé par l'infraction. Malgré quelques arguments en leur défaveur, les actions civiles ont un rôle à jouer. L'action publique peut être influencée par des facteurs autres que l'intérêt général, tandis que les poursuites civiles peuvent être motivées par la détection des infractions, le rassemblement des preuves et la création de nouvelles théories de la responsabilité. L'application du droit par voie d'action civile peut être limitée par des règles définissant le calcul des dommages-intérêts en vue d'élaborer la mesure correctrice optimale. La doctrine du préjudice relevant du droit de la concurrence en est un exemple.

Le Professeur Page commente également plusieurs questions soulevées par le Livre blanc de la Commission européenne. Il déclare que selon le modèle de la dissuasion optimale, le calcul des dommages-intérêts doit être fondé sur le préjudice causé aux victimes. Cette approche correspond davantage au concept de préjudice net. Par exemple, il ne faut pas réduire les dommages-intérêts sous prétexte que les charges d'exploitation d'une entente ont réduit les gains de ses participants. Parallèlement, si l'entente a permis de réduire les charges, les dommages-intérêts ne doivent pas pour autant être plus lourds. Toutefois, dans certains cas, comme pour les actions collectives engagées par des consommateurs, il peut être plus facile d'estimer les gains réalisés par le défendeur que le préjudice subi par le plaignant. Dans ces circonstances, l'allocation de dommages-intérêts fondée sur un enrichissement injuste peut être légitime. Dans les juridictions où elle existe (comme en Allemagne ou aux États-Unis), il convient de recourir de manière judicieuse à la mesure correctrice de restitution publique pour éviter des recouvrements multiples, à moins que cela ne soit le but recherché.

Le Professeur Page souligne le rôle déterminant de la doctrine du préjudice relevant du droit de la concurrence. Faute de limitations appropriées, les plaignants profiteront de toutes les occasions pour engager des poursuites à partir du moment où il y a un préjudice privé. En Europe, la portée des règles de fond peut être supérieure, ce qui peut amplifier ces risques. Par exemple, il peut être possible d'affirmer que les intérêts des concurrents sont protégés dans les fusions ou dans les cas d'abus de position dominante, et que lesdits concurrents sont donc davantage incités à intenter des procès en dommages-intérêts. La doctrine du préjudice relevant du droit de la concurrence peut également être à l'origine de réformes car elle oblige les tribunaux à privilégier les raisons justifiant l'invocation des règles de responsabilité et à réexaminer ces règles. Aux États-Unis, lorsque les tribunaux ont appliqué la doctrine du préjudice relevant du droit de la concurrence et ont tenté d'identifier les victimes légitimes de pratiques anticoncurrentielles, ils ont eu la possibilité d'examiner également les règles de fond.

Selon le Professeur Page, les coefficients de multiplication sont nécessaires. Il serait judicieux de les adopter principalement pour les affaires d'entente car elles constituent des infractions dissimulables et, à ce titre, il y a peu de chance que les concurrents intentent des poursuites. Dans les affaires d'entente, le recours démesuré aux coefficients de multiplication présente peu de risques de dissuasion excessive. D'abord, les pratiques coopératives légitimes n'engendrent d'ordinaire pas d'augmentation des prix ni de baisse de la production. Ensuite, dans les cas d'échange d'informations, s'il y a augmentation des prix, c'est probablement du fait d'une entente tacite. Renoncer au doublement des dommages-intérêts en cas de participation à des programmes de clémence serait justifié pour inciter davantage à quitter une entente. Il n'est cependant pas certain que cela soit nécessaire avant que les dommages-intérêts multiples ne constituent une menace réelle. Il convient de recourir aux intérêts avant jugement, notamment si les dommages-intérêts doubles ne sont pas autorisés. Toutefois, il faut savoir qu'aux États-Unis, dans les cas où les intérêts avant jugement sont autorisés, comme dans les affaires de brevet, les parties peuvent être en désaccord marqué concernant le calcul approprié.

M. Baron explique qu'en Allemagne, la détermination des dommages-intérêts est considérée comme un aspect clé du système de dommages-intérêts civils. Un système de coefficients de multiplication dans les procès en dommages-intérêts serait contradictoire avec le système général de responsabilité fondé sur la restitution et le dédommagement. La commission allemande des monopoles (Monopolkommission) a proposé d'introduire des dommages-intérêts doubles. Toutefois, étant donné que la dissuasion doit être possible principalement au moyen de l'action publique, il incombe aux autorités compétentes de répondre aux questions concernant par exemple la dissuasion optimale. Le recours aux coefficients de multiplication a également été considéré comme une violation de l'*ordre public*. L'opinion publique et le ministère de la Justice résistent également à l'introduction de coefficients de multiplication dans les procès en dommages-intérêts car ils marqueraient un changement d'orientation par rapport au système profondément ancré de la responsabilité. La solution adoptée en Allemagne met l'accent sur les intérêts avant jugement, qui sont obligatoires dès la survenue d'un préjudice. Étant donné le délai potentiellement long entre la survenue de l'acte préjudiciable et la décision de l'autorité de la concurrence ou l'arrêt du tribunal, les intérêts avant jugement sont souvent importants. Ce système est accepté par le secteur privé qui semble convaincu que l'on n'aura pas recours aux coefficients de multiplication.

En ce qui concerne la détermination des dommages-intérêts, M. Baron explique que les règles générales du droit civil s'appliqueront. L'application de règles spécifiques sur les dommages-intérêts dans les affaires relevant du droit de la concurrence a été rejetée. Les dommages-intérêts sont calculés en fonction du préjudice causé aux consommateurs, ce qui peut s'avérer plus délicat que si l'on se fonde sur les gains réalisés par le contrevenant. En revanche, de nouvelles dispositions peuvent faciliter la tâche du plaignant. Par exemple, on pourrait se baser sur les profits réalisés par le contrevenant pour estimer les dommages-intérêts du plaignant. L'Allemagne se méfie du recours à des critères économiques pour évaluer le niveau des dommages-intérêts. Dans des circonstances « normales », ces méthodes seraient en effet difficiles à appliquer et pourraient rendre complexe le calcul des dommages-intérêts par les plaignants. Les poursuites civiles ne seraient pas renforcées. En pratique, l'approche allemande consistant à utiliser des estimations « *ex aequo et bono* » des dommages-intérêts sera plus simple et réalisable.

En somme, les réformes allemandes devraient faciliter les actions civiles, mais il est nécessaire d'évoluer davantage vers une culture du dédommagement. On constate déjà des signes encourageants : dans le cas du cartel des ciments par exemple, des amendes de 700 millions EUR ont été infligées et pour la première fois, de nombreux procès complémentaires ont déjà été intentés pour obtenir des dommages-intérêts de 120 millions EUR.

La Commission européenne déclare que la dissuasion ne doit pas être l'apanage des poursuites publiques et qu'il faut également en tenir compte dans le cadre des poursuites civiles. Les poursuites publiques portent sur de rares infractions au droit de la concurrence. Il y a en outre d'autres raisons pour

que l'autorité compétente ne soit pas efficace. Dans les cas d'entente par exemple, il incombe aux poursuites publiques de définir le niveau de dommages-intérêts pour le calcul des amendes. Il convient cependant de déterminer si les amendes infligées par les autorités compétentes sont suffisamment élevées pour exercer une dissuasion efficace sans conséquences supplémentaires en termes de préjudice réel découlant des ententes. Ensuite, il convient de traiter d'autres aspects comme les affaires de comportement unilatéral. Les participants aux marchés peuvent jouer un rôle utile dans la surveillance de ces marchés car les autorités de la concurrence ne peuvent pourchasser toutes les pratiques anticoncurrentielles. Autre exemple, l'échange d'informations n'est pas un domaine facile mais il y a des circonstances où sa nature anticoncurrentielle est flagrante. Une nouvelle fois cependant, l'autorité de la concurrence ne peut traquer tous les cas.

Le Livre blanc propose le doublement des dommages-intérêts uniquement pour les ententes et non pour les autres infractions au droit de la concurrence. En ce qui concerne les ententes, il n'y a pas d'inconvénient à avoir deux systèmes parallèles, ce qui permettra globalement de renforcer la dissuasion. Les dommages-intérêts doubles ne doivent pas être considérés comme punitifs car les dommages-intérêts simples ne pousseront pas suffisamment les plaignants à intenter des poursuites. En conséquence, les dommages-intérêts doubles constituent simplement une motivation financière nécessaire pour servir l'objectif du dédommagement. Le concept des intérêts avant jugement est considéré comme une excellente idée. Le Commission est consciente qu'aux États-Unis, les règlements négociés sont souvent fondés sur des dommages-intérêts simples et des intérêts avant jugement.

Le Danemark déclare que dans certaines affaires d'entente, les défendeurs ont affirmé que ces ententes n'ont pas eu d'impact sur les prix et demande s'il y a eu des cas où les effets sur les prix étaient incertains. Le recours aux calculs approximatifs pour déterminer les dommages-intérêts peut sembler utile mais s'avérer irréaliste en pratique. Qu'est-ce que les tribunaux ont accepté en pratique si l'évaluation du préjudice était incertaine ? Par ailleurs, il sera peut-être utile de faire la distinction entre les effets statiques et les effets dynamiques des préjudices causés par une entente. Les effets statiques porteraient sur l'augmentation des prix. Cela étant, les effets dynamiques, comme le recul de la R&D et de l'innovation, peuvent être encore plus préjudiciables. Or, les tribunaux seront-ils en mesure de d'identifier aussi ces effets dynamiques ?

La Lituanie explique qu'elle n'a pas beaucoup d'expérience des actions civiles, malgré quelques affaires en cours. Dans l'une d'entre elles, le tribunal a demandé aux plaignants de déterminer le montant des dommages-intérêts, mais il n'existe aucune règle claire sur la façon de les calculer. Quant au concept des sanctions optimales, il peut être difficile de trouver un équilibre satisfaisant entre poursuites civiles et action publique.

À propos d'un aspect soulevé par M. Baron, le Royaume-Uni déclare que l'application optimale du droit ne peut pas être assurée au moyen des actions civiles. Un système d'application optimale doit conjuguer action publique et poursuites civiles, et c'est un modèle nécessaire. Concernant le recours aux critères économiques pour évaluer les dommages-intérêts, le Royaume-Uni convient qu'il s'agit de méthodes potentiellement délicates, notamment dans une procédure contradictoire. Le recours aux critères économiques sera toutefois nécessaire dans le cadre d'un régime de concurrence fondé sur les conditions économiques. La seule alternative est la répression pénale.

Un système basé uniquement sur des dommages-intérêts simples obligatoires a peu de chances d'encourager les actions civiles. Au moins quatre éléments supplémentaires peuvent être utilisés : intérêts avant jugement ; dommages-intérêts punitifs à la discrétion du tribunal ; dommages-intérêts doubles ; règles spéciales concernant les frais de contentieux, notamment pour les petits plaignants.

Le Portugal soulève une question à propos de l'interface entre action publique et poursuites civiles. Le système en vigueur aux États-Unis où les candidats au bénéfice d'un programme de clémence sont passibles de dommages-intérêts simples est-il une solution parfaite ?

Le BIAC déclare que les poursuites civiles ne doivent pas être considérées comme un remède aux échecs de l'action publique, mais comme un complément. Le dédommagement peut être considéré comme une composante des effets dissuasifs. En revanche, les dommages-intérêts triples n'exercent pas nécessairement une dissuasion efficace si seulement un cas sur dix est détecté. Quant à la théorie du préjudice optimal, ce concept a été récemment rejeté par les tribunaux européens car il n'apporte aucune grille d'analyse viable. Les intérêts avant jugement ne doivent pas être considérés comme des dommages-intérêts doubles imposés sournoisement, mais refléter uniquement la valeur temporelle de l'argent. Les droits des tiers dans le cadre de l'action publique n'ont pas été évoqués, mais ils peuvent être utilisés pour prendre en compte les intérêts privés dans l'action publique. Les mesures correctrices intermédiaires peuvent également être utilisées de façon nettement plus efficace, ce qui peut également permettre d'améliorer le système d'application du droit. Le BIAC rappelle aux délégués qu'il faut trouver un équilibre entre davantage d'actions civiles et le risque de poursuites sans fondement.

Les États-Unis demandent aux orateurs leur estimation de la corrélation entre l'efficacité des poursuites civiles aux États-Unis et la méthode de rémunération des avocats des plaignants. La « répétabilité » symétrique des frais de justice (*symmetrical fee shifting*) changerait-elle quelque chose ? En ce qui concerne l'action pénale, dans un système de dissuasion optimale, les sanctions pénales seraient-elles considérées comme un substitut ou comme un complément des dommages-intérêts ? Comment inclure la responsabilité pénale des personnes physiques dans un système de dissuasion optimale ?

Philip Lowe déclare que le dédommagement des victimes ne doit pas être considéré comme une fin en soi, mais comme faisant partie d'une stratégie globale visant à renforcer la dissuasion. Il convient d'être prudent concernant la doctrine du préjudice relevant du droit de la concurrence. Les autorités de la concurrence définissent la portée de l'entente et du préjudice, ce qui limite dans une certaine mesure les actions complémentaires. Les théories du préjudice qui ne correspondent pas aux orientations des autorités peuvent toutefois être détournées par les plaignants qui ne les appliqueront pas avec le même degré de discipline et de cohérence que l'on peut attendre d'une autorité compétente. Pour être qualifiés d'ententes, les accords nécessitent des décisions d'appréciation et une analyse minutieuse. Sans cela, les accords efficaces risquent de faire l'objet d'attaques, ce qui sera source d'incertitude et de grave détérioration de la situation des entreprises.

Le Professeur Page répond aux questions sur l'équilibre optimal entre poursuites civiles et action publique en expliquant que les actions civiles doivent contribuer à la définition d'un coefficient de multiplication adéquat, ce que l'action publique ou les poursuites civiles ne peuvent assurer séparément. Les poursuites civiles présentent donc un intérêt du point de vue de la dissuasion optimale. Elles peuvent également donner naissance à de nouvelles théories de la responsabilité qui ne sont pas prises en compte par l'action publique.

En ce qui concerne les amendes pénales, il estime que le risque d'incarcération est le meilleur moyen pour inciter les individus à respecter la loi. La théorie selon laquelle les amendes individuelles sont superflues parce que les entreprises sanctionnent leurs salariés est en réalité erronée. Les amendes pénales peuvent permettre de réduire les coûts pour l'autorité, par exemple lorsque des cadres intermédiaires participent à une entente à l'insu des cadres dirigeants.

Dans certains domaines, l'action publique exclusive est justifiée, comme pour les fusions et les cas de comportements unilatéraux au niveau d'une seule entreprise, pour lesquels des mesures structurelles sont nécessaires. Quant à l'interface entre action publique et poursuites civiles, on ne bénéficie que d'une

expérience limitée des dispositions de renoncement au triplement des dommages-intérêts. Toutefois, l'incitation à éviter d'éventuelles sanctions pénales est nettement plus efficace que le renoncement aux dommages-intérêts triples en matière de responsabilité civile. L'avantage supplémentaire sera marginal et il convient donc de déterminer si le rétablissement des dommages-intérêts simples est absolument nécessaire. En ce qui concerne la rémunération des avocats, le Professeur Page estime qu'un système de répétabilité asymétrique des frais de justice engendrerait plus de poursuites pour infraction au droit de la concurrence qu'un système où les frais sont systématiquement à la charge de la partie succombante. En ce qui concerne la doctrine du préjudice relevant du droit de la concurrence, il déclare que si l'infraction est définie de manière rigoureuse, les risques d'abus sont plus limités. Toutefois, même dans ces circonstances, les risques de poursuites sans fondement demeurent et la doctrine du préjudice relevant du droit de la concurrence est nécessaire.

M. Baron explique que l'action publique doit définir l'infraction tandis que les poursuites civiles doivent permettre de définir l'ampleur du préjudice. Il importe relativement peu que les poursuites civiles soient évaluées selon la notion de dédommagement ou de dissuasion. Dans l'idéal, elles permettraient de détecter et de poursuivre les affaires d'ententes, mais la première étape consiste à encourager les procès complémentaires. Pour ce qui est des dommages-intérêts doubles, un débat avec les autres ministères a montré qu'il fallait faire la distinction entre les affaires de concurrence et les autres circonstances donnant lieu à des poursuites en responsabilité civile délictuelle. Pour ce qui est du calcul des dommages-intérêts, l'objectif est de procéder à une mise au point progressive. Il existe probablement une meilleure méthode pour évaluer les dommages-intérêts, mais l'objectif initial est d'élaborer une solution exploitable.

Le Professeur Gavil ajoute que de nombreux facteurs contribuent à l'effet dissuasif des actions civiles comme le coût de publicité, les frais de contentieux. Il estime qu'aucune étude empirique ne se prononce en faveur du renoncement aux dommages-intérêts triples en matière de responsabilité civile. Cette possibilité risquerait d'atténuer l'effet dissuasif tout en renforçant les chances de détection, et il n'est pas évident de déterminer quel facteur dominera. Elle peut inciter davantage d'entreprises à tenter de former des ententes dans l'espoir d'échapper par la suite à la responsabilité en demandant la clémence. Cet aspect n'a pas été discuté suffisamment.

Le Professeur Gavil souligne la nécessité d'élaborer des mesures incitant les avocats à accepter des affaires. Les procès relevant du droit de la concurrence sont difficiles et exigent une expertise approfondie. Séparer les parties civiles des avocats spécialisés en mesure de les représenter reviendrait à négliger une part importante du système global. On estime que les États-Unis ont un problème de poursuites sans fondement mais il n'est pas certain que cela soit un réel problème. Selon une étude réalisée pour le Federal Judicial Center, le problème ne vient pas des poursuites sans fondement, mais des contestations sans fondement. Intenter un procès pour infraction au droit de la concurrence est une entreprise ardue, et les avocats des plaignants le savent.

Le Président conclut le débat en constatant les divergences d'opinion sur certaines questions fondamentales comme celle de savoir si la dissuasion ou le dédommagement est l'objectif ultime d'un système d'application de la loi. Il remarque également que l'accent semble être mis sur les problèmes pratiques à l'origine d'une application insuffisante et pas tellement sur l'application excessive. Les questions relatives au mandant/mandataire peuvent être un facteur important car elles peuvent compliquer les efforts visant à élaborer des solutions optimales.

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## CHAPTER 4

### *CLASS ACTION / COLLECTIVE ACTION AND THE INTERFACE BETWEEN PUBLIC AND PRIVATE ENFORCEMENT*

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### **Request for Written Contributions**

As proposed during the last meeting of WP3, the June 2006 roundtable on private litigation will focus on collective action/class action and the interface between public and private enforcement.

Below is a list of issues that delegates might wish to address in their contributions. The list is not intended to be restrictive or comprehensive. Delegates are encouraged to address other issues as well, but could of course also address only some of the issues listed below. There will be no background paper by the Secretariat.

Written contributions should discuss not only national rules applicable in these areas, but also the effects they have on the ability of private parties to bring private actions in competition cases, any concerns that have been raised about these rules, and any plans to review and possibly revise such rules in an effort to facilitate private litigation. Even if rules concerning collective action/class action are new and have not yet been tested, contributions could discuss whether any of the issues listed below have been considered before the rules were adopted.

#### **1. Collective Action/Class Action**

Please describe any rules in your jurisdiction that establish a right of action for damages for a group of (indirect or direct) customers of the person accused of a competition law violation. This could include "representative actions" which a representative person such as a consumer organization can bring on behalf of individuals, or a collective action/class action which is brought on behalf of a group of identified or identifiable persons.

The contributions could address, in particular, whether such a right of action exists for consumers; the rules concerning the formation of the represented group (class certification, opt-in/opt-out); the rights of individuals who do not participate in the group/class to bring individual actions; rules concerning the quantification of damages awarded to the group; rules concerning the allocation of damage awards among group members; and incentives to bring an action on behalf of a group of customers (for example, compensation for attorneys representing a group/class).

Have there been any concerns that collective actions/class actions have created or could create excessive incentives to litigate; if so, how have these concerns been addressed?

#### **2. Interface between Public Enforcement and Private Enforcement**

One of the main issues arising at the interface between private and public enforcement is the effect of private actions on leniency programs, and steps that can be taken to protect the integrity of leniency programs where leniency applicants could be exposed to private actions for damages.

Please describe any rules in your jurisdiction that address the interaction between leniency applications and private actions for damages, including, for example, rules concerning the competition authority's ability to refuse disclosure of the leniency application (or perhaps other documents submitted by the leniency applicant) for use in private actions, or rules limiting the leniency applicant's exposure to damage awards.

Even if specific rules have not (yet) been adopted, please describe whether any concerns about the interaction between leniency programs and private actions have been raised in your jurisdictions, and how such concerns have been or could be addressed.

Please also discuss whether in your jurisdiction similar issues can arise outside the context of leniency applications in cartel investigations, i.e., with respect to information the competition authority has obtained in a private/administrative enforcement action and its use in follow-on private litigation.



## AUSTRALIA

### 1. A brief overview of class action procedures in Australia

Australia is a federation. It has State and Territory Supreme Courts and a Federal Court of Australia, as well as a High Court. Broadly stated, the procedures for what are loosely called class actions are that the Supreme Courts have opt-in procedures while the Federal Court of Australia has an opt-out procedure under Part IVA of the *Federal Court of Australia Act 1976* (Cth).<sup>1</sup> Additionally, the Supreme Courts of Victoria and South Australia have opt-out procedures but this additional option is not true of all Supreme Courts in Australia.<sup>2</sup>

The *Trade Practices Act 1974* ('TPA') empowers the Australian Competition and Consumer Commission (ACCC) to take a representative action in the Federal Court on behalf of persons who have suffered loss or damage by conduct that contravenes the TPA, provided those persons have given prior written consent to be a party to the action (basically, an 'opt-in' procedure under section 87 of the TPA). Additionally, the ACCC may avail itself of the opt-out procedure under Part IVA of the *Federal Court of Australia Act 1976*.

One important rule that attaches to the Part IVA Federal Court procedures is that group proceedings are not permissible against multiple respondents (*Philip Morris (Australia) Ltd v Nixon*<sup>3</sup>), unless all applicants have the same claim against each of the individual respondents. This can be a limitation necessitating separate actions and reform has been suggested.<sup>4</sup> There is, however, no mandatory certification requirement for a class suit under Part IVA of the Federal Court procedure. Part IVA itself sets out the conditions which need to be satisfied in order to activate the class suit.

A person who falls within the class in an opt-out procedure and who wants to take an individual private action must take positive steps to disengage from the class.

The distinction between opt-in and opt-out procedures in Australia can be important for practical reasons when considering a 'class action' claim and the ACCC has had experience over the years with the different procedures, at least in the area of Part V consumer protection matters.<sup>5</sup> In utilising the Part IVA

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<sup>1</sup> The Federal Court procedure, which became law in 1991, is technically a 'representative action' but it is, for all practical purpose, referred to as a class action provision – see the reference to *Wong v Silkfield Pty Ltd*, below).

<sup>2</sup> Broadly stated, an 'opt-in' class action is when plaintiffs to the action must take positive steps to be formally recorded as a party to the action. Any subsequent decision binds the parties who have opted-in but it does not prevent other affected parties from taking their own separate action. An 'opt-out' procedure defines a class of plaintiffs and all persons who are in that class are bound by the decision in the case unless they take positive steps to opt-out. An opt-out process usually requires those who are pursuing the action to notify other potential class members or, at least, to publicly advertise the action.

<sup>3</sup> *Philip Morris (Australia) Ltd v Nixon* [2000] FCA 229 – the case involved three tobacco companies.

<sup>4</sup> Vince Morabito, *Class Actions against Multiple Respondents*, [2002] FedLReview 11.

<sup>5</sup> It should also be noted that there is concurrent federal and State law in the area of consumer protection.

Federal Court procedure, the ACCC has to be necessarily selective in taking representative action for damages for those who have suffered loss. Examples include *ACCC v Chats House Investments Pty Ltd and Others* (1996)<sup>6</sup> (on behalf of 26 clients who suffered financial loss through unconscionable and misleading and deceptive conduct), and *ACCC v Golden Sphere International Inc* (1998)<sup>7</sup> (a pyramid scheme involving an estimated 14,000 consumers). There have been some 11 cases taken by the ACCC using the alternative opt-in procedure under section 87 of the TPA.

As a generalisation, avenues for class actions have been enhanced in Australia in recent years, particularly with the introduction of the Part IVA procedure in the Federal Court in 1991, and their use is likely to increase. The Part IVA procedure was specifically aimed at providing a real remedy for a number of claimants whose loss is small but not economically viable for recovery under an individual action. It was also designed to allow more efficient amalgamation of larger actions rather than hearing individual and time consuming actions.<sup>8</sup> For example, in *Bright v Femcare* (2002)<sup>9</sup>, a product liability case involving a contraceptive sterilisation clip, 61 women sued the manufacturer of the clips using the Part IVA procedure. In *Johnson Tiles Pty Ltd and Ors v Esso Australia Ltd and Ors* (2000)<sup>10</sup>, a group action for economic loss and damage covering a group that included a commercial business, a domestic utility user and a worker stood down because of an interruption to an employer's gas supply was filed with extraordinary speed (four days after a major gas explosion and fire at the Longford Gas Plant). The High Court of Australia has also provided a useful history as well as recognition of the Part IVA Federal Court procedure in *Wong v Silkfield Pty Ltd* (1999)<sup>11</sup> (private litigation concerning a property investment scheme).

## 2. Competition law cases in Australia

In Australia restrictive trade practices are governed by the *Trade Practices Act 1974* and the Competition Codes of all the States and Territories. The term 'Competition Code' incorporates an agreement made in 1995 between the Commonwealth government and the governments of the States and Territories that enables a national approach to be taken in proscribing restrictive trade practices. This agreement is underpinned by legislation in each jurisdiction. The legislative formality is necessary because there are constitutional limits to certain aspects of federal law in Australia.

Within Part IV, the TPA operates to prohibit cartel behaviour, misuse of market power, agreements that substantially lessen competition and resale price maintenance. The ACCC administers the TPA.

Australia's legal system has a thirty-year history involving antitrust cases. Currently the ACCC litigates matters involving alleged restrictive trade practices in civil penalty proceedings.<sup>12</sup> While the TPA provides private rights of action for those who have suffered loss or damage from conduct in contravention of the restrictive trade practices provisions, the majority of antitrust litigation in Australia is undertaken by

<sup>6</sup> *ACCC v Chats House Investments Pty Ltd and Others* (1996) 142 ALR 177.

<sup>7</sup> *ACCC v Golden Sphere International Inc* (1998) ATPR 41-638,

<sup>8</sup> These objectives were stated in the Second Reading speech of the Bill for the *Federal Court of Australia Amendment Act 1991*.

<sup>9</sup> *Bright v Femcare Limited* [2002] FCAFC 243.

<sup>10</sup> *Johnson Tiles Pty Ltd v Esso Australia Ltd* [2002] FCA 1572.

<sup>11</sup> *Wong v Silkfield Pty Ltd* [1999] HCA 48

<sup>12</sup> The Australian Government has announced its intention to provide for criminal prosecution of cartel conduct to exist along with civil prosecution of cartels; <http://www.treasurer.gov.au/tsr/content/pressreleases/2005/004.asp>

the ACCC. There are probably several reasons for this situation in Australia compared to other jurisdictions such as the USA. The commonly understood practice of contingency fees based on a percentage of the damages obtained are actually banned in Australia although, in practice, computations based on a 'no win – no fee' with a successful action involving a standard fee plus an additional fee superimposed (an 'uplift' fee) are permitted. In addition, Australia has not offered an incentive in its anti-trust legislation of the further deterrent of a statutory multiple for damages obtained in private actions. Australia does offer payment of the other party's legal costs by the party who loses the action - using the rule that costs follow the successful action - but while this helps private plaintiffs who are successful it can also inhibit prospective plaintiffs when they weigh up the consequences of losing the action. Such costs are usually subject to independent verification. Also, historically, Australia is not generally viewed as a litigious society.

However, private litigation of antitrust matters has an important role. To date private actions have assisted development of significant judicial precedent although such actions have primarily revolved around redress for conduct other than cartels, such as for misuse of market power and arrangements that substantially lessen competition. What must also be taken into consideration is the purpose for taking such private actions. For example, the purpose for the action may be to obtain injunctive relief rather than to pursue a damages claim. It is also the case that a large number of private actions filed under the TPA seeking redress for restrictive trade practices are discontinued before substantive hearing and may be settled between the parties.

### 3. Representative and class actions in restrictive trade practices matters

As outlined above, the ACCC has useful experience in taking representative actions, especially for consumer protection matters (in the broad sense of the term). Some of these cases extended over comparatively lengthy periods and engaged the ACCC's staff and its lawyers in addressing procedural complexities. Australia's legal system, however, covering class actions for restrictive trade practices is not as well developed. Only two such Australian class actions have been filed, both by private parties and both in relation to alleged cartel activity; *Darwalla Milling Co Pty Ltd & Ors v F Hoffman-La Roche Limited & Ors*, No.V359 of 1999, re vitamins (as at December 2005 that party was still awaiting discovery 7 years after instituting proceedings) and *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd*, filed in the Federal Court on 11 April 2006 concerning an alleged corrugated boxes cartel.

Under the TPA the ACCC may instigate a representative action on behalf of persons who have suffered loss or damage as a result of a cartel. As mentioned above, while the ACCC has on a number of occasions taken representative proceedings on behalf of consumers involving misleading and deceptive conduct and other consumer protection matters it has not undertaken a representative proceeding in relation to cartel conduct.

As explained in the overview, above, representative proceedings by the ACCC can take place either on an 'opt-in' basis, under section 87(1A) of the TPA or on an 'opt-out' basis under Part IVA of the *Federal Court of Australia Act 1976* ('Federal Court Act').<sup>13</sup>

<sup>13</sup> Section 87(1B) of the TPA provides as follows:

- ' The Commission may make an application under paragraph (1A)(b) on behalf of one or more persons identified in the application who:
- (a) have suffered, or are likely to suffer, loss or damage by conduct of another person that was engaged in contravention of Part IV (other than section 45D or 45E), IVA, IVB, V or VC; and
  - (b) have, before the application is made, consented in writing to the making of the application.'

Despite legislative efforts to facilitate representative proceedings, in the form of Part IVA of the Federal Court Act, concern has been voiced that the Australian system makes representative proceedings difficult. Difficulties identified by Australian class action lawyers to the successful formulation of class actions include the ability to attract a representative party, i.e. the party named as the applicant in the proceedings as distinct from an ordinary class member, as the representative party alone is subject to adverse costs if the class action fails. The inability of lawyers to claim a contingency fee in representing a class has also been identified as an issue.

Another factor that potentially impacts upon the prevalence of class actions is the emerging availability of litigation funding in relation to the Trade Practices cases. The existence of litigation funding has been advocated by lenders as allowing litigants to spread their risk. It would seem that the court, upon receiving a complaint by the respondent will scrutinise the details of the agreement between the applicant and the litigation funding company and consider its operation in the circumstances of the proceeding. A key issue would appear to be whether the applicant retains control of the litigation.<sup>14</sup>

Within the Federal Court procedures private parties are provided with capacity to seek orders for preliminary discovery, discovery, for the issuing of subpoenas and interrogatories. It remains the case however, that the ability of private parties to form a case is not without difficulty. Whereas the ACCC has the ability to compulsorily obtain evidence through use of formal investigation powers private litigants face significant hurdles in obtaining evidence.

Section 80 of the TPA provides that 'any ...person' may apply to the Australian courts for an injunction for a perceived breach of the TPA.<sup>15</sup> If and when that matter comes before the court for

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Section 33C of the *Federal Court of Australia Act 1976* provides:

'(1) Subject to this Part, where:

- (a) 7 or more persons have claims against the same person; and
  - (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
  - (c) the claims of all those persons give rise to a substantial common issue of law or fact;
- a proceeding may be commenced by one or more of those persons as representing some or all of them.

(2) A representative proceeding may be commenced:

(a) whether or not the relief sought:

- (i) is, or includes, equitable relief; or
- (ii) consists of, or includes, damages; or
- (iii) includes claims for damages that would require individual assessment; or
- (iv) is the same for each person represented; and

(b) whether or not the proceeding:

- (i) is concerned with separate contracts or transactions between the respondent in the proceeding and individual group members; or
- (ii) involves separate acts or omissions of the respondent done or omitted to be done in relation to individual group members.'

<sup>14</sup> *QPSX Limited v Ericsson Australia Pty Ltd (No 3)* [2005] FCA 933 -

<sup>15</sup> TPA, Section 80(1).

determination, litigants seeking civil redress for alleged anti-competitive conduct of another will present their case before a judge sitting alone. Remedies for breaches of the restrictive trade practices include:

- injunctions (section 80)
- damages for those who have suffered loss or damage from the conduct (section 82) and
- Ancillary orders of various kinds in favour of persons who have suffered loss or damage because of the conduct (section 87), including specific performance, rescission and variation of contracts.

### 3.1 Damages

With Australian Courts, damages will be calculated with regard to the loss or damage suffered by the plaintiff (as distinct from being calculated on the gain made by the defendant). It is not possible to obtain exemplary damages under either section 82 or 87 of the TPA. Further, multipliers of damages in civil compensation cases do not exist in TPA practice. Private litigants that have sought an award of damages for conduct in breach of the restrictive trade practices provisions have in the main taken the ‘but for’ approach to quantifying damages.<sup>16</sup>

Where cartels are detected and prosecuted, there is limited judicial authority in Australia as to the appropriate approach for an award of damages for cartel conduct.<sup>17</sup> A recent private damages case in Australia against an alleged cartel has highlighted that ‘there is considerable room for development of the law’ in relation to claims for damages based upon an alleged contravention of the restrictive trade practices provisions of the TPA.<sup>18</sup>

The issue of whether a passing on defence exists in Australia is also yet to be fully tested in TPA litigation. Australian courts have not had to consider whether indirect purchasers subject to price surcharges resulting from a cartel should, as a matter of policy, be precluded from suing the alleged cartelist for damages. A relevant issue for plaintiffs suing under the TPA in such a circumstance is more whether they have necessary standing.

<sup>16</sup> In *Multigroup Distribution Services Pty Ltd v TNT Australia Pty Ltd* [2001] FCA 226 Multigroup’s pleadings to the Court flagged a claim for loss or damage based on a before and after approach by comparing the profits, expressed as a percentage of sales obtained by Multigroup while the cartel was in existence as opposed to Multigroup’s profits in the year after the cartel ceased. That case was settled before trial. A similar approach has been taken by Energex in *Energex Limited v Alstom Australia Limited* [2004] FCA 575 where it has sought damages based on purchase of transformers at a price higher than that which would have prevailed but for the conduct. The *Energex* matter is ongoing. In *Hubbards Pty Ltd v Simpson Ltd* (1982) 41 ALR 509 and *Parrys Department Store v Simpson Ltd* (1983) 76 FLR 60 the plaintiffs sought damages based on the estimated lost sales due to the withholding of the Simpson products and the profits which would have been obtained on those products had Simpson not ceased trading (and not applied its RPM policy).

<sup>17</sup> Gyles J in *Multigroup Distribution Services Pty Ltd v TNT Australia Pty Ltd* [2001] FCA 1144, a case where a competitor to alleged cartelists sought damages, observed that the approach of the parties to the case could be characterised as ‘trench warfare’.

<sup>18</sup> *Energex Limited v Alstom Australia Limited* [2005] FCAFC 215.

#### **4. Interface between Public Enforcement and private Enforcement**

##### **4.1 Damages Actions and the impact of the ACCC Immunity Policy**

On 5 September 2005 the ACCC's Immunity Policy for Cartel Conduct replaced its 2003 leniency policy.

The Immunity Policy confers amnesty from prosecution by the ACCC to the first eligible cartel participant to report their involvement in a cartel and to cooperate with the ACCC's investigation and prosecution of other cartel participants. In doing so, the Immunity Policy maximises incentives for cartel participants to self-report their involvement in a cartel and provides certainty for applicants about how the ACCC deals with immunity applications.

Given the ACCC has only adopted a modern leniency regime in recent years it is too early to discern how this will impact upon private actions. The ACCC is becoming aware that legal advisors are now advising clients about the benefits of the Immunity Policy but also advising that obtaining immunity is not an end in that there is likely to be an increasing propensity for private actions for damages. This is because the Immunity Policy does not provide immunity or any other protection against civil actions for damages.

However, under the Immunity Policy (para 42) the ACCC will not itself use as evidence in proceedings against the applicant any information which the ACCC has accepted in support of an immunity application in respect of the relevant cartel. (If the applicant is a corporation the same principle extends to prevent such use against current or former directors, officers and employees if they satisfy the terms of the Immunity Policy.) In addition, the ACCC will not share confidential information provided by an immunity applicant with other regulators overseas, unless required by law, or a waiver is provided, and the ACCC will use best endeavours to protect any such confidential information (paras 44 and 45).

No special rules of evidence apply to render inadmissible, in private damages claims, information provided by an immunity applicant. However, a court may exclude evidence (under s130 of the *Evidence Act 1995* (Cth)) if the public interest in admitting information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality.

The new ACCC Immunity Policy has withdrawn a consideration that was relevant to the 2003 leniency policy; whether a party was prepared to provide restitution to affected parties. Looking forward the ACCC noted that the 'carrot' of immunity from prosecution by the regulator remains paramount in detecting and prosecuting cartels.

##### **4.2 ACCC position on damages actions**

In a paper to the International Bar Association 2nd Antitrust Spring Conference, (Sydney 28 April 2006), Graeme Samuel, Chairman of the ACCC, noted that there seemed to be a growing recognition by victims of cartels that they are entitled to seek redress. Mr Samuel stated:

- The ACCC has been approached by both private legal firms and litigation funders seeking whatever assistance the ACCC can offer in the development of private damages claims. The ACCC sees private proceedings as a legitimate and valuable avenue of redress. However there are limits to what role the ACCC should play in such proceedings and what assistance it can provide.
- For instance, it would not be possible for the ACCC to share information that had been obtained using the ACCC's compulsory information gathering powers under section 155 of

the Act. Similarly, the ACCC obtains information on a confidential basis. It would not be possible to share this information without the consent of those who provided the information.

- It has also been suggested that the ACCC should actively seek findings of fact that will assist private damages claimants. The ACCC will not shy away from this in appropriate circumstances. However, there may be legitimate reasons in a particular matter for the ACCC to obtain findings that do not cover all instances of certain conduct, or indeed, not pressing for findings of fact at all. The ACCC would not wish to jeopardise the public interest of obtaining an agreed penalty or other outcome merely because this would not advance a private damages action, or would advantage certain private parties over others.

In attempting to balance the benefit from greater private enforcement of laws against the ACCC's need to effectively detect, investigate and prosecute cartels, the ACCC recently refused to voluntarily provide witness statements and transcripts of interviews conducted relating to a leniency applicant. The ACCC has also sought to protect the confidentiality of information provided by cartel participants who came forward under the ACCC's Cooperation Policy. The ACCC's overall position is that there is nothing that the ACCC does that is designed to discourage or impact upon third party damages actions.

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## CZECH REPUBLIC

### 1. Experience with private remedies

The undertakings and consumers in the Czech Republic suffering damage from breach of competition law may submit their claims by means of private actions to the civil courts; there are no courts specialized in this type of claims. The Office is not involved in the proceedings (and even does not have to be informed about it), it is however possible for the plaintiff to use the Office's decision declaring breach of competition law, which is binding for the court.

According to the knowledge of the Office the civil claims in competition cases are still applied only rarely. Currently, the Office is informed about the first case of civil dispute related to an infringement of national competition rules. We believe that the publicity which the case enjoyed (due to the fact that the parties to the proceeding were two major Czech telecommunication operators) will contribute to the public awareness of the possibility to bring the civil claims in competition cases before the courts.

The particular situation in the Czech Republic may be caused especially by the fact that there is still no established approach of the Czech courts towards the competition matters and their decision-making is therefore to a significant extent unpredictable. The court procedure in the Czech Republic is quite lengthy which is also connected with increase of the average costs of conducting a civil procedure. This situation should be remedied by the complex reform of the judiciary in the Czech Republic aimed at making the procedures speedier, which is currently discussed by the Czech Government; no specific details concerning this reform were published yet.

### 2. Interface between public and private enforcement

The Office is not entitled to decide on damages. However, once there is a decision of the Office on a breach of competition law, it is binding also for the civil courts. The plaintiff therefore does not need to prove the unlawfulness of the defendant's action, and it cannot be challenged by the defendant. In case when there is not the Office's decision in force, courts are entitled to assess the whole matter, including the breach of the competition law, or to interrupt the proceeding and await the decision of the Office. According to our experience, no court has ever decided to assess a breach of competition law on its own in civil proceedings.

In order to be informed about private claims based on breach of competition law (and possibly to intervene in them as *amicus curiae*), the Office initiated negotiations with the Ministry of Justice, asking it to oblige the courts to inform the Office. These negotiations have not been completed yet, but the Ministry is not in favour of imposing any new obligations on courts.

As far as the interface between Czech courts and the Commission is concerned, the rules of such a co-operation were laid in Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (OJ 2004/C 101/04).

Generally the national courts may apply EC competition rules in lawsuits between private parties, such as actions relating to contracts or actions for damages. They also act as public enforcer or as review

court. When applying aforesaid EC competition rules national courts are bound by the case law of the Community courts as well as by Commission regulations.

The mutual co-operation to a great extent comprises of the assistance of the Commission to the national courts when they apply Community law. In this sense national courts may request an opinion on question concerning the application of EC competition rules. The Commission is also obliged to transmit relevant information it holds to national courts.

### **3. Claims for damages**

In the Czech legal order, there are no specific provisions concerning claims for damages based on breach of competition law; general provisions of the Commercial Code are used instead. It is worth mentioning that the Commercial Code which is applicable since 1991 no longer fully reflects current economic reality. A new Commercial Code is being prepared, but it is not expected to come into force within next three years.

According to the Commercial Code, anybody who suffered damage as a result of unlawful conduct of somebody else is allowed to claim it, on condition he is able to prove

- the unlawfulness of such a conduct (in this respect, decision of the Office may be used, as discussed above),
- the damage suffered, and
- causal connection between the unlawful conduct and the damage.

Provided they are able to bring evidence necessary to prove these three conditions, anybody is allowed to bring a claim. Therefore, even indirect purchaser has, as a matter of principle, *locus standi* to file such an action. There is no experience with this sort of actions in the Czech Republic, but due to lack of any specific legal provisions, one may suppose it would be extremely difficult to establish the casual link and the amount of damage. Before the case law is settled in cases concerning direct purchasers, which will take at least another five years, we do not foresee any such claims.

As far as definition of damages is concerned, the Commercial Code states only that the damages shall include the actual damage suffered and loss of income caused by the breach of law (*damnum emergens and lucrum cessans*). It is the plaintiff's obligation to prove the exact amount of sustained damage. If the plaintiff requests so repair of the unlawful state (*restitutio in integrum*) is claimed instead of monetary compensation. Since there has not yet been any judicial decision on this problem in competition cases, it is possible only to predict the possible reasoning of the judges.

With regard to definition contained in the Commercial Code, the damages would be calculated with regard to the loss suffered by the plaintiff, not the gain made by the defendant. Establishing the loss, it might be possible to claim reduced profit margin as well as lost sales; it is however not possible to predict standard of evidence the courts would be requiring in these cases.

The defendants are allowed to contradict the amount of damage and the causality claimed by the plaintiff (and in cases where there was no previous decision of the Office, even the unlawfulness of their conduct); as a matter of principle, the passing-on defence might therefore be used. According to our general experience with Czech litigation, this sort of defence would be used, especially due to the fact that the basis for calculating damage is the real loss suffered; nonetheless, there is no experience with it yet.

#### 4. Collective actions

The very term „Collective action“ is not to be found in Czech competition law. As a matter of fact it is not mentioned in the Czech system of law at all. However, a specific legal instrument in the field of unfair competition law could be under the certain circumstances considered to fulfil the characteristics of this particular institute.

The law of unfair competition is primarily comprised of tort that causes an economic injury to a undertaking or a consumer, through a deceptive or wrongful business practice. The most familiar example of unfair competition is false advertising, unauthorized substitution of one brand of goods for another and false representation of products or services as declared in Commercial Code (§§ 44 to 52 of the act No. 513/1991 Coll., commercial code, ammended by later acts) which gives the basis for the legal regulation of this issue.

Commercial Code (§§ 53 to 54) also provides a civil legal remedies to unfair competition. Under these provisions several forms of compensation may be sought. A person whose rights were violated by unfair competition may demand that the violator refrain from further conduct and repair the unlawful state. Also an appropriate (monetary) compensation may be claimed as well as damages and unjust enrichment.

At this point the issue of „collective action“ may be taken into account. Under the provision of § 54 refraining from further conduct and repair of the unlawful state may be claimed also by a legal person entitled to representation of undertakings or consumers, though these are the only possible remedies. Such a legal person cannot claim damages or any other form of compensation. In order to protect the rights of subjects listed above such a legal person can bring a collective action against the particular violator of competition law instead of several singular actions that might be brought against the same violator by different consumers or undertakings themselves.

In case consumer or a legal person representing consumers claims refraining from further conduct and repair of the unlawful state the burden of proof rests upon a defendant.

This regulation, however, covers only the field of unfair competition. The option of collective action does not exist in any other area of competition law, nevertheless inclusion of similar provisions in the future are still under consideration.

#### 5. Plurality of actions according to the Code of Civil Procedure

Czech Code of Civil Procedure (Act No. 99/1963 Coll., Code of Civil Procedure, ammended by later acts – hereinafter referred to as „CCP“) does not explicitly mention collective actions. One option could be the institute referred to as a joinder of parties (generally described in § 91 paragraph 2 of CCP). In such a case the court’s decision concerning joint rights or obligations must apply to all participants of one party. Also all actions of any participant are binding for the whole party, except for the consent to settlement and acknowledgement of the claim which must be approved by every participant of both parties concerned.

In connection with facts presented in point IV. of this article the CCP contains special provision related to the actions in cases of unfair competition (§ 83 paragraph 2 letter a of CCP). Once the action is brought by a single undertaking, consumer or a legal person representing undertakings or consumers it constitutes an estoppel of the trial pending. Any other entitled person cannot start a new trial with the same claim. Such person can only participate in the trial as a enjoined party.

## **6. Case study**

As mentioned above, the Office is informed about only one case of private enforcement of claims based on competition law. Two mobile telecommunication operators were established on relevant market before the third one entered it. The former two required fees for interconnection of their networks that were lower than the fees required for the calls between their networks and the one belonging to the new entrant. The Office initiated proceedings with the two operators, which were, according to applicable law, both found dominant on the relevant market. The Office decided they had abused their dominant position. On the basis of these decisions, the third operator initiated civil proceedings against the other two, claiming damages based on the fact that due to higher interconnection costs

- its clients realised fewer calls to the competing networks and
- it acquired fewer customers, while many of the potential customers were discouraged by the higher fees

The court has not decided yet, and no oral proceedings have taken place until these days.

## DENMARK

### 1. Collective Action/Class Action

According to Danish law, class action can be defined as a lawsuit where one or several of the parties of an action, with or without an individual authority, represent a group whose members are not parties to the action, but where the judgment has binding legal force on the members of the group.<sup>1</sup> Generally, a judgment only has binding legal force on the parties to an action.

### 2. The present law

Because the Administration of Justice Act (“Retsplejeloven”) does not contain any rules on class action, today, there is no option of such actions in Denmark.

However, different types of combining cases are possible under the Administration of Justice Act.

For instance, under certain conditions<sup>2</sup>, two or more plaintiffs may appear together in a joint action – e.g. in a joint action for damages as a result of a competition law violation. But the claims of each party are heard individually, and the outcome of the case may differ from party to party. If the defendant opposes a joint action, it is necessary for the plaintiffs to demonstrate the existence of a certain connection between the claims.

Assuming that a right belongs jointly to several persons – e.g. the joint ownership of a house – all the owners are obliged to file a joint lawsuit acting as one party during the proceedings. Thus, the outcome of the judgment will be binding for all the owners.

Associations<sup>3</sup> (e.g. an association of car distributors), trade organisations or other interest groups may also file proceedings on behalf of their members in matters falling within the field of the association’s sphere of interest. There are, however, no examples of consumer organisations having filed proceedings on behalf of consumers having suffered damages as a result of a competition law violation.

A number of authorities, associations and organisations have statutory rights to file proceedings, for instance within environmental protection matters. Also a number of EC Directives, e.g. within the consumer protection field, contain provisions of the rights of associations, organisations etc. to file proceedings for the purpose of ensuring that national provisions implementing a Directive are observed.

The Danish Marketing Practices Act (“Markedsføringsloven”) contains an exceptional right for the Consumer Ombudsman, upon request, to recover, claims collectively in case of a plurality of consumers

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<sup>1</sup> Cf. p. 81 of Report No 1468/2005 from the Danish Administration of Justice Council concerning a reform of the rules applicable to the civil administration of justice, Part IV, Class Actions (“Retsplejerådet betænkning nr. 1468/2005 om reform af den civile retspleje, IV, Gruppesøgsmål, s. 81.”)

<sup>2</sup> Cf. the Administration of Justice Act Section 250.

<sup>3</sup> Cf. the Administration of Justice Act Section 124.

having uniform claims for damages.<sup>4</sup> This procedure only applies to claims based on the Marketing Practices Act as opposed to other laws, such as the Danish Competition Act. The Procedure has not yet been put into practice.

### **3. Possible future regulation**

On 19 December 2005, the Danish Administration of Justice Council (“Retsplejerådet” - the Council) published a report on the introduction of class actions within all fields of damages in Denmark.<sup>5</sup> The Danish Government is, after a public hearing of the report, considering whether a bill introducing class action lawsuits shall be introduced – be it in the last half of 2006 or in the first half of 2007.

In general, the Council recommends the Administration of Justice Act to be amended for the purpose of introducing the possibility of a so-called group representative to institute a class action on behalf of a group of plaintiffs with similar claims against a defendant. The outcome of the judgment will have binding force on all members of the group.

The Council recommends the introduction of class actions in order to provide a more efficient handling of disputes relating to a plurality of similar claims. The introduction of a class action will primarily ensure that such similar claims, perhaps not individually large enough for a case to be filed, are not dropped in advance.

In order to prevent any inconveniences of class actions, in particular the filing of unjustified claims for the purpose of putting pressure on an undertaking to enter into a settlement of such unjustified claims, the Council suggests that it shall be for the courts to approve a class action in each individual case. Furthermore, it is proposed that the courts shall approve the group representative.

The Council’s proposals do not imply an option of instituting class actions in respect of similar claims against a group.<sup>6</sup>

The report proposes that, as a main rule, a class action shall only encompass persons who have actively signed up for the class action (the opt-in model). The group is to be represented by a group representative being the only party in the case in respect of the plaintiffs. The group representative can be a member of the group, an association or a public authority authorized by law to act as a group representative. In respect of the latter, the Council suggests that only the Consumer Ombudsman shall be appointed as a group representative.

The Council suggests that the courts may decide that a class action shall extend to cover all persons with similar claims unless the person in question actively asks not to be included in the class action (the opt-out model). That kind of class action will apply in cases where the claims are of such an insignificant dimension that they would normally not be the subject of an individual action. It is a prerequisite that a class action following the opt-in model cannot be considered efficient enough and that the group representative is a public authority. Again, the Council has suggested that only the Consumer Ombudsman shall be appointed a group representative.

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<sup>4</sup> Cf. the Marketing Practices Act Section 20.

<sup>5</sup> Cf. footnote 1.

<sup>6</sup> Actions against several defendants are, however, to a certain degree already possible under the Administration of Justice Act.

Irrespective of the class action in question being instituted as an opt-in model or an opt-out model, it is a prerequisite that the competent court can approve that the conditions are met.

One of the conditions implies that other types of actions are not a more suitable procedure. A class action is to be considered an alternative form of legal procedure.

Another condition implies that the potential members of the group can be identified and subsequently possibly notified. In that respect, access to names of the defendant's clientele can be an important remedy for the group representative to be able to identify potential members of the group. However, the Council does not suggest that a court may impose the defendant to divulge that information.

When the Council's report was circulated for comments, the Danish Competition Authority emphasized that access to the names of the defendant's clientele can be crucial in case of class actions against members of a cartel and thus recommended an option for the courts to impose such an obligation of divulgement. Furthermore, the Danish Competition Authority recommended the establishment of a forum on the Court Administration's<sup>7</sup> homepage with an option to announce potential class actions and thereby establishing the necessary contact with possible members of a group. At the same time, it would be natural for the Danish Competition Authority to be in a position to publish possible class actions on its homepage.

The courts may request the group representative to provide a guarantee for the legal costs that the group representative may be compelled to pay to the defendant in case the group is not – wholly or partly – successful in the action.

Concerning costs, members of a group, initially, are not considered parties in the action. As a consequence, the members are not to pay costs.

However, the Council considers it important that the members of the group shoulder a certain degree of responsibility for the action. Accordingly, the Council suggests that the courts may make it a condition for a member to sign up for a class action (the opt-in model) that the member provides a guarantee for some of the legal costs, i.e. the sum fixed by the courts, provided that the member's claim represents an adequate amount.

As for the members of a group in a class action covering all persons who have not explicitly asked not to be included in the action (the opt-out model), the Council proposes that the members can solely be imposed to contribute to pay the legal costs within the scope of their own outcome from the action.

#### **4. Interface between Public Enforcement and Private Enforcement**

##### **4.1 *The present law***

Although the explanatory notes to the Danish Competition Act<sup>8</sup> allow the use of leniency in competition cases, Denmark has at present not a binding leniency programme. The Competition Authority is the principal enforcement body and thus the initial point of contact for a leniency applicant. The Authority does not, however, have the authority to make a commitment of lenient treatment. The Authority can only make recommendations to the Public Prosecutor for Serious Economic Crime ("SØK"). After a matter has been referred for prosecution, it is for the Prosecutor to offer an undertaking that the Prosecutor will "not speak" against a reduction of fines by the courts. The judge may ignore this advice, but so far the

<sup>7</sup> "Domstolsstyrelsen" is an authority responsible for the administration of the judiciary.

<sup>8</sup> Cf. the Office of the Folketing Hansard 2001/2002; Supplement A, p.4454 ("Folke-tingstidende 2001/2002, tillæg A, s. 4454.").

courts have complied with the Prosecutor's recommendations in respect of "rebates" in relation to competition cases.

## **5. Possible future regulation**

Leniency instruments are currently discussed by a Committee, set up in February 2006 by an agreement between the Minister of Justice and the Minister of Economic and Business Affairs. At present, the Committee focuses only on leniency and investigations and not on the interaction between leniency applications and private actions for damages.

Without anticipating the contents of the future Danish debate on the interface between public enforcement and private enforcement in respect of particular leniency applications, one must recall that, as a principal rule, the Access to Public Administration Files Act ("Offentlig-hedsloven") does not apply to cases within the Competition Act.<sup>9</sup> Consequently, third parties are generally not granted access to files including a leniency application.

The courts may, however, at the request of a party, order the other party or a third party – e.g. the Danish Competition Authority – to submit documents of significance to the case in their possession or custody.<sup>10</sup> Information which the other party or a third party, as a part of a testimony, is excluded or exempted from providing is not comprised by the discovery rules.

A party is generally exempted from providing information that would have an otherwise damaging impact on the party or his closest relatives. It remains to be seen whether the courts could order the disclosure by a party of its leniency application or whether they would be excluded since such disclosure could be considered having an otherwise damaging impact on the party.

Due to public interest, an employee at the Danish Competition Authority is generally excluded from providing information which applies to duty of confidentiality. It remains to be seen whether disclosure of a leniency application applies to this exclusion from the ordinary rules on discovery.

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<sup>9</sup> Cf. the Competition Act Section 13 (1).

<sup>10</sup> Cf. the Administration of Justice Act Section 298 (1) and 299 (1).

## GERMANY

Private antitrust enforcement plays an important and valuable role in Germany. It supplements and relieves public antitrust enforcement by covering cases which would not be prosecuted by the competition authorities due to limited resources. It thus leads to a wider sanctioning of competition law violations and strengthens the overall competition culture. Each year numerous private claims are filed in Germany against violations of competition law; most of these on account of a violation of the prohibitions of abuse. In cartel cases, fines imposed by the Bundeskartellamt remain the principal instrument of enforcement.

With the 7<sup>th</sup> amendment of the Act against Restraints of Competition (ARC) the legal framework for damages actions was substantially improved. Clear emphasis was given to the area where improvements were absolutely necessary: hardcore cartels. The changes are adequately embedded into the general system of civil liability. Thus, the reform represents a further development of the existing legal framework and does not build on specific principles known from the US (punitive damages, contingency fees, opt-out class actions etc.).

### 1. Collective Action /Class Action

According to German law, only “collective” claims are allowed, i.e. the collection of individual claims. Class actions that lead to the automatic application of a final judgment to third parties not involved in the proceedings (so called “opt-out” class actions) are not known in Germany. They are also incompatible with the German legal system. Constitutional law guarantees every claimant to be heard before a binding decision is taken. Opt-out class actions imply the risk of ignoring this fundamental right of every claimant.

During the course of the discussions on possible forms of bundling individual claims, a pilot project was undertaken in Germany with the Act on the Introduction of Test Case Litigation for Capital Investors (Kapitalanleger-Musterverfahrens-Gesetz), which recently took effect. Here, each capital investor claiming damages may request the initiation of a test case. The request is published electronically. If 10 or more requests for clarification of the same test case are filed within four months, the Higher Regional Court will decide the test case. The other proceedings are interrupted until a decision is taken by the Higher Regional Court. One claimant will be appointed *ex officio* to be the test claimant. Since all the other claimants are added to the test case it is ensured that every claimant’s right to be heard is respected. Compared to individual proceedings, the procedure under this Act offers the following advantages:

- Each claimant is placed in a position in which he can effectively enforce his damage claim.
- The risk associated with the proceedings is significantly lowered.
- Complex legal questions are clarified with a binding effect for all injured capital investors and evidence needs to be taken only once.
- The handling of various claims is accelerated and the courts concerned are relieved.

Germany hopes to gain some experience from and evaluate the main findings of this pilot project before taking a decision on which forms of bundling can be best integrated into the existing legal system.

Today, under the German ARC representative actions can be filed by industry associations, but not by consumer associations. The ARC contains a provision (§ 34a) entitling in addition to the competition authorities also certain industry associations to file for injunctive relief, remedy or profit skimming. If an undertaking commits an infringement of competition law and thereby gains a economic benefit at the expense of multiple purchasers or suppliers it may be required by industry associations to surrender the economic benefit to the treasury to the extent that the cartel authorities do not order the skimming off of the economic benefit. If the economic benefit has been skimmed off by the payment of damages the respective amount shall be deducted from the claim.

### ***1.1 Interface between Public Enforcement and Private Enforcement***

The private and public enforcement of competition law are both indispensable elements of an effective competition law enforcement system. Mostly, they will complement and even strengthen one another. This is obvious where private parties can rely on administrative or court decisions when seeking compensation for damages they have incurred. Conversely, private actions frequently occurring in a certain economic branch or in a certain market may induce competition authorities to take up investigations.

It is imaginable, however, that situations may arise where there is a conflict of interest between public and private enforcement. This may especially be the case with the introduction of new instruments and the alleviation of procedural burdens on potential private plaintiffs.

### ***1.2 The situation in Germany after the 7<sup>th</sup> amendment of the ARC***

The links between public and private enforcement are manifold, and they have undergone some change with the 7th Amendment of the ARC.

Private damage actions are normally follow-on actions, i.e. they follow on from a prior authority decision. This is because competition authorities have compulsory investigatory powers which make it easier to prove a cartel law infringement. Therefore, in practice, it seems very unlikely that private investigations and stand-alone claims might become a feasible alternative to public enforcement. However, this does not only apply to the situation in Germany. An ICN Report on Interaction between public and private enforcement in cartel cases<sup>1</sup> holds that in most jurisdictions private competition law enforcement in the area of hard-core cartels is largely restricted to follow-on claims.

The new ARC provides that the Bundeskartellamt's final decisions are binding upon civil courts. This is a definite plus for private enforcement but it means in turn that the decisions of the Bundeskartellamt might be appealed more often.

Under the old regime and during a transitional period the Bundeskartellamt in its decisions always specified the cartel profits and the hypothetical market price. Under the new legislation it will switch to a more schematic approach when setting a fine. Fines are now based on other factors, e.g. a company's turnover in the cartelized market. For private plaintiffs this means that they will have much more difficulty in their civil actions to prove the amount of damages incurred since they can no longer rely on calculations given in a prior authority decision.

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<sup>1</sup> Available under <http://www.internationalcompetitionnetwork.org/capetown2006/ICN-private-enforcement-final-version.pdf>. This is confirmed by the replies of the NGAs, the vast majority of whom advise their clients to first await the outcome of public cartel law enforcement by the competent authority.

Furthermore, compensation occurs irrespective of other sanctions, since the 7<sup>th</sup> Amendment contains an explicit legal order that in fixing the amount of the fine the national competition authority has to take into account possible damages claims. Thus, private actions constitute an additional sanction and deterrent that is adequately embedded in the overall system of sanctions.

## **2. Interaction between leniency programmes and private actions for damages**

The prevailing issue in the discussion about the interaction between public and private enforcement is the concern whether private enforcement has an impact on the effectiveness of leniency programmes. There is often the concern that the incentive of leniency programmes could be considerably reduced if the leniency applicant is confronted with extensive private follow-on claims for compensation. In this respect, in the course of the ICN project on interaction between public and private enforcement in cartel cases a questionnaire was also sent to so-called non-governmental advisors (including four German lawyers) to gain an insight into the interaction between public and private enforcement from a practitioner's point of view. The survey showed that the vast majority of the NGAs in Germany and other jurisdictions acknowledged the risk of potential follow-on claims being a possible disincentive to leniency application but they assess it as only one factor among many others. In general, they experienced that the benefits of a leniency application outweigh the potential risk of a follow-on damage claim. This applies especially to leniency applications where full immunity is granted whereas for applications for a reduction of fines the disincentives stemming from "excessive" private follow-up claims are considered by German NGAs to be more significant. Only one German NGA experienced a case in which a leniency application was not filed because of the risk of follow-on claims.

Given the legal situation, this raises two aspects which are of relevance: Firstly, it is to be questioned whether the cooperation of a leniency applicant is also able to reduce the potential level of damages the defendant has to pay or whether the leniency applicant will even be granted immunity. Secondly, the fact that the leniency applicant is cooperating with the competition agency could be used as evidence for its guilt in civil proceedings, especially if the disclosure of documents that were produced specifically for the purpose of a leniency application is ordered.

### **2.1 *The position of leniency applicants vis-à-vis private damage claims***

Under German antitrust law, leniency applicants do not benefit from their cooperation in the sense that they are granted immunity from private damage actions or that the potential level of damages is reduced. Hence, they are fully exposed to private damages claims. On the other hand, there is no pre-trial discovery procedure and there is no obligation upon the applicant to cooperate with cartel victims in a civil suit.

However, the first company to fully cooperate with the Bundeskartellamt is generally granted immunity from fines. That means that there is no authority decision against this specific undertaking. This can be an advantage, since such a decision could be used as a binding precedent in a follow-on civil suit.

### **2.2 *Rules of evidence in the interaction between public and private enforcement: Access to file and the supply of information under German law***

The success of a leniency programme largely depends on an applicant's trust in the competition authority not to disclose documents to third parties. Granting potential claimants unrestricted access to file would provide them with a magnitude of information which they would not normally be able to obtain.

As regards access to the Bundeskartellamt files a distinction should be made between different types of requests:

### 2.2.1 *Fines procedures*

Victims of cartel offences have a right of access to file. Any other third parties can normally merely require to be informed about the content of files. In any of the alternatives the Bundeskartellamt can deny or limit access to file and the supply of information, respectively, if this would harm the legitimate interests of the party affected hereby<sup>2</sup>. This means that the Bundeskartellamt has a rather wide margin of discretion when deciding upon requests for information or access to file.

In its new leniency programme of March 2006 the Bundeskartellamt has outlined how it will make use of its discretionary power. In order to reassure leniency applicants that the information submitted will be treated confidentially, it has pledged

- to treat in confidence the identity of the applicant and protect all trade and business secrets during the course of the proceedings up to the point at which a statement of objections is issued to a cartel member;
- to refuse applications by private third parties for the supply of information or access to file, insofar as the leniency application and the evidence provided by the applicant are concerned.

### 2.2.2 *Administrative procedures*

Where access to administrative procedure files (e.g. merger application files) is requested, the petitioner can rely on provisions in the Administrative Procedure Act (Verwaltungsverfahrensgesetz) and/or the Freedom of Information Act (Informationsfreiheitsgesetz). In both alternatives, again, the Bundeskartellamt can refuse or limit access to file and the supply of information, respectively, if the legitimate interests of the affected party so require or where business secrets are concerned.

## 2.3 *Current discussion on the Green Paper of the European Commission*

The current discussions about private enforcement have chiefly been triggered by the Green Paper which was published by the European Commission in 2005.<sup>3</sup> The concerns that have been raised in the course of these discussions are less about the status quo of the interaction between leniency programmes and private enforcement. Rather, fears have been voiced that the facilitation of private damages actions might undermine the attractiveness of leniency programmes. Hereby, it should be borne in mind that the companies' motivation for filing for leniency is often based less on moral than on economic considerations. It would be counterproductive if private damage claims and not the fine were perceived as the true sanction. Hence, any efforts to enhance private enforcement should be finely tuned so as to avoid the impression that companies may be better off economically if they abstain from participation in leniency programmes.

Further, there is a certain ambiguity to the approach by the European Commission. On the one hand a strengthening of private antitrust enforcement is being promoted. On the other hand, a more economic approach for the assessment of abuse cases is advocated in a discussion paper. It should be kept in mind that the application of the more economic approach may run counter to the goal of strengthening private enforcement.

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<sup>2</sup> It can equally do so if the success of an investigation would be put at risk.

<sup>3</sup> Available at [http://www.europa.eu.int/comm/competition/antitrust/others/actions\\_for\\_damages/gp.html](http://www.europa.eu.int/comm/competition/antitrust/others/actions_for_damages/gp.html).

Reducing or limiting the obligation to pay damage compensation and the joint and several liability of the leniency applicant would create numerous problems. The extent to which preferential treatment of the leniency applicant vis-à-vis other infringing parties is justified and how this can be effected when necessary can only be sensibly decided within the framework of the applicable national law. The leniency application, which in Germany is currently based on administrative principles of the Bundeskartellamt, cannot encroach upon damage compensation claims and the rule of joint and several liability.

Conversely, it would significantly reduce the attractiveness of leniency applications if potential applicants saw themselves as being subject to the danger of multiple damage compensation claims or far-reaching civil procedure law obligations to produce evidence, which could amount to a fishing expedition. Thus, these instruments should also be rejected because of their negative effects on leniency applications.

DAF/COMP(2006)34

## HUNGARY

### 1. Collective Action/Class Action

An action for damages in connection with the breach of competition rules can be brought pursuant to the general rules of civil procedure.<sup>1</sup> Any natural or legal person of full capacity can sue or be sued in court.<sup>2</sup> Under certain circumstances foreign natural or legal persons may also initiate a lawsuit before a Hungarian court. However, a plaintiff can only enforce its claim in a lawsuit if it has standing. A plaintiff has standing if (i) its rights or interests are affected by the legal dispute that is the subject-matter of the lawsuit; or (ii) it is authorized to bring an action by law (e.g. a public prosecutor). Accordingly, a claim for damages can be brought by the person who suffered damage.

#### 1.1 Collective actions

Two main types of collective actions are available in Hungary. The first group is that of joint actions when plaintiffs or defendants form a group in the procedure. According to the legal basis of their joint action their position might be uniform or it can be more independent of each other. The other group is the actions initiated by bodies because of an infringement of the interest of a large number of customers. Only joint actions may end in the awarding of damages in an antitrust case.

##### 1.1.1 Joint actions

Two or more plaintiffs may initiate a joint action if (i) the subject-matter of the lawsuit is a joint right or obligation that can be judged only uniformly, or if the judgment would affect the joint plaintiffs irrespective of one of the plaintiffs' absence from the procedure; (ii) the plaintiffs' claims are based on the same legal relationship; or (iii) the plaintiffs' claims have similar legal and factual bases and the same court has jurisdiction for all defendants.<sup>3</sup> Consumers can therefore initiate a joint action either under the first or the third option.

In the case of the first type of the joint actions the principle of dependency applies to the plaintiffs party to the same joint action. This means that the acts of one plaintiff during the procedure cannot be evaluated independently of the other plaintiffs' acts. Due to this dependency the failure to act of one plaintiff has no consequences if any of the other plaintiffs have acted. The procedure, due to the nature of its subject influences the rights of persons absent from it. This does not affect their right to initiate a separate action but it would most likely be unified with the ongoing procedure. On the other hand if the first procedure is over, its outcome qualifies as *res iudicata* in respect of that persons action who did not join the joint action.

In the case of the second and third type of joint actions the plaintiffs cannot benefit or suffer disadvantages from the other plaintiffs acts or non acting.

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<sup>1</sup> Act III of 1952 on the Civil Procedures (the ‘‘Civil Procedures’’)

<sup>2</sup> Article 48 of the Civil Procedures

<sup>3</sup> Articles 51-53 of the Civil Procedures

A special rule relates to the first two types above according to which, parties who were entitled to participate in the joint action as plaintiff may join it until the end of the last trial before the bringing of the first instance judgment. This provision further extends the possibilities for joint actions.

There are no special rules on the initiation of a joint action, but the court checks the existence of the legal conditions. The parties can quit the litigation according to the general rules, the joint nature of the action does not restrict them in this sense. In joint actions the calculation and the allocation of damages has no special rules either.

#### *1.1.2 Actions of entitled bodies on behalf of a large number of consumers or in the public interest*

In a number of cases certain bodies are entitled to initiate actions in the public interest. These procedures however could almost never end up in the compensation of damages. Most of these procedures do not affect competition law at all and relate to the infringement of public procurement rules, provisions on equal treatment etc.

#### *Actions of entitled bodies in case of infringement of the Competition Act*

According to Article 92 of the Competition Act a consumer protection organization, the competition authority (GVH) or an economic chamber may start an action on behalf of consumers against anyone who, through the violation of the Act harms a large number of consumers or causes significant harm to consumers. The action can be brought on behalf of both identified and unidentified consumers.

The court can only oblige the infringing person to lower the price, to repair or replace the product, or to refund the price but it can not order the compensation of damages. Further, the court can empower the plaintiff to publish the court's judgment in a national daily at the infringer's cost. The infringing person shall perform its court-ordered obligations *vis-à-vis* each consumer in accordance with the terms of the judgment. The lawsuit has importance because it can lead to the judicial establishment of the infringement enabling the parties injured to initiate their own related civil law claims (e.g. claim for damages) in a separate lawsuit, without the burden of proving the infringement itself. It should be noted that if the infringement directly affected consumers and not only through the passing on of the damages, ordering the reduction of the price could be considered as a kind of compensation. Such a reimbursement would cover damages directly inflicted on consumers, but not those deriving from e.g. dead weight loss. A judgment on the compensation of damages could form a basis of direct execution without follow on claims by consumers.

The GVH may bring such an action concerning cases falling within its competence within one year from the date of the breach if it has already established the infringement in an administrative decision. The deadline makes practically inapplicable the provision for the GVH as its decisions in antitrust matters are actually never brought within a year. In fact the time frame for the initiation of a lawsuit was not adjusted to the changes of the deadlines of the administrative proceedings of the GVH. However as the GVH was not active in initiating such actions, not the simple extension of the statutory deadline but a thorough revision of this form of action would be necessary because under the present rules once the GVH has established the infringement in its own procedure, prohibited the behavior, imposed fine and published the decision a follow on action would not bring much benefits only if damages were available. The main problem therefore, as it was mentioned above is that the actions initiated by the GVH cannot result in the compensation of damages or in payments for public purposes. Consumers should therefore submit subsequent claims. Though the preceding litigation makes the consumers' claim less complex it can be said that if they were not stimulated to initiate a follow on action after the GVH has brought its administrative decision than their willingness to sue after a collective action of the GVH would not rise significantly either.

## The role of the public prosecutor

The public prosecutor has a general authorization in the Act on Civil Procedures to start a lawsuit if the person entitled for it is unable to protect its rights. In certain Acts the public prosecutor has more specific entitlements too. Though according to e.g. the Act on Consumer Protection when someone harms a large number of consumers the prosecutor is entitled to start a lawsuit, the general authorization of the Act on Civil Procedures should according to the Constitutional Court be interpreted narrower. The Constitutional Court has established that the prosecutor may not restrict individuals right to such an extent that it initiates procedures even if they are not unable to protect their rights. It stated that individuals have a right for non action too and that would be unduly restricted by the prosecutor in cases where the individual is not completely unable to protect its own rights. Their great number does not qualify as such a circumstance.

The prosecutor's general authorization however does not apply either if other agencies or persons are exclusively entitled to start action. Therefore it seems that under the Competition Act the prosecutor is not entitled to start actions because, as it was mentioned above, consumer protection organizations, the GVH and economic chambers are specifically empowered for it. The prosecutor could therefore only step forward at the court if the original infringement was on the borderline of competition and consumer protection provisions. These cases however would certainly not be of antitrust nature.

### **1.2 Perspectives**

According to legal firms the current system in Hungary is not satisfactory if the goal is to ensure that consumers are compensated for damage suffered as the result of some anticompetitive behavior. It is not practical that each and every consumer sues the tortfeasor separately or in a joint action. The above goal can be achieved only by introducing an appropriate form of group litigation, e.g. class action, into the Hungarian legal system. However, the class action would be a novelty in the Hungarian legal system and would rise several procedural issues, e.g. who would be entitled to bring such an action, and, in case of unidentified victims, how would the damages awarded by the court be divided among the victims. For the time being, Hungarian law does not have the answers to these questions.

It is true that one of the main reasons of ineffective private enforcement is the reluctance of consumers and customers to initiate even follow on actions. This is mainly due to two reasons. One is that individual incentives for action could be very low if the damage inflicted per consumer is small. The other reason is the lack of awareness for the damage or the fear of negative consequences in future business relations with the sued party. The stimulation of law firms with the introduction of class actions could be a solution for the first reason. However it is questionable whether the procedural system can be amended this way especially if it were introduced exclusively in respect of damage claims based on the infringement of antitrust rules. Another approach could be the reconsideration of actions in public interest. If the courts could rule on damages or on payments for public interest, consumer organizations and other entitled authorities would be more active in starting actions. As to the second reason it can be said that through the development of competition culture parties could become more conscious to their rights and more active in private law enforcement.

## **2. Interface between Public Enforcement and Private Enforcement**

One of the main relationships between public and private law enforcement is that decisions brought by the GVH bind the courts. The prerequisite question of illegality of the defendant's behaviour is therefore already decided in the civil law procedure if the GVH investigated the issue. The other connection of the two areas related to the exchange of information and the expectations of undertakings applying for leniency in the administrative procedure. The GVH does have a leniency program and

although there are no special rules on private enforcement to avoid conflicts between incentives for leniency application and the threat of future damage claims, this situation has not caused problems up till now as there were no private actions at all. Moreover, the corporate statements of the leniency applicants were not part of the case-file<sup>4</sup> and they would not be accessible by the other parties / complainants. It is however recognised that the conflict would cause problems if private parties turn to court more actively, especially given the fact that the Hungarian Leniency Notice was changed this year and since 15 February, corporate statements can be directly used as evidences and therefore are accessible and may be copied by the parties.<sup>5</sup>

### 2.1 Courts' access to hard data collected by the GVH

It is considered that the main source of problem is that the undertaking applying for leniency submits data that could be used for the calculation of damages and therefore would constitute an essential evidence for plaintiffs. However the GVH is of the view that cooperation between competition authorities and the courts is important in order to make private enforcement a meaningful option for victims of anticompetitive behaviour, and to ensure the consistent application of the competition laws which is needed to create legal certainty. Having this approach in mind, the institution of *amicus curiae* introduced by Regulation 1/2003/EC in respect of cases based on Article 81 and 82 EC was expanded to purely national competition law cases as well in 2005.

In follow-on cases, the decision of the GVH is an important precondition to launch a successful action, and may also provide some useful information in connection with other aspects of the case, e.g. proving the damage. Some of that useful information may be found in documents contained in the competition authority's file but the parties do not have direct access to such documents. One possible alternative to make the data available to the court could be if the GVH intervenes as *amicus curiae* and provides help in the assessment of the amount of damages. However it is not clear whether the role of *amicus curiae* is only restricted to the presentation of legal opinions or could it be extended to a more substantial intervention, like the transmission of hard data.

The other possibility is that upon the request of a party, the court can obtain documents from other authorities, notaries or other organisations, provided that the party cannot obtain the documents directly.<sup>6</sup> The transfer of the documents can be denied only if it contains state, service or business secrets, in which case the waiver of the rightholder must be obtained.<sup>7</sup> A court can order evidence taking *ex officio* only if it expressly allowed in the given situation as foreseen by an Act.<sup>8</sup> Under the existing rules, the court would not order any evidence taking *ex officio* in a lawsuit for damages based on the infringement of competition laws, but would only issue such order at the request of a party in the case.

In the absence of any precedent case, we cannot report on the practical issues of the above rules in follow-on actions for damages related to antitrust cases. Nevertheless certain problems can be anticipated. Most of the information that could be used in a private action (e.g. for proving the damage caused by the anticompetitive behaviour), is protected as business secrets in the GVH's file, and the public version of the documents may not be too helpful for the client in the lawsuit.<sup>9</sup> It is likely that the defendant would claim in the private lawsuit as well that the data in question still qualifies as business secret. Therefore it would

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<sup>4</sup> The GVH has used leniency applications only as «roadmaps» to the investigations, similarly to the USDOJ, but they has never been used as evidences.

<sup>5</sup> According to Art. 55 of the Hungarian Competition Act, the right of access to the file contains also the right to make copies of the documents.

<sup>6</sup> Article 192 (1) of the Civil Procedures

<sup>7</sup> Article 192 (2) of the Civil Procedures

<sup>8</sup> Article 164 (2) of the Civil Procedures

<sup>9</sup> Article 55 (3) of the Competition Act

not grant the waiver required for making the documents already available in the GVH's file part of the court's file. On the other hand it is questionable that data already transmitted to an administrative procedure should be withheld from a court procedure. Having regard to the fact that the court is bound to keep such information confidential it seems to be unjustified to enable the parties to apply such restrictions. This possibility also restricts the parties right to seek judicial remedy. The consideration of the amendment of the relevant legislation might therefore be necessary.

It might happen however even under the present system to avoid the application of the above provision enabling the party to disallow the transmission of data from the GVH to a court. It might happen in many cases that actually there was a valid justification for qualifying the relevant information as business secrets in the course of the GVH's investigation (e.g. recent sales figures), but such legal protection may not be necessary some years later when the follow-on action is pending before the civil courts. Therefore, it seems practical to transfer the given documents to the court in a sealed envelope, and to require the defendant to give a reasoned justification why the information contained in the documents should still be treated as business secrets. Then the court could make a decision on how to handle the document containing business secrets.<sup>10</sup>

## 2.2 *Safeguarding incentives for leniency application*

It is another important question how to handle leniency applications in the above context in order not to discourage cartel members from approaching the authorities because of the consequences of a follow-on action for damages, in which case the information contained in the leniency application could be used against cartel members, including the leniency applicant. For the time being, there is no legal provision addressing this issue.

Under Hungarian civil law, members of a cartel would qualify as joint tort-feasors who are jointly and severally liable to the victims for the injury caused to them. To each other, the tort-feasors are liable based on the proportion of their fault.<sup>11</sup> Among themselves, the tort-feasors' liability is shared equally if the proportion of their fault cannot be established.<sup>12</sup> A court may decide not to impose joint and several liability on the tort-feasors if (i) it does not jeopardise or delay compensation for the plaintiff's injury, or (ii) the plaintiff contributed to the injury or has been late with ascertaining his claim without a valid reason.<sup>13</sup> In other words, there are already some cases under Hungarian law in which the general rule of joint and several liability of joint tort-feasors is not applied.

According to law firms it is worth considering to exempt a leniency applicant from joint and several liability, or even to make its liability secondary to the other cartel members (i.e. it should pay only if the victim cannot collect damages in full from the other cartel members). These rules would be justified by the fact that the leniency helped the competition authorities to conclude the case with success, which also probably serves as the basis for a successful private action for damages. Nevertheless, this "leniency in private action" should not deprive the victims from receiving adequate remedies for their injuries.

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<sup>10</sup> See Article 119 (2) of the Civil Procedures

<sup>11</sup> Article 344 (1) of the Civil Code

<sup>12</sup> Article 344 (2) of the Civil Code

<sup>13</sup> Article 344 (3)

DAF/COMP(2006)34

## IRELAND

### 1. Introduction

The Irish Competition Authority's response to the OECD questionnaire on private actions is divided into two main sections.

- First, an outline of rights of action for breach of antitrust rules in Ireland and the provisions under Irish law for collective actions.
- Second, a description of the Irish Cartel Immunity Program, and our thoughts on the main elements of the interface between public and private enforcement in Ireland.

The Competition Authority has recently made a submission on the European Commission Green Paper for breach of EC Antitrust rules. For ease of reference a copy of the submission is attached as Appendix A.

### 2. Collective Action/Class Action

#### 2.1 *Rights of action in competition cases*

Ireland's Competition Act, 2002 ("the Act") provides a right of action for breaches of the Act. Under section 14, any person who is "aggrieved in consequence of any agreement, decision, concerted practice or abuse which is prohibited under section 4 or 5" has a right of action for damages including exemplary damages as well as other relief against the undertaking that engaged in the impugned conduct and any director, manager or other officer who authorized or consented to the conduct.

Section 14 (1) of the Act provides:

- Any person who is aggrieved in consequence of any agreement, decision, concerted practice or abuse which is prohibited under section 4 or 5 shall have a right of action under this subsection for relief against either or both of the following, namely-
  - Any undertaking which is or has at any material time been a party to such an agreement, decision or concerted practice or has done any act that constituted such an abuse,
  - any director, manager or other officer of such an undertaking, or a person who purported to act in any such capacity, who authorised or consented to, as the case may be, the entry by the undertaking into, or the implementation by it of, the agreement or decision, the engaging by it in the concerted practice or the doing by it of the act that constituted the abuse.

A person's right to bring the action depends therefore upon his being able to establish that he is "aggrieved". Although the term "aggrieved person" is not defined in the Competition Act itself, it is a term

that appears in other statutes, and there is some case law on its meaning. It is, according to the court in *The State (Lynch) v Cooney*<sup>1</sup>,

“a term to be generously interpreted - which is generally understood to include any person who has reasonable grounds to bring the proceedings [...]The question of whether or not a person has sufficient interest must depend upon the circumstances of each particular case. In each case the question of sufficient interest is a mixed question of fact and law which must be decided upon legal principles but, it should be added, there is greater importance to be attached to the facts because it is only by an examination of the facts that the court can come to a decision as to whether there is a sufficient interest in the matter to which the application relates.”

Section 4 of the Act is the domestic equivalent of Article 81 of the EC Treaty which prohibits anti-competitive agreements, decisions and concerted practices. Section 5 is the domestic equivalent of Article 82 of the EC Treaty which prohibits an abuse of a dominant position. The Act also provides that a breach of section 4 or Article 81 and a breach of section 5 or Article 82 are criminal offences under sections 6 and 7, respectively.

Section 4 (1) of the Act provides

*Subject to the provisions of this section, all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State are prohibited and void, including in particular, without prejudice to the generality of this subsection, those which-*

- directly or indirectly fix purchase or selling prices or any other trading conditions,
- limit or control production, markets, technical development or investment,
- share markets or sources of supply,
- apply dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage,
- (make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts.

Section 5 (1) & (2) of the Act provides

- Any abuse by one or more undertakings of a dominant position in trade for any goods or services in the State or in any part of the State is prohibited.
- Without prejudice to the generality of subsection (1), such abuse may, in particular, consist in-
- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions,

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<sup>1</sup> [1982] IR 337

- limiting production, markets or technical development to the prejudice of consumers,
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage,
- making the conclusion of contracts subject to the acceptance by other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts.

Under section 15C of the Act as inserted by the Competition (Amendment) Act 2006, which came into force on March 20, 2006, any person who is aggrieved as a consequence of any conduct prohibited in section 15B has a right of action for damages and other relief against an undertaking and any director, manager or officer who authorised or consented to the prohibited conduct. Section 15B, a non-criminal provision, prohibits the practice of price maintenance, discrimination, advertising or display allowances by a grocery goods undertaking and the practice of demanding slotting allowances (“hello money”) by a grocery goods undertaking who is a retailer, provided that the practice has as its object or effect the “prevention, restriction or distortion” of competition in the grocery goods trade.

#### Section 15C (1) Competition Amendment Act 2006

*Any person who is aggrieved in consequence of any conduct which is prohibited under section 15B shall have a right of action under this subsection...*

Under both section 14 and section 15, the Competition Authority, which is the independent, statutory body responsible for investigation and enforcement of the Act, has a right of action, the types of relief available to the Competition Authority include injunctions and declarations, but the relief available does not include damages.

Notwithstanding that the Act does not provide a right of private action for a breach of Article 81 or Article 82, the European Court of Justice has ruled in *Courage v. Crehan* (Case C-453/99, 20 September 2001, paragraphs 26 and 27) that an individual who has suffered a loss as a result of an infringement of Article 81 or Article 82 has a right of action for damages.

In Ireland there have been very few private actions taken, the Competition Authority believes the major reason for this is the cost of litigation and the fact that the losing party pays the costs of the winner.

## **2.2 Collective Actions in Ireland**

Multi-party procedures are not unknown in Ireland, although the class action as such does not exist. The two forms of procedure currently in force are the representative action and the test action.

### The Representative action

Order 15, rule 9 of the *Rules of the Superior Courts 1986* provides “Where there are numerous persons having the same interest in any cause or matter, one or more such persons may sue or be sued, or may be authorised by the court to defend, in such cause or matter, on behalf, or for the benefit, of all persons so interested.” However, as the Irish Law Reform Commission has pointed out, this form of action is of questionable utility for multi-party litigation because:

- Remedies are limited to injunction and declaration; damages may not be sought

- Very strict “same interest” requirements are imposed
- Civil legal aid is excluded.

#### The test case

The test case procedure is used quite often in Ireland. The Law Reform Commission recently described it as follows:

- The nature of the test case does not merit description as a procedure. It is instead the application by analogy of the findings in one case to the facts of others. The test case scenario may arise in one of two ways. Firstly, the test case may be chosen from a pool of litigants as the most appropriate to go forward as an exemplar. This presupposes a degree of organisation among the pool. Alternatively, where the pool has a less coordinated approach, the outcome of a vanguard case will be awaited by others and will provide guidance as to the possible outcome of later actions. Here, while there is no express coordination, the cases will nonetheless be aligned, and the initial judgment will in effect operate as a test case.
- In either of these scenarios, the test case plaintiff will, at least formally, act solely in his or her own interest. They are not burdened by responsibilities or duties toward the rest of the pool or group either in the institution of the proceedings or any subsequent trial process. In these circumstances, the priority of the test case plaintiff will be to dispose of the individual action as profitably and as comprehensively as possible. There is no obligation to notify those with similar claims nor may it be in the interests of the test plaintiff to do so. Accordingly, potential plaintiffs outside the pool from which the test case was selected may only learn of proceedings, if at all, through media reports of the outcome. This may have consequences for every other potential litigant involved other than the test plaintiff. In particular, the court hearing the test case may not have an accurate picture as to the scope of the litigation in mind when arriving at a judgment; future plaintiffs may not have an opportunity to secure equal awards of damages despite having equally meritorious claims; and the defendant will be faced with continued exposure to future claims plus, where they are unsuccessful in their defence, the possibility of a full set of costs for each of the claims dealt with.<sup>2</sup>

The Irish Law Reform Commission has recently recommended a new procedure for dealing with multi-party litigation, to be called a Multi-Party Action.<sup>3</sup> The Commission recommended that the Multi-Party Action procedure would operate on an opt-in basis subject only to a power vested in the court to oblige an action to be joined to an existing group. However, this proposal has not so far been implemented.

### **3. Interface between public and Private Enforcement**

#### **3.1 Background**

Section 6 of the Act creates an offence for a breach of section 4 or Article 81 of the EC Treaty and section 7 creates an offence for a breach of section 5 or Article 82 of the EC Treaty. In addition to undertakings and their directors, managers or officers, individuals who aided or abetted the commission of an offence may be charged as well.

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<sup>2</sup> Report on Multi-Party Litigation (LRC 76-2005)

<sup>3</sup> Ibid.

2.2 The prosecution of a criminal offence may be by way of summary proceedings or on indictment. The Competition Authority may commence summary proceedings. Prosecution on indictment is the prerogative of the Director of Public Prosecutions (“DPP”) who is responsible for all aspects of the prosecution. The essential differences between summary proceedings and indictment proceedings are that with the latter, there is a trial by jury and the penalties on conviction are more severe.

2.3 On conviction of an offence under the Act, a court may impose a fine of up to €4 million, a term of imprisonment of up to 5 years or both.

### 3.2 *Immunity Programme*

On 20 December 2001, the Competition Authority and the DPP established a cartel immunity programme<sup>4</sup> with respect to cartel offences under the Act. It must be emphasised the programme is only available for hardcore cartel offences.

The key elements of the programme are:

- The programme deals with immunity from prosecution and not leniency such as reduced penalties (as discussed below);
- Applications are made to the Competition Authority;
- Decisions on applications are made by the DPP with the advice and recommendation of the Competition Authority;
- The only party specifically excluded from the programme is the person who played the lead role in the cartel.
- The policy of the Competition Authority is to recommend immunity to the DPP if the applicant is the first person to come forward before the Competition Authority has gathered sufficient evidence to warrant a referral of a completed investigation file to the DPP .
- The program is limited to the first person to apply and qualify for immunity. Joint applications for immunity by two or more conspirators will not be accepted and will be invalid.
- If a corporate undertaking qualifies for immunity, its past and present directors, officers and employees may qualify as well;
- As a condition of the grant of immunity, the undertaking has the obligation to provide full and continuing disclosure and to cooperate with the Competition Authority and the DPP in the investigation of the matter.

The programme is for immunity and not leniency since under Irish law and court practice, it is not considered proper for counsel to make submissions on penalties in a criminal matter even if they are jointly agreed to with counsel for the accused. Thus, the decision by the DPP and the Competition Authority on an immunity application is whether or not to grant immunity from prosecution on all of the possible charges.

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<sup>4</sup> See Appendix B

### **3.3 *Interface between Public and Private Enforcement***

The work of the Competition Authority is conducted in private. Under section 32 of the Act, it is an offence for a person to disclose information which comes into the possession of the Competition Authority by virtue of the exercise of its powers under the Act or provided to it in the course of an Authority meeting held in private unless the disclosure is necessary for the performance of duties under the Act, for the purpose of legal proceedings under the Act, pursuant to a court order or to the Garda Síochána (the Irish Police force) in relation to the commission of an offence under any Act.

Section 32 (1) of the Act 2002

- A person shall not disclose information that-
- comes into the possession of the Authority by virtue of the exercise by it of its powers under this Act to obtain information, or
- comes into the possession of the Authority in the course of a meeting of the Authority held in private at which he or she is present.

In addition, any person who suffered loss or harm as a result of any unauthorized disclosure has a right of action against the individual making the disclosure.

In the circumstances, the practice of the Competition Authority is to not provide any documents in its file to third parties except pursuant to a court order. National Competition Authority's (NCA's) are responsible for protecting the competitive process and not the interests of competitors (or indeed any private litigants even if they are consumers). NCA's should not be seen as a fast track to evidence gathering for plaintiffs in private litigation.

It is possible in a civil action, for a party to apply for a court order for third party discovery (Order 12 of the Rules of the Superior Courts) to gain access to the files of the Competition Authority, however it should be noted the Authority can refuse disclosure of files to third parties until completion of the criminal proceedings, to avoid prejudicing such proceedings. In a criminal proceeding, the DPP is obliged to disclose to the defendant all relevant evidence including any immunity applications relating to the subject matter of the prosecution. Thus, neither the Competition Authority nor the DPP can ensure that an immunity application may not be disclosed in a related civil action or criminal proceeding.

2.9 Since the Cartel Immunity Programme is relatively new, it is too early to draw any firm conclusions about whether immunity applications are discouraged by the existence of a right of private actions or the availability of third party experience. Under Irish law, criminal proceedings may be brought against companies and individuals who engage in egregious conduct such as participating in a cartel and the Act provides for several penalties on conviction, including a term of imprisonment. The Competition Authority believes that the possibility of criminal sanctions outweighs disincentives created by the possibility of disclosure of an immunity application in related civil action or criminal proceeding.

## APPENDIX A-

**IRISH COMPETITION AUTHORITY SUBMISSION ON EUROPEAN COMMISSION  
GREEN PAPER FOR BREACH OF EC ANTITRUST RULES****1. Introduction**

The Competition Authority has read with interest the Commission's Green Paper<sup>5</sup> on damages actions for breach of the EC antitrust rules, and the accompanying Staff Working Paper<sup>6</sup>. The Green Paper has as its basic premise that the promotion of private antitrust actions will assist enforcement of the antitrust rules of the Treaty. Proceeding from that point, the Green Paper identifies issues that it perceives to militate against the bringing of private actions and proposes various options for reform.

The Commission is of the view that the rules on access to evidence in different member states pose a considerable obstacle to plaintiffs in private antitrust actions. The Green Paper asks whether there should be special rules on disclosure of documentary evidence, and if so, what form it should take. **The Competition Authority believes to harmonise procedural requirements across the EU in one field of law alone seems to have great potential for confusion. With that important caveat in mind, the Competition Authority considered the options as to the form the rules (if any) on disclosure should take.**

Given the importance of EC and national competition laws, the Competition Authority support action by the Commission to ensure that the right to bring damages action for breach of EC competition laws (and national competition laws) is a reality in all Member States. Since there are great differences in national legal and court systems, the Competition Authority is concerned to ensure that any specific rules concerning antitrust damages action will not have unintended and potentially harmful effects on the conduct of other damages actions in Member States. For this reason, the Competition Authority ask the Commission to adopt a minimalist approach, namely, to adopt only the rules that are deemed necessary to ensure that the right of damages action for EC competition laws (and national competition laws) is viable in all Member States.

The Competition Authority strongly support the initiative of the Commission to promote public debate about the conditions for bringing damages claims for infringement of EC antitrust law and the important work done by the Commission Staff on the Green Paper and the Commission Staff Working Paper annexed to the Green Paper.

The Competition Authority agree that there are too few damages claim for breach of the EC antitrust law and competition laws of Member States. The Competition Authority believes the major reason for this in Ireland is the cost of litigation. The other impediments to damages action identified in the Green Paper are in the Competition Authority's view, less relevant or less significant in the Irish context although the Authority appreciate the difficulties they cause in certain other Member States.

The Competition Authority is grateful for the opportunity to make submissions on the Green Paper in general, and on the options for reform in particular. In doing so, this submission will follow the order and logical sequence of the Green Paper itself, firstly by outlining the question posed by the Commission and secondly the Competition Authority's position on each issue. For ease of reference a

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<sup>5</sup> Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules, Brussels 19.12.2005 {COM (2005) 672 final}

<sup>6</sup> Commission Staff Working Paper. Brussels 19.12.2005

summary of the options which are in the Competition Authority's view the most desirable is attached as Appendix A to this submission.

## 2. access to evidence

### 2.1 *Question A*

*Should there be special rules on disclosure of documentary evidence in civil proceedings for damages under Articles 81 and 82 of the EC Treaty? If so, which form should such disclosure take?*

2.1 The Competition Authority believes Option 3, with the addition of judicial oversight, will give the best opportunity to a plaintiff to access the necessary evidence. In Ireland, the discovery rules are very wide, but are under court control. Any party may, without filing any affidavit, apply to the court for an order directing any other party to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of the application the court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage;, or make such order on such terms as to security for the costs of discovery or otherwise and either generally or limited to certain classes of documents as may be thought fit. An extract from Order 12 of the Rules of the Superior Courts, in which the discovery rules are set out, is attached as Appendix B to this submission.

2.2 The Competition Authority also agrees with the adoptions of an obligation to preserve evidence, as set out in Option 5, and sanctions for destruction of evidence, as set out in Option 4. In Ireland, a defendant is obliged to preserve evidence once litigation has commenced. Any failure to do so is treated as a contempt of court, and could result in imprisonment.

2.3 In summary, the Competition Authority suggest the adoption of Option 3, expanded to include judicial control, Option 4 and Option 5

### 2.2 *Question B*

*Are special rules regarding access to documents held by a competition authority helpful for antitrust damages claims? How could such access be organised?*

2.4 The Competition Authority considers this question first in relation to documents held by a National Competition Authority ("NCA"). The Competition Authority is of the view that if the options previously suggested in relation to discovery are adopted, the plaintiff will have all relevant documents that are in the defendants' possession, **except documents which the defendant may have provided to the NCA or other third parties**. From the Competition Authority's point of view Option 6 is therefore unnecessary.

2.5 A different issue, not addressed by either of the options provided, arises in respect of any documents provided by the defendant to the NCA (**or other third parties**) and therefore no longer in the defendant's possession or under his control. The Competition Authority does not believe as a matter of policy that a NCA should be obliged by anyone other than a court to provide any documents to a private litigant. If NCAs handed documents over to private litigants as a matter of course it would seriously undermine public enforcement of the law. Parties subject to investigation by a NCA would be much more reluctant to provide documentation sought under a letter of request during an investigation if they knew that these documents would find their way into a private litigant's hands in the future. They would also be much less willing to make

voluntary discovery in civil proceedings and would look to the courts to make narrow ‘conditional’ discovery orders in proceedings. NCAs are responsible for protecting the competitive process and not the interests of competitors (or indeed any private litigants even if they are consumers). NCA’s should not be seen as a fast track to evidence gathering for plaintiffs in private litigation.

2.6 It is possible under Irish law, however, for an order of third party discovery to be made by the court, where documents relevant to the action are held by a person other than the defendant. The Competition Authority submits that the Commission might consider the possibility of third party discovery to enable documents held by a NCA to be discovered to a plaintiff.

2.7 Option 7 asks for feedback on how national courts can guarantee confidentiality, and on the situations in which national courts would ask the Commission for information that parties could also provide. The Competition Authority is unable to address either of those issues.

2.8 In summary, the Competition Authority suggests a new option of third-party discovery.

### 2.3 *Question C*

***Should the claimants burden of proving the antitrust infringement in damages actions be alleviated and, if so, how?***

2.9 The Competition Authority recommends that the plaintiff’s burden of proving the infringement should not be alleviated, except in the case of an action following a finding of infringement by a court or by the Commission. In those two cases, the Competition Authority believes that the finding of infringement should be binding on the court hearing the action for damages.

2.10 The Competition Authority believes in all other cases, the plaintiff should be obliged to prove the infringement to the civil standard (i.e., on the balance of probabilities). Any alternative would (a) risk the working of an injustice against the defendant; (b) give rise to a litigation culture and (c) give rise to the possibility of abuse by competitors.

2.11 Specifically, the Competition Authority is strongly opposed to the shifting or lowering of the burden of proof in cases on information asymmetry. In some cases, this could work injustice on the defendant, in other cases, it might be counter-productive and work injustice on the plaintiff, as judges might view this shift with suspicion, and the balance would be tipped in the defendant’s favour.

2.12 In summary, the Competition Authority submits that all the options should be rejected. Instead a plaintiff’s burden should be alleviated only where a finding of infringement has been made by a national court or by the Commission, and that the alleviation should take the form only of making that infringement decision binding upon the court that hears the damages action.

## 3. **Fault requirement**

### 3.1 *Question D*

***Should there be a fault requirement for antitrust-related damages actions?***

3.1 The Competition Authority suggests that Option 11 should be chosen in this case. Proof of the infringement is sufficient; otherwise there would be a perverse result if a NCA or the

Commission made a finding of infringement and those who suffered loss were unable to recover compensation because the defendant was not “at fault”.

#### **4. Damages**

##### **4.1 *Question E***

###### ***How should damages be defined?***

4.1 The Competition Authority is of the view that the purpose of private actions for damages should always and only be to compensate the injured party. The Competition Authority believes the raising of damages levels to include the recovery of illegal gains is inappropriate. It is true that it would have a deterrent effect, but this would be outweighed by its attendant disadvantages. These are:

- a) The fact that it would give the plaintiff a windfall to which he would not be entitled, and
- b) That it would increase the danger of frivolous and vexatious actions and cultivate a litigation culture.

4.2 The adoption of Option 14 would compensate the plaintiff without having the disadvantages previously mentioned. The addition of pre-judgment interest, while justly compensating the plaintiff, would have the advantage of a deterrent effect upon the defendant. In particular, post-judgment interest would encourage early payment of the damages awarded.

4.3 In summary, the Competition Authority suggests the adoption of Option 14 and Option 17, amended so as to include post-judgment interest. The Competition Authority does not feel it would be appropriate for the Commission to specify any particular method for determining pre-judgment or post-judgment interest rates to be adopted in all Member States, given the divergence of legal and court systems and the existence of other types of damages actions in Member States.

##### **4.2 *Question F***

###### ***Which method should be used for calculating the quantum of damages?***

4.4 The three options suggested in the Green Paper do not really address the question; instead they pose additional questions.

4.5 Option 18 asks whether there is any added value in using complex economic models, and whether the court should have power to assess quantum on the basis of an equitable approach.

4.6 The Competition Authority believes the calculation of damages in antitrust actions does not lend itself to a rigid scientific method, as there are too many variables and unknown quantities to permit it.

4.7 As previously submitted, the Competition Authority believes damages should be defined as compensatory only. In that case, the best approach will be the equitable or “common-sense” approach, used traditionally by the courts of Ireland, England and Wales when calculating damages, where the aim is to restore the plaintiff as far as is possible to the situation he would have been in if he had not suffered the alleged injury.

- 4.8 Option 19 asks whether the Commission should publish guidelines on the quantification of damages. The Competition Authority submits that it should not. Courts are accustomed to calculating damages for financial loss, and if the equitable approach is to be adopted, some flexibility must be allowed.
- 4.9 Finally, the Competition Authority does not see any advantage in the introduction of split proceedings between liability and calculation, except in “follow-on” actions where, as previously suggested, the court hearing the claim for damages should be bound by an earlier court finding of infringement. The Competition Authority is, however, concerned about the rigidity and formalism which it understands may be followed by the courts of some Member States. It might therefore be helpful if the Commission established the compensatory principle and urge courts to be flexible in adopting a “common-sense approach”, rather than placing an undue burden on the plaintiff to exactly quantify damages,
- 4.10 In summary, the Competition Authority submits that an equitable or “common-sense” approach to the calculation of damages should be adopted, and that the Commission should not issue any guidelines on quantification.

## **5. Passing-on defence and indirect purchaser standing**

### **5.1 Question G**

*Should there be rules on the admissibility and operation of the passing-on defence? If so, which form should such rules take? Should the indirect purchaser have standing?*

- 5.1 If the principle underlying a damages claim for an antitrust infringement is compensatory, a defendant should be entitled to raise a passing-on defence, i.e., that any loss suffered by the purchaser was passed on to the customers of the purchaser. The Competition Authority notes, however, that a passing-on defence is unlikely to be a complete answer to a damages action. The fact that an overcharge has been passed on does not necessarily mean that no damage has been suffered. To take just one example, there may have been a loss in sales by a purchaser as a result of the unlawful behaviour of the defendant even though the plaintiff may have passed on to its customers the overcharge for the goods actually purchased from the defendant.
- 5.2 The Competition Authority is sympathetic to the rationale for excluding the passing-on defence, namely, that if a passing-on defence is successful against an indirect purchaser claim, there is a strong possibility that indirect purchasers would not bring actions. As a result the defendant, assuming liability is established, would benefit from its unlawful conduct and victims of such conduct would not be compensated.
- 5.3 From the perspective of the compensatory principle for damages claims, the Competition Authority is of the opinion that there should be no specific rule on the passing-on defence and the Authority is concerned that in practice, the existence of a successful (or almost successful) passing-on defence might preclude the bringing of damages actions by either direct or indirect purchasers. For this reason, the Competition Authority supports further consideration of the implications of the passing-on defence and the issue of whether indirect purchasers may sue.
- 5.4 The compensatory principle also implies that an indirect purchaser should not be precluded from bringing a damages action. The Competition Authority is concerned about the fact that indirect purchasers are unlikely to bring many actions and for this reason, the Authority supports representative actions, a topic considered later in this submission.

- 5.5 In Ireland, the rule set out in the Competition Act 2002 as to standing in private antitrust actions is that the plaintiff must be an “aggrieved person”. Although the term “aggrieved person” is not defined in the Act itself, it is a term that appears in other statutes, and some case law exists as to its meaning. It is, according to the court in *The State (Lynch) v Cooney*<sup>7</sup>,

*a term to be generously interpreted - which is generally understood to include any person who has reasonable grounds to bring the proceedings [...] The question of whether or not a person has sufficient interest must depend upon the circumstances of each particular case. In each case the question of sufficient interest is a mixed question of fact and law which must be decided upon legal principles but, it should be added, there is greater importance to be attached to the facts because it is only by an examination of the facts that the court can come to a decision as to whether there is a sufficient interest in the matter to which the application relates.*

- 5.6 In summary, for the reasons outlined above, the Competition Authority believes that **there should be no specific rule on the passing-on defence** and that both direct and indirect purchasers should have standing. The Competition Authority also urges further consideration of the policy implications of these two issues.

## 6. Defending consumer interests

### 6.1 *Question H*

***Should special procedures be available for bringing collective actions and protecting consumer interests? If so, how could such procedures be framed?***

- 6.1 The Competition Authority agrees with the Commission that lack of resources will mean that a NCA cannot take action in every case that arises. The existence of a right of private action is therefore valuable not only for its compensatory, but also for its deterrent effect. Unfortunately, this effect at present is weak. The number of private actions taken in Member States has been few. A significant reason for this may be the frequent existence of a Goliath-like defendant, which individual plaintiffs may be loath to take on.
- 6.2 However, it is rare that a breach of competition law would affect only one or two individuals. Because breaches of competition law usually result in higher prices than would otherwise have been the case, consumers are ultimately the injured parties. While any illegal price increase would ultimately impact adversely on the end user, it is difficult to quantify that impact except where the price increase involves finished goods for which, at each stage of the distribution, there is a mark-up. Where the goods involved are production inputs, the impact on the end user of the goods that incorporate the input may be small, and difficult to quantify. Thus, there are unlikely to be many consumer antitrust damages actions.
- 6.3 The Competition Authority believes that certain types of collective action may address this problem, in particular, empowering bodies such as consumer associations to institute actions on behalf of consumers. In the United States, a useful example is provided by section 19(b) of the FTC Act<sup>8</sup>, which allows the Federal Trade Commission to institute a civil action seeking redress for consumers who have been injured by violations of the antitrust rules. The court may order a wide variety of remedies, including restitution in the form of monetary refunds. Disgorgement to

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<sup>7</sup> [1982] IR 337

<sup>8</sup> 15 U.S.C. § 57b(b) (2000)

the US Treasury has also been held to be an appropriate remedy for preventing unjust enrichment where it is not possible to identify all the consumers entitled to restitution.

6.4 Some adaptation of another interesting US procedure might also be useful. Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976<sup>9</sup> authorises a state attorney general to bring an action for injuries to natural persons residing within the state. Any damages established may either be distributed in a manner authorised by the court or be awarded to the state as a civil penalty, subject in each case to the requirement that any distribution procedure adopted afford each person a reasonable opportunity to secure his appropriate portion of the award. The Act also provides for the recovery of reasonable attorneys' fees following the successful outcome of the litigation.<sup>10</sup>

6.5 In summary, the Competition Authority submits (a) individual consumers should not be deprived of bringing an action; (b) consideration be given to the creating of a cause of action by a representative body, or (c) consideration be given to some adaptation of the US *parens patriae* procedure.

## 7. Costs

### 7.1 *Question I*

***Should special rules be introduced to reduce the cost risk for the claimant? If so, what kind of rules?***

7.1 The options suggested in the Green Paper are: plaintiffs to pay costs only if they have acted in a manifestly unreasonable manner by bringing the case, or the court to have discretion to order at the beginning of the trial that the plaintiff should not be exposed to costs even if unsuccessful.

7.2 The Competition Authority believes both of these are dangerous options. Why should a defendant against whom nothing has been proved be exposed to costs? This would be particularly invidious where the private action was not a follow-on action, and no infringement had been established. The options would also go a long way towards encouraging a litigation culture.

7.3 If some form of representative action is established for consumers, the cost burden will be greatly lessened for them. They form the class of plaintiffs most at risk from cost awards in individual actions. The Competition Authority does not believe that plaintiffs other than consumers should be in any better position as regards costs in antitrust litigation than they would be in other civil actions.

7.4 The experience of other jurisdictions is informative. In the Canadian province of British Columbia, class action rules provide that no costs are payable by either party at any stage of a class proceeding including the certification stage unless a party has engaged in vexatious conduct.<sup>11</sup> This relieves the potentially onerous burden on the plaintiff class of having to pay costs if it is unsuccessful but, as a matter of balance, the defendant is also relieved from paying

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<sup>9</sup> 15 U.S.C. § 15c (a) (1).

<sup>10</sup> A useful discussion of the *parens patriae* action can be found in ABA Section of Antitrust Law, *Antitrust Law Developments* (5th ed. 2002) Vol. 1 page 807 ff.

<sup>11</sup> See, for example, Class Proceedings Act, RSBC 1996, Chapter 50, section 37

costs if it is unsuccessful. In the provinces of Ontario and Quebec, a representative plaintiff may apply to a class proceedings fund to defray the expense of litigation.

7.5 In summary, the Competition Authority submits that no special provisions should be made in respect of costs, if the option of representative actions is adopted.

## **8 Public and Private Enforcement**

### **8.1 Question J**

#### ***How can optimum coordination of private and public enforcement be achieved?***

8.1 Three options are suggested in the Green Paper: the exclusion of discoverability of the leniency application, thus protecting the confidentiality of submissions made to the competition authority as part of the leniency application; conditional rebate on damages claims against the leniency applicant; removal of joint liability from the leniency applicant.

8.2 These options all appear to be based on the premise that if a leniency applicant is exposed to damages, it may prevent undertakings or individuals seeking leniency, thus undermining public enforcement.

8.3 First, the Competition Authority is doubtful about the merits of this premise. The Competition Authority believes that, weighing up the pros and cons of applying for leniency, it will always be to an undertaking's, or individual's advantage to come forward for leniency. If he does, and leniency is granted, then, although he may subsequently be exposed to damages, his risk will be less than if he did not apply for leniency, in which case he would risk both substantial penalties and damages. The Competition Authority submits that if the Commission wishes to promote the bringing of private actions, it should not do anything to favour a leniency applicant – provided always that damage are defined as compensatory.

8.4 Second, the Competition Authority does not believe as a matter of policy that a leniency applicant should in effect be “rewarded” for coming forward by having his exposure to damages limited or excluded. He is already benefiting from either immunity from prosecution or some other form of leniency.

8.5 Third, the Competition Authority does not believe that a plaintiff who has proved his case should be disadvantaged because one of the defendants is a leniency applicant. The Competition Authority submits that if the leniency applicant's unlawful behaviour has caused injury to the plaintiff, he should be liable to compensate him, whether singly, or jointly and severally.

8.6 Finally, if the Competition Authority's proposals on court-controlled discovery are adopted, the Authority believes that submissions attached to a leniency application will not be admitted unless they constitute relevant evidence. If they do constitute such evidence, the Competition Authority can see no reason why they should be excluded. It should be noted that an immunity applicant under the Irish Cartel Immunity Programme<sup>12</sup> must make full disclosure of all relevant information in his/her possession to the Director of Public Prosecution in order to qualify for the final grant of immunity. This information must then be disclosed in full to the defendants in criminal proceedings. The evidence of an immunity applicant is reduced to statement form and is tested in full in open court. It is very difficult to see in an Irish context how it would be possible

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<sup>12</sup> <http://www.tca.ie/immunity.html>

to exclude discoverability of the immunity applicant's information (application). In fact, where parties are being sued in damages and discover that the immunity applicant has avoided suit, it would be very easy for those parties being sued to release, in discovery to the plaintiff, the witness statements made by the immunity applicant, as they will be in possession of this evidence from the criminal proceedings. Defendants would also be entitled to join the immunity applicant in the civil suit if the immunity applicant is not being sued. In that instance, the defendants would ensure that the party that received immunity would share in the costs (including any damages awards) that will arise from the follow on civil action.

8.7 In summary, the Competition Authority does not agree with the premise and does not believe that any of the options should be taken.

## **9. Other Issues**

### **9.1 Question K**

*Which substantive law should be applicable to antitrust damages claims?*

9.1 The four options suggested in the Green Paper are: the law of the place where the damage occurs; the laws of the states on whose market the victim is affected; the law of the forum; where more than one state is affected, the choice of the plaintiff.

9.2 Although the first two options seem at first sight to be the same, the Commission's Staff Working Paper points out that the place where the damage occurs may be interpreted as the place where the financial loss occurs rather than to the place where the market effects are felt, although these will often coincide.

9.3 The Competition Authority believes that if Member States are to encourage private actions flexibility for the plaintiff is a good thing, and that the option of leaving the choice to the plaintiff should be adopted.

### **9.2 Question L**

*Should an expert, whenever needed, be appointed by the court?*

9.4 The Competition Authority recommends this should be left to the court in each case. The Competition Authority also submits that the appointment of a court-appointed expert should be without prejudice to the rights of the parties to bring in their own expert witnesses if they so wish. It is a well-known fact that experts disagree and a party should not be denied the opportunity to present its strongest case.

### **9.3 Question M**

*Should limitation periods be suspended? If so from when onwards?*

9.5 The Competition Authority submits that the limitation period should only begin to run when the damage has been discovered.

9.6 Although the Competition Authority recognises the usefulness to a prospective plaintiff of suspending a limitation period while public enforcement proceedings are in being, on balance the Authority does not think that this option should be adopted, as it could result in extensive

limitation periods where a NCA or the Commission is carrying out a protracted cartel investigation and does not deal with all members of the cartel at the same time.

**10. Concluding comments**

The Competition Authority is grateful for the opportunity to make submissions on the Green Paper and strongly support the initiative of the Commission to promote public debate about the conditions for bringing damages claims for infringement of EC antitrust law.

## APPENDIX B-

**THE IRISH CARTEL IMMUNITY PROGRAM  
CARTEL IMMUNITY PROGRAMME**

*Introduced 20th December 2001*

**PREFACE**

This notice outlines the policy and procedures involved in applying for immunity from prosecution for criminal offences under the Competition Act, 2002 (“the Act”). The Competition Authority (“the Authority”) has identified the pursuit of cartels as a top priority. Cartel behaviour is almost inevitably harmful to consumers as it results in their having to pay more than they should for goods and services. Cartels are by their very nature conspiratorial. The participants are secretive and hard-core cartels are notoriously difficult to detect and prosecute successfully. This programme encourages self-reporting of unlawful cartels by offenders at the earliest possible stage.

This notice makes transparent the policy of both the Authority and the Director of Public Prosecutions (“the DPP”) in considering applications for immunity in such cases of self-reporting. It also outlines the process through which parties must agree to cooperate, in order to qualify for immunity. This Programme comes into effect on 20th December 2001.

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- B. Roles of the Authority and the DPP when a request for Immunity is made
- C. Obtaining Immunity
- D. Impact of Corporate Immunity on Directors, Officers and Employees
- E. The Immunity Process
- F. Failure to Comply with the Requirements of the Agreement
- G. Disclosure

**A. Introduction**

The Act establishes rules for the conduct of business in Ireland. It prohibits anti-competitive agreements, decisions and concerted practices, and abuse of dominance. The most serious forms of anti-competitive agreements are price-fixing, bid rigging and market sharing by competitors – generally described as cartel activity.

For the purposes of this notice, the term *undertaking* is as defined in section 3(1) of the Act.

The Competition Act 1991 established the Authority as an independent body responsible for administering and enforcing the Acts, and gave it the power to carry out investigations. The Competition Act 1996 Act created criminal and civil provisions that prohibit amongst other things, horizontal price-fixing agreements and “bid-rigging”. The 1991 and 1996 Acts are now revoked, but the 2002 Act, which continues the Authority in being, provides for criminal penalties of up to five years in prison (for individuals) and fines of up to £€4,000,000 or 10% of turnover (whichever is the greater) for individuals and undertakings.

When there has been a violation of the Act, the Authority's objective is to investigate the anti-competitive behaviour, prosecute the undertakings and individuals responsible, and deter similar offences. The Authority recognises the importance of programmes that contribute to the detection, investigation and

prosecution of cartels. This notice details the approach of both the Authority and the DPP to the grant of immunity for an offender who violates the Act, but nevertheless comes forward and volunteers information to the Authority which leads to the detection and prosecution of other offenders who might otherwise escape detection. A cartel necessarily involves at least two conspirators. Immunity would be granted to one conspirator in

This notice does not give legal advice. Readers should refer to the Act and obtain independent legal advice when questions of law arise or if a particular situation causes concern.

Nothing in this programme shall affect the discretion of the DPP in the exercise of his functions.

In this notice, the term immunity refers to a grant of full immunity from prosecution in criminal cases under the Act.

Any person or undertaking implicated in an activity that violates the Act may offer to co-operate with the Authority and request immunity. An undertaking may choose also to initiate an application on behalf of its employees including its directors and officers. Employees who are neither directors nor officers of the corporate undertaking may approach the Authority on their own behalf.

#### **B. Roles of the Authority and the DPP when a request for Immunity is made**

The Authority investigates alleged breaches of the Act. The DPP has sole responsibility to prosecute offences on indictment.

Applications for immunity should be made to the Authority. Only the DPP can grant immunity. Subject to the requirements set out below, the Authority will make a recommendation to the DPP to grant immunity.

#### **C. Obtaining Immunity**

The Authority encourages parties (which may include corporate undertakings, partnerships and individuals) to come forward as early as possible.

Subject to the requirements set out below, the Authority will recommend immunity to the DPP if the applicant is the first to come forward before the Authority has gathered sufficient evidence to warrant a referral of a completed investigation file to the DPP.

#### ***Requirements:***

The applicant must take effective steps, to be agreed with the Authority, to terminate its participation in the illegal activity.

The applicant must do nothing to alert its former associates that it has applied for immunity under this programme.

The applicant, including all its relevant past and present employees, must not have coerced another party to participate in the illegal activity and must not have acted as the instigator or have played the lead role in the illegal activity. The applicant must be able to show this to the satisfaction of the Authority.

Throughout the course of the Authority's investigation and any subsequent prosecution, the applicant must provide complete and timely co-operation. In particular, the applicant must:

- Reveal any and all offences under the Act in which it may have been involved;
- Provide full, frank and truthful disclosure of all the evidence and information known or available to it or under its control, including all documentary and other records, wherever located, relating to the offences under investigation with no misrepresentation of any material facts; and
- Co-operate fully, on a continuing basis, expeditiously and at its own expense throughout the investigation and with any ensuing prosecutions.

In the case of a corporate undertaking, the application for immunity must be a corporate act. While applications from individual directors or employees will be considered they will not be regarded as made on behalf of the undertaking in the absence of a corporate act. Corporate undertakings must take all lawful measures to promote the continuing co-operation of their directors, officers and employees for the duration of the investigation and any ensuing prosecutions.

If the first applicant to request immunity fails to meet these requirements, a subsequent applicant that does meet these requirements can be considered for immunity

#### **D. Impact of corporate immunity on Directors, Officers and Employees**

If a corporate undertaking qualifies for a recommendation for full immunity, all past and present directors, officers and employees who admit their involvement in a cartel as part of the corporate admission, and who also comply with Paragraph 16 (a) to (c) will also qualify.

20 Applications for immunity for an individual employed by an undertaking involved in a cartel will be considered, even where the employer undertaking does not apply or otherwise co-operate under this programme.

#### **E. The immunity Process**

##### **Step 1: Initial Contact**

Applications for immunity must be made to the uniquely designated officer in the Authority who will receive all applications for immunity. Contact with the designated officer must be in person or by telephone. Applications made to any other person or body that is not at that time the officer designated for that purpose would be invalid. The officer designated by the Authority may be contacted at telephone number 087 763 1378 between the hours of 10am and 4pm Monday to Friday, except public or bank holidays.

The applicant should present an outline of the facts of the case to the designated officer of the Authority. The applicant may initially present the case through its own legal advisors in hypothetical terms so as to protect its anonymity.

Applications for immunity will be queued and dealt with in the order of receipt. An applicant will be allowed to place a “marker” with the designated officer for a period to be determined by the designated officer in order to retain the applicant’s place in the queue for immunity until such time as the applicant is in a position to complete its application for immunity.

Joint applications for immunity by two or more conspirators will not be accepted and will be invalid.

### **Step 2: Qualified Guarantee of Immunity**

If the applicant decides to proceed with the immunity application, a description of the illegal activity must be furnished to the Authority, which in the Authority's opinion is sufficient for its purposes. If the Authority is of the opinion that the case falls within this programme, the Authority will then refer the matter to the DPP seeking a written qualified agreement to grant immunity from the DPP.

### **Step 3: Full Disclosure**

Upon receipt by the applicant of a written qualified agreement to grant immunity from the DPP, both the DPP and the Authority must be informed with sufficient detail and certainty what evidence can be provided by the applicant. Full disclosure is required at this stage and will be conducted with the understanding that neither the Authority nor the DPP will use the information against the applicant, unless there is a failure to comply, as described in Part F, below.

The applicant will make full disclosure after the applicant has been reminded of its legal privilege against self-incrimination. This will ensure that should there be a subsequent failure by the applicant to comply with the terms of the immunity agreement, the Authority in continuing its investigations can then use information given by the applicant under full disclosure.

### **Step 4: Immunity Agreement**

Once the terms of the qualified guarantee have been satisfied the DPP will execute an immunity agreement that will include all continuing obligations as described in paragraph 16, above.

## **F. Failure to comply with the requirements of the Agreement**

Failure to comply with any of the requirements set out in this programme may result in the DPP revoking the immunity agreement made with the applicant. The Authority will then continue its investigation and will include the applicant that has failed to meet its obligations under the agreement in the investigation.

Without prejudice to the generality of the above, failure to comply with requirements under the agreement includes failure by an undertaking to fully promote the complete and timely co-operation of its employees, failure to disclose any and all offences and failure to provide full, frank and truthful disclosure of all evidence and information known or available to it or under its control.

## **G. Disclosure**

Information becoming available pursuant to this programme will not be disclosed other than in accordance with the normal practices and procedures pertaining to criminal investigations and prosecutions. In particular, information may be disclosed:

- When there has been public disclosure by the applicant;
- Where disclosure is required by law;
- When disclosure is for the purpose of the administration and enforcement of the Act;
- When disclosure is necessary for the prevention of the commission of a criminal offence; and/or,
- When disclosure is made in the course of an investigation or subsequent proceedings.

## JAPAN

### 1. Collective action system

Collective action generally refers to the locus standi of requests for suspension and claims for compensation exercised by a group (consumer group or trade association, etc.) which is not a direct victim of the violation but fulfills certain requirements. Under the diet resolution made by both the House of Representatives and Councilors<sup>1</sup> when revising the Antimonopoly Act of 2005 and the Consumer Basic Plan<sup>2</sup>, the Japan Fair Trade Commission (JFTC) is considering introducing a collective action system into the Antimonopoly Act and into the Premiums and Representations Act and will make a uniform decision by 2007.

The JFTC is presently hearing opinions from legal experts on collective action systems and is organizing the issues.

### 2. Interface between public and private enforcement

With the introduction of a leniency program in the amended Antimonopoly Act of 2005, the JFTC announced that it would not disclose to a court or to others the contents of a report made in relation to a leniency program<sup>3</sup>. The reason for this is that the JFTC is concerned that disclosure of the contents of a report made in relation to a leniency program, made with the aim of complying with the discovery of other countries, will lead businesses to refrain from making an application for a leniency program for fear of the risk such disclosure might bring, such as the potential filing of a civil suit for a violation.

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<sup>1</sup> According to the diet resolution by both the House of Representatives and Councilors when revising the Antimonopoly Act of 2005, policies will be promptly discussed to find further effective measures such as subpoena duces tecum and collective action on requests for suspension of Unfair Trade Practices (Economy, Trade and Industry Committee in the House of Representatives, March 11, 2005 and Economy, Trade and Industry Committee in the House of Councilors, April 19, 2005).

<sup>2</sup> Based on the Consumer Basic Act established in June 2004, the Japanese Government publicly announced the 2005 – 2009 five-year consumer basic plan in April 2005 which states the basic policy for the plans and integral measures by the government as a whole regarding the protection and improvement of consumer interests. One of the priorities in this consumer basic plan is the implementation of the consumer collective action system.

Specifically, to implement a system that allows certain consumer associations to file an injunction against inadequate performance by a business to protect the interests of consumers in general, the Cabinet Office was required to submit related bills during the ordinary diet session in 2006 after deliberating the rules for the agreement between consumers and entrepreneurs based on the Consumer Contract Act. Accordingly, as with the Consumer Contract Act, the bill which enables legal actions by certain consumer associations under the Consumer Contract Act was submitted to the Diet on March 3, 2006. Furthermore, the results of deliberating the introduction of collective actions into the Antimonopoly Act and into the Premiums and Representations Act for the JFTC will be given by 2007.

<sup>3</sup> The Fair Trade Commission's View on New Rules of the Amended Antimonopoly Act – Comments Addressed to the Commission regarding the Draft of its Rules and the Point of View of the Commission–  
([http://www.jftc.go.jp/e-page/legislation/ama/view\\_on\\_newrules.pdf](http://www.jftc.go.jp/e-page/legislation/ama/view_on_newrules.pdf)) (p.20-21)

If no application for a leniency program is filed by an entrepreneur, it would tremendously hinder the investigation activities of the JFTC in cases of violation, and otherwise impede the performance of the public service of the JFTC. For this reason, the JFTC considers that the contents of a report made in relation to a leniency program will be confidential information in the context of Article 220, etc., of the Code of Civil Procedure<sup>4,5</sup>.

Furthermore, whereas a leniency program in Japan basically requests reports in writing, applicants may hold concerns that the submitted documents or their copies may be subject to the discovery system and will be disclosed to courts including those from other countries. The JFTC has placed due consideration of this issue in Section 3, Subsections 2 and 3, in the Rules on Reporting and Submission of Materials regarding Immunity from or Reduction of Surcharges<sup>6</sup> which stipulates that the details of the violation and the name of the representative and director can be reported orally under committee approval.

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<sup>4</sup> Article 220 of the Code of Civil Procedure which stipulates the duty to submit documents for civil cases states that documents need not be submitted if “the documents concern official confidentiality of the public official where the submission of the document would impair public interests or would significantly interfere with the performance of public duties.”

<sup>5</sup> Whether contents of a report made in relation to a leniency program will be confidential information or not leaves the judgment up to the court in each case.

<sup>6</sup> Rules on Reporting and Submission of Materials regarding Immunity from or Reduction of Surcharges (<http://www.jftc.go.jp/e-page/legislation/ama/immunity.pdf>)

## NETHERLANDS

The OECD has requested the Netherlands to make a written contribution in the field of the private enforcement of competition law. It concerns questions relating to I. collective action and II. relating to the influence of private enforcement on public enforcement. The OECD is asking for information about the way in which the above-mentioned questions are dealt with in Dutch legislation and about the operation of these rules in practice.

### 1. Collective action

In the Netherlands, civil procedures are only rarely conducted in respect of alleged infringements of competition law that should lead to compensation. Although there is insufficient knowledge about the extent of extra-judicial settlements on account of breaches of competition law, there is an impression that they occur relatively infrequently. That also applies to collective action in this field. In short, Dutch legislation has five examples of collective action.

Firstly, Article 3:305a of the Dutch Civil Code provides for collective action. In the context of this collective action, aggrieved parties must unite in a foundation or an association that can act in legal proceedings on behalf of the aggrieved parties. Both the foundation and the association have legal personality. In a procedure the aggrieved party's representative can institute various actions, such as a declaratory judgment (e.g. that a certain act was unlawful), dissolution of an agreement and a claim arising from undue payment. A claim for damages in cash is, however, **explicitly** ruled out in Article 3:305a, paragraph 3, of the Dutch Civil Code.

A claim for compensation for damage is ruled out because in the context of damages the basic premise taken is that damages must be paid to the persons who have themselves suffered the damage. Furthermore, the legislator asserts that a collective action for damages leads to technical legal problems. The question of whether and the extent to which a person against whom an unlawful act is said to have been carried out has suffered damage in this way, should generally not lend itself to a collective action because many questions relating to a claim for damages can only be responded to individually.

Secondly, the aggrieved parties should be able to undertake a joint action. They should together be able to give a lawyer power of attorney to act on their behalf in legal proceedings. This will then involve one lawyer who acts on behalf of several aggrieved parties, without a foundation or association being set up. The likelihood that aggrieved parties choose this option is, however, very small if it is only a matter of very limited damages (small-claim litigation).

Thirdly, at the end of 2005, the *Wet Afwikkeling Collectieve Massaschade* [Act on the Collective Settlement of Mass Damage Claims] came into force. This act provides for the possibility that a judge, at the request of the parties (probably on the one hand a representative of a group of aggrieved parties and on the other hand a company), declares an agreement on the settlement of claims for damages, to be generally binding for all the consumers aggrieved by the company. This act provides for an opt out option. This means that for individual aggrieved parties it is possible to withdraw from the operation of the agreement. Those who choose to opt out retain the possibility of instituting individual claims for damages.

Fourthly, at the end of 2005, the bill on the introduction of the Consumer Authority (part of the Ministry of Economic Affairs) was submitted. The act will probably come into force at the end of 2006. The act provides for the possibility for the Consumer Authority, on request or on its own initiative, to act against breaches of various aspects of consumer law. This act does not provide for the possibility of collective action for redress through the Consumer Authority for damage suffered. Aggrieved parties can, however, take advantage of a judgment obtained through the court on a claim of the Consumer Authority. Aggrieved parties can afterwards possibly take further steps.

Fifthly, there is still the possibility for aggrieved parties of individually assigning/transferring their own claim for damages to one (legal) person. This person can act in his/her own name against the party that has acted unlawfully. In this situation the respective company does, however, retain the right to set up a defence per claim transferred.

Dutch legislation does not contain rules regarding:

- quantifying the awarding of damages to a group,
- the way in which within a group amounts received must be distributed and
- incentives to institute a group action.

## **2. Conclusion:**

Dutch legislation does not provide for collective action whereby damages can be claimed. At the moment, there are no initiatives to amend the legislation in this regard.

## **3. Influence of private enforcement on public enforcement.**

This question by the OECD contains two parts; 1. the effect of private enforcement on the leniency programme, and 2. the releasing of business information by the Dutch Competition Authority (hereinafter referred to as the "DCA") to private parties.

- At present, Dutch legislation does not contain any rules in this area, apart from what follows from Regulation 1/2003 concerning confidentiality and from the Commission Communications regarding modernisation and more particularly the Commission Notice on cooperation within the network of competition authorities (2004/C 101/03), Official Journal 2004, No. C 101/43 (see: [http://europa.eu.int/eur-lex/pri/nl/oj/dat/2004/c\\_101/c\\_10120040427nl00430053.pdf](http://europa.eu.int/eur-lex/pri/nl/oj/dat/2004/c_101/c_10120040427nl00430053.pdf)) and the joint statement by the competition authorities on the subject (see: [http://ec.europa.eu/comm/competition/antitrust/legislation/list\\_of\\_authorities\\_joint\\_statement.pdf](http://ec.europa.eu/comm/competition/antitrust/legislation/list_of_authorities_joint_statement.pdf)). In the response to the Commission's green paper on claims for damages on account of infringements of Community anti-trust rules (19/12/2005), the Netherlands held the view that it is undesirable to indemnify the applicant for leniency in respect of private enforcement. The risk for claims for damages for the applicant for leniency should indeed be limited. In this context, it is negotiable for the Netherlands if perhaps the applicant for leniency is not (jointly and severally) liable for the total damage caused by the cartel, but only for its share of the damage.

- In the context of the implementation of the Competitive Trading Act, the DCA receives much (business) information from companies. This can involve information that is provided in the framework of an ex officio investigation, but also with regard to requests in the context of the leniency rule. At different times private parties have tried to obtain details of this information. However, the DCA refuses to issue this information and invokes Articles 90 and 91 of the Competitive Trading Act, which states that data or information concerning a company, which is obtained in connection with any activity for the benefit of the implementation of this Act, in principle may only be used for the application of this Act. The above provision does not affect the possibility for the civil court, at the request of the parties or on its own initiative, to request the DCA to provide information that it has obtained in the context of a leniency application.

The DCA attaches considerable importance to protecting data that is provided to competition authorities in the context of leniency applications; this should never be made available to civil procedures. Moreover, civil enforcement can be complementary to public enforcement.

#### **4. Conclusion:**

Dutch legislation does not contain any rules relating to the interaction between private and public enforcement. Under Articles 90 and 91 of the Competitive Trading Act or Article 28 of Regulation 1/2003, the DCA refuses to issue to private parties data or information concerning a company which is obtained in connection with any activity for the benefit of the implementation of the Competitive Trading Act.



## SWITZERLAND

### 1. Introduction

As it has been described in earlier contributions, Swiss Law on Cartels does allow for private rights of action and in particular for damage or reparation claims (i.e. no double or treble damages), but the usual way of proceeding against anticompetitive practices in Switzerland is through administrative procedures. Nonetheless, Switzerland follows with high interest possible developments in our neighbouring countries and in the EU as well as the respective discussions on private remedies in different international fora (OECD, ICN). We recognize that facilitation of private actions might further improve antitrust enforcement.

As, however, this topic has not yet been an issue within the Swiss jurisdiction, the present paper necessarily confines itself to some general comments regarding the questions raised by the Secretariat concerning collective actions, class actions and the interface between public and private enforcement.

### 2. Collective Actions / Class Actions

In Switzerland, the legal foundations for damage claims in case of competition law violation are embodied in art. 12 al. 1 lit. b of the Swiss Law on Cartels. In a complementary way, the rules of the Swiss Code of Obligation are applicable (art. 41 ss. and art. 97 ss. Code of Obligation). It has to be mentioned that, in addition to the claim for damages (with an interest on it of 5%, art. 73 al. 1 Code of Obligation), claims for redress (art. 49 Code of Obligation) and skimming of profits (art. 419 ss. Code of Obligation)<sup>1</sup> are also possible. On the state level, the enforcement of the civil rules in the Swiss Law on Cartels is in the competence of the responsible tribunals of our 26 states, each of which disposes of a different procedural law. However, it is the intention of the legislative of creating a single Swiss procedural law for the states. At the moment, there is a single procedural law for the entire country only for procedures at the Federal Court, the court of last instance. For this reason, this paper renounces to mention the different particularities on the state level.

Although the Swiss system provides for possibilities of appeal by authorities and associations in certain particular fields of law (e.g. environmental law), such a possibility does not exist according to our Law on Cartels. Art. 12 Law on Cartels provides that only any natural or legal person impeded by an unlawful restraint of competition from entering or competing in a market is entitled to appeal. Thus, collective actions are only allowed according to the terms of the general procedural and substantive rules.

In Switzerland, collective actions exist in the form of so-called *litis consortia*. They can be described as a group of persons on the plaintiff- or the defendant-side (see art. 24 al. 2 Federal Procedural Law). Voluntary *litis consortia* are formed without compelling rules, usually in cases in which the claims are based on the identical legal foundations or facts.

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<sup>1</sup> So far, there is no jurisdiction about the question whether it is possible to skim profits by means of a civil claim if an administrative sanction has already been pronounced.

There is only a loose link among the persons taking part in the voluntary *litis consortium*. The procedural requirements are to be examined separately for each of these persons (e.g. legal capacity). If one of these requirements is not met in one case, this has no impact on the other persons taking part in the voluntary *litis consortium*. Each litigation participant has the capacity to take legal actions for himself (e.g. withdrawal of the action, settlement, taking appeal). The negligence of one litigation-participant does not harm the others. It is possible and usually appropriate for the *litis consortium* to mandate a common legal representative. The unification of several lawsuits always demands the – in most cases implicit – judge’s approval. The judge has the power to separate the different lawsuits at every stage of the process, even without the consent of the parties (art. 24 al. 3 Federal Procedural Law). Because of the substantive law, the judgments concerning the litigation-participants are not necessarily identical. Furthermore, the costs of the procedure can be different for each of the litigation-participants.

By filing an action, the procedure is initiated and the relationship among the parties for the purpose of the procedure is established. Persons and enterprises which are not referred to as parties in the statement of claim at the moment of its filing, do not take part in the *litis consortium* and are not involved in the procedure. As a matter of principle, it is not possible to join the *litis consortium* at a later stage. Under certain circumstances, there is a possibility to exchange parties. However, this always requires the approval of the adverse party (art. 17 Federal Procedural Law). The possibilities of changing the claim (e.g. the amount of the damage) are limited (art. 26 Federal Procedural Law). Persons and enterprises which are not involved in the process can institute their own legal proceedings for the same matter and can form their own *litis consortium*. In such a case, they may file a petition aiming at the unification of the procedure, if territorial and functional jurisdiction as well as the competence are identical. Furthermore, the judge can unify the different procedures *ex officio*.

From a theoretical point of view there is another possibility of proceeding which, in its effect, is similar to filing collective actions. This concerns those kinds of procedures in which harmed enterprises cede their claims to a firm which bundles the claims and subsequently files them in a group. Competition damage claims are ordinary claims. According to the Swiss law, they can be ceded and subsequently asserted and enforced by the new creditor. It remains to be seen, if there is a need on the Swiss market for such firms specialized in competition damage claims.

According to art. 43 al. 1 Code of Obligation, the court determines the kind of compensation taking into account the specific circumstances. Apart from compensation<sup>2</sup>, there is the possibility of restitution in kind (e.g. obligation to contract). In the cases in which the exact extent of the damage cannot be proven or if this requirement would amount to an unreasonably severe burden, it is in the judge’s discretion to estimate the losses (art. 42 al. 2 Code of Obligation). The exact quantification and measuring of the damage take place separately for each litigation-participant. In the end, the determination of the exact amount of the compensation for each litigation-participant lies within the discretion of the judge (art. 43 al. 1 Code of Obligation).

In Switzerland, there are no specific incentives to bring an action on behalf of a group of plaintiffs. However, due to an increased efficiency of the procedure and in the interest of the plaintiffs, it is advisable for the latter to sue the defendants as a *litis consortium*: The advantages consist of a common statement of

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<sup>2</sup> Generally speaking, the definition of damage in Swiss law involves an actual pecuniary loss (*damnum emergens*) or missed profits (*lucrum cessans*). The second possibility would also include losses resulting from the reduction in quantity purchased. In the course of the quantification of damages, the fulfillment of the duty of minimize as well as the possible advantages and savings of the harmed person or enterprise have to be taken into credit. When the exact quantification of the damage has taken place, the calculation and measuring of the damage has to be carried out. In this context, especially the reasons for the reduction of the liability for damages have to be taken into account (e.g. partial responsibility for the causation or aggravation of the damage).

claim, common examination of witnesses and a common legal representative. Furthermore, contradictory judgments are avoided.

### 3. Interface between Public Enforcement and Private Enforcement

Leniency rules in Switzerland provide successful applicants only with immunity from administrative sanctions. They cannot annul or limit third parties' rights to seek compensation for damage in civil proceedings.

As it has been described in our last contribution to the discussion on private remedies, Swiss Code of Obligation relies heavily on the idea that damage claims ought to be strictly limited to the actual loss occurred and the concept of multiple damages appears to be an alien element within the system. At the most, a plaintiff thus receives full compensation for the losses suffered, possible damage claims are thus limited. However, it cannot be excluded that the risk of being exposed to such claims might be considered as a disincentive by potential leniency applicants. But so far, the probability of being exposed to administrative sanctions is much higher than the probability of being involved in civil proceedings.

What has been once at stake were the effects of wide-ranging extraterritorial application of the US treble damage rules on our leniency program. In the case *Empagran S.A. et. al. v. F.Hoffmann-La Roche LTD et. al.*, United States Court of Appeals, District of Columbia Circuit, Switzerland intervened, among others, as *amicus curiae*. One of the main arguments put forward concerned precisely the fear that a decision permitting independently injured foreign plaintiffs to pursue private treble-damages remedies in the US would undermine (Switzerland and other foreign) nations' own antitrust enforcement policies by diminishing foreign firms' incentive to cooperate with antitrust authorities in return for prosecutorial amnesty. Indeed, the Court of Appeals took these considerations into account and decided against a further extension of US treble damage rules.

If in the light of international discussions and developments Switzerland were to decide to introduce the concept of multiple damages in private antitrust actions, the same problem would, of course, arise within our one jurisdiction. A means to reduce negative effects of multiple damages on the success of our leniency program might simply consist in reducing the maximum damage compensation to the actual loss occurred for the person who has filed successfully a leniency application.

With regard to a possible disclosure of documents which might constitute a further disincentive for leniency applicants, art. 25 and 40 of our Act on Cartels provide that the Swiss competition authorities are bound by professional secrecy and the information collected in performance of their duties may be used only for the purpose of the investigation. Thus, as a matter of principle, an information exchange between the Swiss Competition Commission (Comco) and other authorities or tribunals does not take place. Apart from one exception (agreement between EU and Switzerland on air transport, art. 42a Law on Cartels) there is no legal basis providing for an information exchange between Comco and foreign authorities either. Therefore, such an exchange of information would only be allowed if the concerned undertaking would agree to it. Such an approval would be practically impossible in the case of leniency as the information provided by the applicant usually includes information regarding other members of the cartel who normally are not aware of the leniency application. It is yet unclear if enterprises cooperating with the Comco may be committed to agree to an information exchange.

Nonetheless, due to the rights of other parties (e.g. other cartel members or harmed enterprises) to the procedure, the maintenance of absolute secrecy regarding all documents as well as the identity of the leniency applicant(s) has turned out to be quite a challenge in practice. It remains to be seen in the future if the identity of the leniency applicant(s) is to be published at the end of the procedure or even earlier. This question is particularly delicate in those kind of situations in which enterprises have to fear procedures in

the US, in which case documents of Swiss administrative procedures have to be handed out in the course of pre-trial-discovery-procedures. However, further reflection will be necessary in order to maintain the effectiveness of the leniency rules although the identity of the applicant(s) must, at a certain stage, be published.

If the parties themselves break secrecy or if foreign competition authorities that deal with the same case publish the results of their findings before Comco has issued a decision Comco can, of course, also disclose the identity of the leniency applicant(s).

#### **4. Summary and conclusion**

Swiss legislation provides for the possibility of collective actions only according to the terms of the general procedural and substantive rules. They exist in the form of so-called *litis consortia* and can be described as a group of persons on the plaintiff- or the defendant-side (see art. 24 al. 2 Federal Procedural Law). There is only a loose link among the persons taking part in the voluntary *litis consortium*. As a matter of principle, lawsuits can be unified and separated at every stage of the procedure, litigation participants can take legal actions for themselves and the determination of the exact amount of the compensation takes place separately for each litigation-participant, according to the discretion of the judge. Apart from certain procedural advantages, there is thus no particular incentive to initiate collective actions in Switzerland.

Although the probability of being exposed to an administrative sanction is still much higher than the probability of being involved in civil proceedings, it cannot be excluded that the following issues might constitute a disincentive for potential leniency applicants.

With regard to the exchange of documents and other relevant information to the tribunals the Swiss competition authorities are bound by professional secrecy and the information collected in performance of their duties may be used only for the purpose of the investigation. Nonetheless, it has turned out that it is quite a challenge to guarantee the maintenance of absolute secrecy in practice.

Finally, although Switzerland itself has not introduced multipliers for damage claims, the wide ranging application of foreign rules might also have an impact on our leniency program. This problem has been illustrated in the case *Empagran S.A. et. al. v. F.Hoffmann-La Roche LTD et. al.*, United States Court of Appeals, District of Columbia Circuit.

## UNITED KINGDOM

### 1. Summary

As a matter of general law, forms of collective action are possible under the law of England and Wales. In Scotland, it is possible to arrange administratively for cases to be dealt with together, if the parties agree. Bodies specified by the Secretary of State for Trade and Industry may bring actions for damages on behalf of two or more individual consumers before the Competition Appeal Tribunal.

The ability of competition authorities in the UK to disclose information is limited by Part 9 of the Enterprise Act 2002, in particular. Although there are no competition-law-specific rules limiting a leniency applicant's exposure to damage awards, a mechanism by which that aim could be achieved exists under the general law.

The full UK Government response to the European Commission's Green Paper on damages actions for breach of the EC antitrust rules can be found at: <http://www.dti.gov.uk/files/file28534.pdf>

### 2. Responses to questions raised in the OECD request for submissions

#### 2.1 *Collective action/class action*

##### 2.1.1 *General*

The right to damages for breach of the competition rules arises from the law of breach of statutory duty. The rules described below (on representative actions, group litigation orders and actions brought by consumer organisations) are procedural rules only, which *presuppose* the existence of a right of action.

##### 2.1.2 *Representative actions*

As a matter of general law, there is a possibility of representative actions under Section II of Part 19 of the Civil Procedure Rules (CPR).<sup>1</sup> Representation orders are likely to be made when more than one party has the 'same interest' in a claim. There is no direct equivalent of Part 19 of the CPR in Scots law, but it is possible to arrange administratively for cases to be dealt with together, if the parties agree. Representation orders can apply to individuals and/or undertakings.

The UK is not aware of any representative actions being brought in the UK for breach of the competition rules.

##### 2.1.3 *Group litigation orders*

As a matter of general law, there is a possibility of Group Litigation Orders (GLOs) under Section III of Part 19 of the CPR. GLOs are subject to strict supervision by the court and may only be made with the

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<sup>1</sup> See [www.dca.gov.uk/civil/procrules\\_fin/menus/rules.htm#part11](http://www.dca.gov.uk/civil/procrules_fin/menus/rules.htm#part11).

consent of a senior judge.<sup>2</sup> GLOs are likely to be made when there are common or related issues of fact or law. As mentioned above, there is no direct equivalent of Part 19 of the CPR in Scots law, but it is possible to arrange administratively for cases to be dealt with together, if the parties agree. GLOs can apply to individuals and/or undertakings.

The UK is not aware of any GLOs being granted in respect of an action for breach of the competition rules.

#### 2.1.4 *Actions brought by consumer organisations*

Bodies specified by the Secretary of State for Trade and Industry may bring actions for damages on behalf of two or more individual consumers ('consumer claims') before the Competition Appeal Tribunal (CAT) under section 47B of the Competition Act 1998. The only body which has been designated to date is *Which?* (formerly known as the Consumers' Association).

*Which?* was awarded the relevant powers with effect from 1 October 2005. To date, it has not brought any actions in the CAT under section 47B but there appear to be no reasons why it will not do so in due course.<sup>3</sup>

In order to be specified to bring claims on behalf of consumers, bodies must meet the following criteria:<sup>4</sup>

- The body is so constituted, managed and controlled as to be expected to act independently, impartially and with complete integrity;
- The body is able to demonstrate that it represents and/or protects the interests of consumers. This may be the interests of consumers generally or specific groups of consumers; and
- The body has the capability to take forward a claim on behalf of consumers.

The fact that a body has a trading arm will not disqualify it from being able to bring consumer group claims, provided that the trading arm does not control the body, and any profits of the trading arm are only used to further the stated objectives of the body.

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<sup>2</sup> See Practice Direction 19B at:  
[http://www.dca.gov.uk/civil/procrules\\_fin/pdf/practice\\_directions/pd\\_part19b.pdf](http://www.dca.gov.uk/civil/procrules_fin/pdf/practice_directions/pd_part19b.pdf)

<sup>3</sup> Recent reforms in respect of conditional fee arrangements have, to some extent, addressed any potential issues of funding and may provide a suitable mechanism for designated bodies wishing to bring claims. Conditional fee agreements allow a solicitor to take a case on the understanding that, if the case is lost, he will not charge his client for the work he has done (or he will charge at a lower rate). However, if the case is successful, the solicitor can charge a success fee on top of his normal fee, to compensate him for the risk of not being paid. That success fee is calculated as a percentage of his normal fee; the level at which the success fee is set reflects the risk involved (the success fee can be up to 100% of the agreed or taxed expenses paid by the losing side). The success fee is recoverable from the losing side. In Scotland, conditional fees and success fees are also now permitted, but the success fee is paid by the client, not the other side.

<sup>4</sup> *Claims on behalf of Consumers – Guidance for Prospective Specified Bodies*, published by the Department of Trade and Industry. The OFT believes that it fulfils the criteria and may itself wish to apply to the Secretary of State to become a specified body in due course.

Claims can only be brought as 'follow-on' actions, i.e. on the basis of an infringement decision made by either the Office of Fair Trading ('OFT') or the European Commission: Section 47A(5) and (6) CA 1998.

Section 47B(6) CA 1998 stipulates that the damages awarded in respect of a consumer claim must be awarded to the individual concerned, but the CAT may with the consent of the specified body and the individual order that the sum awarded be paid to the specified body.

## **2. Interface between public enforcement and private enforcement**

### **2.1 Restrictions on disclosure**

In the UK, documents held by a competition authority are not, as a general rule, available to claimants in a damages claim due to the restrictions on disclosure contained in Part 9 of the Enterprise Act 2002, in particular. Part 9 stipulates, inter alia, that information which relates to the affairs of an individual or any business of an undertaking must not be disclosed unless certain conditions are met. However, a competition authority must comply with any court order requiring disclosure.

#### *2.1.1 OFT's views on the interaction between leniency programmes and private actions*

Where a competition authority has not yet published or otherwise made available its decision in connection with a given investigation, a claimant may wish to seek access to any documents created for inclusion in or to support an undertaking's leniency application (together, 'leniency documents'). Such documents may be in the possession of the (potential) defendant or a competition authority.

In its *Response to the European Commission's Green Paper, Damages actions for breach of the EC antitrust rules*, May 2006 (OFT844), the OFT expressed its belief that, in order to maintain the effectiveness of the leniency regime, a claimant should not be allowed access to the leniency documents in the circumstances described above.<sup>5</sup> Although it could be argued that access should be granted where the competition authority has decided not to pursue the case on, for example, grounds of administrative priority, the OFT believes that this would discourage leniency applications – whether a competition authority pursues a case following a leniency application is largely outside the control of the leniency applicant. Precisely how this should be achieved is an open question – any measures to prevent leniency applications being used against the leniency applicant will need to be accommodated within the existing rules. As mentioned above, the OFT would be required to comply with any court order requiring access.

In its response, the OFT agreed with the European Commission's suggestion that,

'It might ... be necessary to exclude not only the actual corporate statement but also to disallow that a claimant seeks through disclosure the documents in the form submitted by the leniency applicant to a competition authority',<sup>6</sup>

but subject to the modifications suggested below.

The OFT believes that the proposed exclusion should not just cover the national equivalents of the 'corporate statement', but also all material created for inclusion in or to support an undertaking's leniency application (that is, 'leniency documents' as defined above). Such material could include, for example,

<sup>5</sup> See [www.offt.gov.uk](http://www.offt.gov.uk).

<sup>6</sup> Commission Staff Working Paper, Annex to the Green Paper, *Damages actions for breach of the EC antitrust rules*, 19 December 2005, COM(2005) 672 final at paragraph 234.

transcripts of interviews and witness statements. Leniency applicants would place themselves in a position worse than that of the other members of the cartel if such material were not covered by the exclusion.

Where leniency documents are released to the other infringing undertakings to enable them to exercise their rights of defence, restrictions must be placed on the use to which those documents can be put.<sup>7</sup> The OFT understands that there has been at least one instance of a claimant obtaining from an infringing undertaking a copy of the corporate statement submitted to the European Commission as part of a leniency application and seeking to rely on it against the Commission's leniency applicant in a private action in another jurisdiction (the United States). However, there may be circumstances in which the leniency applicant would be prepared to grant access to leniency documents (for example, where the claimant agrees to use the leniency documents against other cartellists only). The OFT believes that the leniency applicant should be permitted to waive his rights in whole or in part, if he considers that it is in his interest to do so.

The OFT believes that a distinction should be drawn between (i) leniency documents; and (ii) documents created for any other purpose (that is, pre-existing documents, broadly). The OFT believes that there should be no blanket exclusion of access to pre-existing documents, as this would confer advantages in litigation that would not have been obtained but for the leniency application. However, the OFT believes that a request for access in the form of a request for all documents submitted to the competition authority should be rejected.

### 2.1.2 *Exposure to damages awards*

Under the general law of England and Wales, claimants are able to sue and obtain judgment against a leniency applicant under normal principles of joint and several liability, whilst the court is empowered to allow the leniency applicant, in turn, to seek contributions of up to 100 per cent from the other cartellists.

Section 1(1) of the Civil Liability (Contribution) Act 1978<sup>8</sup> provides that, '... any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)'.

Section 2(1) provides that, '... the amount of the contribution recoverable ... shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question'.

Section 2(2) provides that, '... the court shall have power ... to exempt any person from liability to make a contribution or to direct that the contribution to be recovered from any person shall amount to a complete indemnity'.

The UK is not aware of any instances of the Civil Liability (Contribution) Act 1978 being used in a competition case in the UK to date.

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<sup>7</sup> Under section 241(2) of the Enterprise Act 2002, where 'specified information' is disclosed for the purpose of facilitating the OFT's statutory functions and is not made available to the public, the person(s) to whom the information is disclosed may not disclose it further without the agreement of the OFT. Under section 245 of the Act, disclosure of specified information may be a criminal offence.

<sup>8</sup> The position in Scots law, as governed by section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, is similar but not identical.

### 3. Conclusion

As can be seen from the discussion above, the UK has taken a number of measures at national level aimed at encouraging and facilitating the bringing of claims.<sup>9</sup> The UK considers that private actions are a very important, complementary limb of an effective competition regime and is actively involved in discussions in a number of fora as to how to best achieve an appropriate balance and fit between private enforcement and public enforcement. In this context, the OFT believes that the possibilities for consumer redress should be improved and that preservation of victims' rights to obtain compensation is consistent with preservation of the effectiveness of leniency programmes. It also intends to use its powers under Regulation 1/2003 in a way which will best assist the courts and the development of competition law.

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<sup>9</sup> The UK's response to the Commission's consultation sets out its position and examines to what extent the options match, overlap or differ from current UK law. See: [www.dti.gov.uk/bbf/competition-law/Competition%20Policy/index.html](http://www.dti.gov.uk/bbf/competition-law/Competition%20Policy/index.html)



## UNITED STATES

Class actions can be an efficient and effective way to use litigation resources, remedy consumer injury, deter wrongdoing, and help maintain the integrity of the marketplace. They are a mechanism for the courts and the parties to adjudicate multiple claims efficiently. Combining individual injuries into a single legal action can also vindicate consumer rights that might otherwise go without remedy, thereby serving important redress and deterrence goals. For example, when a large number of consumers have each been injured a small amount, a suit by a single consumer is not rational because the costs associated with bringing the suit far outweigh any likely individual redress. The wrongdoer has reaped large rewards, however, and allowing such harm to go unredressed fails to deter such wrongdoing. This not only imposes costs on the injured consumers but also diminishes the trust all consumers are willing to place in the market system, ultimately harming all consumers and honest sellers. While enforcement actions by public agencies can also serve these goals of efficiency, redress, and deterrence, the class action device enables private actors to seek resolution for some problems for which government agencies may not have the statutory authority to obtain full redress<sup>1</sup> or the resources to pursue.

Sometimes, however, class actions do not serve the goals for which they were created. Where the interests of private class attorneys and defendants align to the detriment of the class members, injured plaintiffs may be offered insufficient redress while defendants obtain broad releases from liability and class counsel receive generous fees. In addition to the problem of insufficient redress, the class action mechanism can also create incentives to bring meritless class actions simply to pressure defendants to settle to avoid the nuisance of defending themselves. There have been attempts to ameliorate these problems through legislation and through the Federal Trade Commission's Class Action Fairness Project.

### 1. Rules that Establish a Right of Action for a Group of Consumers

The effort to accommodate multiparty litigation in a manageable way has a long and complex history in the United States. A variety of devices evolved for resolving claims of numerous parties that presented common legal issues.<sup>2</sup> **This multiparty litigation was dramatically transformed by the 1966 amendments to Federal Rule of Civil Procedure 23, which provides the governing framework for class actions today.**<sup>3</sup> This section provides an overview of the basic requirements of Rule 23.

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<sup>1</sup> In some cases, the statutes under which the government acts may provide primarily or exclusively for injunctive relief or criminal penalties rather than direct financial relief to consumers. In many states, however, attorneys general have the ability to initiate so-called *parens patriae* actions in the name of the state on behalf of residents of such state for, e.g., violations of consumer protection and antitrust laws. Further, the Clayton Act authorizes a state attorney general to bring such an action in federal court on behalf of the natural persons residing in such state for a violation of the federal antitrust laws. In such a case, the attorney general acts as the representative of a "class" of harmed consumers and may seek treble damages for any such violations.

<sup>2</sup> See Note, *Multiparty Litigation in the Federal Courts*, 71 Harv. L. Rev. 874 (1957) (providing comprehensive treatment of multiparty litigation just before the beginning of the modern era).

<sup>3</sup> There are also state class action statutes but, for reasons of brevity, this discussion will focus on federal class action issues.

Rule 23(a) sets out the four prerequisites for a class action. First, there must be numerosity of class members such that “joinder of all members is impracticable.” Second, there must be commonality, meaning there are “questions of law or fact common to the class.” Third, there must be typicality of “the claims or defenses of the representative parties” as compared to the rest of the class. And fourth, the representative parties must “fairly and adequately protect the interests of the class.” Rule 23(b) further provides that common issues must predominate over individual issues and that a class action must be superior to other methods of adjudication of the matter.

Rule 23(c) lays out the class certification process. The court must hold a hearing to determine whether to certify the lawsuit as a class action, and an order certifying a class action must define “the class and the class claims, issues, or defenses, and must appoint class counsel . . . .” Rule 23(f) provides that a court of appeals, in its discretion, may permit the appeal of the decision granting or denying class certification. If a class is certified, the court typically must “direct to class members the best notice practicable under the circumstances,” which must concisely and clearly state in plain, easily understood language the following information: the nature of the action; the definition of the class certified; the claims, issues, or defenses; the ability and method to opt out of the class; and the binding effect of a class judgment on members.

Rule 23(g) states that, unless a statute provides otherwise, a court that certifies a class must appoint class counsel, who must fairly and adequately represent the interests of the entire class. In appointing class counsel, the court must consider the work that counsel has done in identifying the claims in the action; counsel’s experience with class actions, other complex litigation, and the type of claims asserted in the action; counsel’s knowledge of the applicable law; and the resources counsel will commit to representing the class. Further, Rule 23(h) permits the court to award reasonable attorneys’ fees to class counsel in a lawsuit certified as a class action. A claim for such an award must be made by motion to the court. A class member may object to a motion for attorneys’ fees, and the court may, in its discretion, hold a hearing to address such a motion.

Rule 23(e) provides that the court must approve any settlement or other disposition of the matter and direct notice in a reasonable manner to class members. The court, however, must hold a hearing to determine whether the disposition is fair, reasonable, and adequate. Class members may object to proposed dispositions that require court approval.

## **2. Issues Raised by Class Actions**

Class actions have raised many different issues over the years since the 1966 amendments to Rule 23. In light of the questions posed by the request for written contributions and the antitrust enforcement agencies’ experiences, this section focuses on those issues associated with class certification, the opt-out system, notice to the class, incentives for collusive settlements, coupon settlements, excessive attorneys’ fees, and follow-on actions after government enforcement.

### **2.1 Class Certification**

Many courts and commentators have observed that the fate of a class action is largely determined by the court’s decision whether to certify a class. A recent empirical analysis conducted by the Federal Judicial Center, the research and education agency of the federal judicial system, found that 89% of cases that were certified as class actions concluded with a court-approved, class-wide settlement.<sup>4</sup> In only 4% of such cases was a trial held. The authors of the study explained that “[t]he dichotomy between certified and

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<sup>4</sup> Thomas E. Willging & Shannon R. Wheatman, *An Empirical Examination of Attorneys’ Choice of Forum in Class Action Litigation* 50 & tbl. 19 (Fed. Judicial Ctr. 2005).

noncertified cases could hardly be clearer. A certification decision appears to mark a turning point, separating cases and pointing them toward divergent outcomes.”<sup>5</sup> These findings are consistent with the view that class certification puts an immense pressure on defendants to settle class action litigation to avoid “the risk, however small, of potentially ruinous liability. . . .”<sup>6</sup>

## 2.2 *Opt-out System*

The 1966 Amendment to Rule 23 changed the prior practice of opt-in classes to an opt-out system. Some commentators argue that there is a flaw in an opt-out system that permits “lawyers to speak for immense ‘phantom’ classes of people who have not selected them - - who may, in fact, be entirely unaware that they are parties to a lawsuit,” which allows class counsel, rather than the class members, to drive the litigation and automatically gives counsel substantial bargaining power.<sup>7</sup> The very low settlement participation rates for some recent class action settlements seem to bear out this criticism. For example, in *Strong v. BellSouth Telecommunications, Inc.*,<sup>8</sup> **the settlement provided class members with the option of either continuing under a service plan or canceling and receiving a credit. Although the settlement purportedly provided \$64 million in compensation, the credit requests submitted by class members amounted to less than \$1.8 million. Similarly, commentators report that the redemption rates for coupons sometimes used to settle class actions mirror the typical corporate-issued promotional coupon redemption rates of 1-3%.**<sup>9</sup>

## 2.3 *Insufficient Notice to the Class*

Presenting legally and factually complex information in an easily understood format is a challenge in drafting notices to members of a class action. Nonetheless, recently revised Rule 23 requires that class certification notices must be written in “plain, easily understood language.” Such language is necessary to consumers’ ability to make rational, well-informed decisions regarding the exercise of any legal rights affected by the class action. Commentators, however, have observed many shortcomings in notices to the class. For example, notices may ignore the plain language requirement by including legal terminology and chains of defined terms; may be too lengthy or redundant; may omit pertinent information, such as the nature of the claims in the lawsuit; may provide scant notice of the legal rights that may be at issue in the class action; may “sell” the settlement rather than present it in a neutral fashion; may attempt to dissuade class members from participating in or objecting to the proposed settlement; or may hinder the ability of potential class members to receive additional information regarding the settlement.<sup>10</sup>

<sup>5</sup> *Id.* at 50.

<sup>6</sup> *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001). *See also* *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, C.J.) (“[The defendants] might, therefore, easily be facing \$25 billion in potential liability (conceivably more), and with it bankruptcy. They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle.”).

<sup>7</sup> Thomas B. Leary, *The FTC and Class Actions* 2 (2003), available at <http://www.ftc.gov/speeches/leary/classactions Summit.htm>.

<sup>8</sup> 173 F.R.D. 167, 172 (W.D. La. 1997).

<sup>9</sup> *See, e.g.*, James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 Geo. J. Legal Ethics 1443, 1445 (2005).

<sup>10</sup> *See* Todd B. Hilsee, Shannon R. Wheatman & Gina M. Intrepido, *Do You Really Want Me to Know My Rights? The Ethics Behind Due Process in Class Action Notice Is More Than Just Plain Language: A Desire to Actually Inform*, 18 Geo. J. Legal Ethics 1359, 1367-68 (2005).

## 2.4 *Incentives for Collusive Settlements*

As discussed above, the overwhelming majority of class actions, like the majority of other lawsuits, are settled before trial. When settlement and coupon redemption participation rates are expected to be low, however, there is the potential for a substantial pool of unclaimed funds that, in effect, can be split between class counsel and the defendants. That is, there are incentives for these parties to craft a settlement that allows class counsel and the defendants to maximize the pool of cash to themselves and subordinate the interests of the class. Once a proposed settlement is reached, class counsel and defendants have a common interest in touting the benefits of the proposed settlement and minimizing the difficulties associated with executing such settlement. Two types of settlements of particular concern are (1) settlements involving excessive attorney fees, and (2) so-called “coupon” settlements, in which class members receive discounts on future purchases from the defendants rather than cash.

Class action attorneys that represent their clients zealously and efficiently are entitled to reasonable compensation. Excessive class action attorney fee awards, however, represent a significant source of consumer harm. Such fee awards are not a costless windfall for lawyers, but rather diminish the total compensation available to injured consumers. To the extent that such fees do not accurately reflect the amount of work performed by the attorney, or the value of the settlement to the class, they may also create distorted incentives, thereby promoting excessive litigation that is not only contrary to the interests of the class, but unnecessarily raises the cost of goods and services to consumers generally.

Settlements involving coupon or other non-pecuniary compensation may be appropriate in certain circumstances, particularly where the size of each class members’ individual recovery is likely to be *de minimis*. Under such circumstances, the cost of distributing each class members’ cash award may exceed the total settlement amount, making coupons one of the few options available for providing relief of any kind. The use of coupon settlements, however, raises conflict-of-interest concerns. Defendants may be tempted to agree on coupon compensation because they are counting on a low redemption rate or because the coupons can actually generate additional sales. As a result, consumers may not get meaningful relief or the amount of the relief claimed. Further, coupon settlements are difficult to value, yet the aggregated face value of the coupons – regardless of the actual redemption rate of such coupons – has been used as a basis for setting class counsel’s fees. Thus, class counsel may be tempted to settle for coupon compensation that is ultimately of little value, or even no value to the class, provided that the coupons facially appear valuable enough to justify the fees counsel seeks from the court.

## 2.5 *Private “Follow-on” Actions to Government Enforcement*

Private class actions often can provide a beneficial complement to government enforcement actions. In some cases, for example, a private class action can provide a superior remedy to injured consumers than would be possible in a government action. This is the case where the statute(s) under which the government proceeds may provide primarily or exclusively for injunctive relief or criminal penalties rather than direct financial relief to consumers. “Follow-on” or “piggyback” class actions,<sup>11</sup> however, can also fail to significantly improve the recovery for injured consumers and can be duplicative.

Several issues have been raised concerning follow-on actions. Knowledge of the existence of a parallel or preceding government action can be important information to a court as it undertakes to understand the issues in dispute, assess the overall fairness of a proposed settlement, and determine the appropriate level of fees for class counsel. In light of the substantial work often undertaken by the government in prosecuting a case, the existence of a related government action likely reduces the amount

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<sup>11</sup> “Follow on” actions refer not only to suits that take place after the government’s enforcement action, but also those prior to and, even more likely, simultaneously with the government action.

of effort, prosecution risk, and expenses that class counsel otherwise would face without such government action. Maximizing class members' rightful recovery is the principal role that follow-on class actions are intended to play in a hybrid public/private enforcement structure, and class counsel's fees should be set at a level reflecting that objective.

### 3. How Have These Concerns Been Addressed?

#### 3.1 *FTC Class Action Fairness Project*

In response to concerns about the treatment of consumer interests in class actions, the FTC initiated the Class Action Fairness Project in 2002. The goal of the Project is to ensure that consumers with meritorious claims get meaningful, not illusory, relief. The FTC is interested in consumer class actions, and in particular, consumer class action settlements, because they raise issues that are at the core of the FTC's consumer protection mission. FTC efforts under the Class Action Fairness Project have taken the form of, among other things, several amicus briefs objecting to proposed settlements, an advocacy filing with the Federal Judicial Conference,<sup>12</sup> a class action workshop,<sup>13</sup> and a consumer education piece.<sup>14</sup>

The FTC has participated as an amicus in cases in which it believed the interests of consumers were being inadequately represented, or, in some instances, not represented at all. To date, the FTC's settlement objections have focused primarily on coupon compensation and excessive attorneys' fees. The Commission's briefs also have raised, to a lesser degree, such issues as insufficiently clear notices to the class, burdensome claims procedures, and follow-on class actions. In *In re First Databank*,<sup>15</sup> the Commission had challenged a merger as anticompetitive and, as part of the settlement, obtained \$16 million in consumer redress. Subsequently, private class action counsel negotiated a settlement that added at most \$8 million to the fund, for a total of \$24 million. Class counsel sought 30% of the \$24 million as a fee – a sum that would have captured 90% of the value added by their efforts and directly reduced the funds available to identifiable customers who had been overcharged. After the FTC objected, the court awarded counsel only 30% of the \$8 million value added.

In *Erikson v. Ameritech*,<sup>16</sup> the FTC objected to a proposed coupon settlement that it believed was not only unlikely to be of value but actually likely to be affirmatively harmful to class members. To compensate consumers for its failure to disclose key terms of its voice mail service, Ameritech offered to provide coupons for one free month of speed dial service. There was no evidence that consumers would want this unrelated service, and, worse, the settlement notice did not adequately disclose that consumers

<sup>12</sup> Letter from FTC to the Judicial Conference of the United States (Feb. 15, 2002) (commenting on proposed amendments to Rule 23), available at [www.ftc.gov/os/2002/02/rule23letter.pdf](http://www.ftc.gov/os/2002/02/rule23letter.pdf).

<sup>13</sup> FTC Workshop, *Protecting Consumer Interests in Class Actions* (Sept. 2004). The workshop's home page, which includes links to many of the materials produced by the Class Action Fairness Project, is found at [www.ftc.gov/bcp/workshops/classaction/index.htm](http://www.ftc.gov/bcp/workshops/classaction/index.htm).

<sup>14</sup> FTC Bureau of Consumer Protection, *Need a Lawyer? Judge for Yourself* (advising consumers, among other things, to scrutinize opt-out notices and class action settlement terms carefully, particularly attorney fee awards that may reduce the total compensation available to class members), available at [www.ftc.gov/bcp/online/pubs/services/lawyer.pdf](http://www.ftc.gov/bcp/online/pubs/services/lawyer.pdf).

<sup>15</sup> 209 F. Supp. 2d 96 (D.D.C. 2002). The FTC's amicus brief in this matter is available at [www.ftc.gov/os/2002/01/heardbrief.pdf](http://www.ftc.gov/os/2002/01/heardbrief.pdf).

<sup>16</sup> No. 99 CH 18873, slip op. (Ill. Cir. Ct. Sept. 18, 2002). The FTC's amicus brief in this matter is available at [www.ftc.gov/os/2002/06/eriksonmemo.pdf](http://www.ftc.gov/os/2002/06/eriksonmemo.pdf).

who accepted the free service for a month would thereafter be billed for it unless they affirmatively canceled the service. The court rejected the proposed settlement, characterizing it as a “court-sponsored promotion gimmick.”

Most recently, the FTC filed an amicus brief recommending that the court reject a proposed class action settlement in *Chavez v. Netflix*.<sup>17</sup> The proposed settlement offered current customers one month of upgraded service and former members one free month of service. Class members who accept the settlement, however, would be obligated to pay for the expanded or new service on a monthly basis after the conclusion of the free month, unless or until they cancelled the service. The FTC’s objection focused on this “negative option” feature, arguing that it would be disclosed inadequately and would serve more as a marketing vehicle than as a redress mechanism. The parties subsequently restructured their settlement agreement, eliminating this negative option feature.

### 3.2 *Class Action Fairness Act of 2005*

The Class Action Fairness Act of 2005 (CAFA)<sup>18</sup> was signed into law on February 18, 2005. In findings adopted as part of CAFA, Congress noted that recently there have been abuses of the class action device. In particular, “[c]lass members often receive little or no benefit from class actions, and are sometimes harmed, such as where . . . counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value. . . .” CAFA, therefore, was intended to “(1) assure fair and prompt recoveries for class members with legitimate claims; (2) restore the intent of the framers of the United States Constitution by providing Federal court consideration of interstate cases of national importance under diversity jurisdiction; and (3) benefit society by encouraging innovation and lowering consumer prices.” With these stated purposes in mind, CAFA provides two main areas of reform: expansion of federal jurisdiction over certain cases and new provisions for class action settlements and calculation of attorneys’ fees.

The Class Action Fairness Act expands federal court jurisdiction to include class action lawsuits brought under state law where any class member is a citizen of a state different from any defendant, the total amount in controversy (including all claims of the individual class members) exceeds \$5 million, and the putative class has at least 100 members. CAFA was intended to and likely will result in most class actions, including indirect purchaser actions, being litigated in federal court. Nonetheless, certain exceptions to this expanded jurisdiction – applicable where more than one-third of the proposed class members are citizens of the state in which the lawsuit was originally filed – permit truly localized disputes to be heard by local state courts.

Other CAFA provisions concern class action settlements and the calculation of attorneys’ fees. While CAFA does not prohibit the use of coupons in such settlements, it does restrict the fees paid to class attorneys who obtain coupon settlements for the class. CAFA provides that, “[i]f a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney’s fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed,” as opposed to the value of all coupons issued to the class. CAFA also provides that a settlement involving coupons may be approved only if the court conducts a hearing and makes written findings that the settlement is fair, reasonable, and adequate for class members. Such hearing may, in the court’s discretion, include expert testimony on the actual value to the class members of the coupons that are redeemed. CAFA further provides that the court may require that a

<sup>17</sup> No. CGC-04-434884 (Cal. Sup. Ct.). The FTC’s amicus brief in this matter is available at [www.ftc.gov/os/2006/01/netflixamicusbrief.pdf](http://www.ftc.gov/os/2006/01/netflixamicusbrief.pdf).

<sup>18</sup> Pub. L. No. 109-2, 119 Stat. 4 (2005).

proposed settlement agreement include the distribution of a portion of the value of unclaimed coupons to one or more charitable or governmental organizations, as agreed to by the parties.<sup>19</sup> The value of any such distribution, however, may not be used to calculate the fees for class counsel.

CAFA also provides for two types of protection in approving proposed settlements. First, a court may not approve a settlement under which any class member is obligated to pay sums to class counsel that would result in a net loss to the class member unless the court makes a written finding that nonmonetary benefits to the class member substantially outweigh the monetary loss. Second, a court may not approve a settlement that discriminates in the benefits provided to class members based on geographic proximity to the court.

In response to issues raised by follow-on class actions, CAFA requires that, within ten days of filing a proposed class action settlement for court approval, each defendant must send to the “appropriate” state and federal officials, among other things, a copy of the settlement agreement, complaint, settlement hearing information, proposed settlement notice, and information about class members residing in each state. In most cases, the appropriate state and federal officials will be the Attorney General of the United States and of each state in which a class member resides. (A different federal official is appropriate in cases involving certain financial institution defendants, and a different state official is appropriate where some state official other than the attorney general has primary regulatory or licensing authority over the defendants or the subject matter of the lawsuit.) No proposed class action settlement may be approved until 90 days after the appropriate federal and state officials have been notified of the proposed settlement.

#### **4. Conclusion**

A class action can be an efficient mechanism for using judicial resources, providing consumer redress, deterring wrongdoing, and safeguarding the integrity of the marketplace. As consumer class actions have evolved over time, however, concerns have been raised about whether some of these actions – and in particular some of the settlements reached in these actions – truly serve consumers’ interests and deter unlawful behavior by defendants. These concerns focus on, among other things, the disproportionate influence of the class certification decision, insufficient notice to the class, consumer redress that does not really provide anything of value, and excessive attorneys’ fees that may either reduce consumer redress in meritorious cases or provide incentives for prosecution of meritless cases that can harm consumers indirectly.

As discussed above, the FTC’s Class Action Fairness Project has addressed some of these concerns, particularly those involving coupon settlements and excessive attorneys’ fees that negatively impact consumers. Further, the enactment of the Class Action Fairness Act of 2005 – the most significant amendment of U.S. class action law since the 1966 amendments to Rule 23 – was prompted by many of the concerns outlined in this submission. The impact of CAFA on class action litigation and settlements will be closely watched and analyzed by the FTC, courts, commentators, and the bar.

##### **4.1 *Interface between Public Enforcement and Private Enforcement (Contributed by the United States Department of Justice)***

In June 2004 the U.S. Congress passed the Antitrust Criminal Penalty and Reform Act of 2004, Pub. L. No. 108-237, § 215, 118 Stat. 665, 668 (2004), to provide more incentive for leniency applications by

<sup>19</sup> Such distributions – typically referred to as *cy pres* awards – are utilized when it is impossible to distribute all of the settlement fund directly to the class. (The term *cy pres* is derived from a French phrase meaning “as near as,” and reflects the belief that such awards are the next-best use of settlement funds that cannot be distributed directly to class members.)

de-trebling private damages for leniency applicants which cooperate with civil plaintiffs in their suits against the other cartel members. This provision was specifically designed to enhance the Antitrust Division's Corporate Leniency Policy, which has been very effective in exposing harmful cartel activity in recent years. The de-trebling legislation gives cartel members an even greater incentive to turn themselves in by limiting their potential damages in private lawsuits to single damages based on their own role in the cartel, provided that they also cooperate with plaintiffs in the private lawsuit. Other cartel participants remain fully liable for treble damages based on harm caused by the entire conspiracy. The result should be more cartels exposed and brought to justice, both in criminal prosecutions and in private legal actions.

This provision reduces civil damages from corporate amnesty applicants to single damages in a private lawsuit *only* if an applicant cooperates with the plaintiffs in that lawsuit. The court in which the civil action is brought determines whether cooperation is satisfactory, but the de-trebling statute provides that cooperation shall include: (i) providing a full account of all facts known to the applicant that are potentially relevant to the civil action and (ii) furnishing all documents potentially relevant to the civil action that are in the possession, custody, or control of the applicant, wherever those documents are located. An antitrust leniency applicant must also use its best efforts to secure the cooperation of its employees.

The Antitrust Division's policy is to treat as confidential the identity of leniency applicants as well as any information they provide. The Division will not disclose a leniency applicant's identity, absent prior disclosure by or agreement with the applicant, except by court order.

Federal Rule of Criminal Procedure 6(e) prohibits disclosure by government attorneys of any matters occurring before criminal grand juries. When a private party in private litigation seeks to obtain from another party information that the latter has provided to the government (such as a discovery request to an amnesty applicant or subpoena recipient asking for all information provided to the government during the course of a criminal investigation), the government can seek to intervene to obtain a stay of discovery. Frequently, in a private damages case the court will stay testimonial discovery and certain interrogatories of key witnesses in order for the government to complete its criminal investigation and proceedings.

In one private case the plaintiffs tried to subpoena "leniency materials" from an unsuccessful leniency applicant. Even though the discovery request was not directed to the Division, the Division participated as amicus in the district court proceedings over the subpoena. When the district court permitted the discovery, the Division also filed a brief on appeal, but the leniency applicant at that point settled the entire case, thus mooting the appeal on the discovery issue, and the district court decision was vacated.

On the civil enforcement side, the Division has on occasion dealt with attempts by private parties to obtain non-public civil investigation materials from the Division by subpoena or by making a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. In general, documents, information, and testimony obtained from merging parties under the Hart-Scott-Rodino Act (HSR Act), or produced by any party in response to an administrative subpoena, are shielded by law from disclosure to outside parties. HSR materials are expressly exempt from disclosure under FOIA, 15 U.S.C. § 18a(h), and otherwise protected from public disclosure except in the course of FTC and DOJ administrative and judicial proceedings. Likewise, materials submitted in response to administrative subpoena are exempt from disclosure under FOIA, 15 U.S.C. § 1314(g), and may not be disclosed to outside parties without the consent of the producing party, except where the disclosure is (1) to Congress, (2) between DOJ and the FTC, (3) to third parties during the course of investigatory depositions, or (4) for official use in connection with federal administrative or regulatory proceedings. As a result, private parties are generally unsuccessful in obtaining these investigative materials from the Division.

With respect to other investigative material, such as information provided voluntarily by investigative sources, the Division strictly protects the confidentiality of sensitive business information, and takes all appropriate steps to prevent competitively sensitive information from being shared among competitors. Therefore, the Division's policy is not to disclose such information unless it is required by law or necessary to further a legitimate law enforcement purpose. In response to any request by a private party for disclosure of confidential business information, the Division generally will (1) assert all applicable legal exemptions from disclosure, (2) for requests under FOIA, provide notice to the company and give the company an opportunity to object to disclosure as provided in Departmental regulations, and (3) for requests outside of FOIA, use its best efforts to provide the company such notice as it practicable prior to disclosure of confidential business information.



## EUROPEAN COMMISSION

### 1. Collective and representative action

#### 1.1 Summary

In its Green Paper on damages actions for breach of the EC antitrust rules, the Commission distinguishes between damages actions aimed at protecting the rights of final consumers and damages actions aimed at protecting the rights of other groups of purchasers. With regard to final consumers, the Green Paper contains an option based on a representative action by consumer associations. For other groups of purchasers, the Green Paper raises for debate an option based on an opt-in collective action.

##### 1.1.1 *A representative action by consumer associations*

The December 2005 Green Paper<sup>1</sup> makes the argument that there is a merit in fostering claims by final consumers, because these claims contribute directly to the overarching aims of compensation and increased deterrence, as well as to the development of a competition culture. Costs, delays and administrative burdens involved in ordinary judicial proceedings can, however, discourage consumers who suffer a relatively minor economic loss from starting a damages action. To enable consumers to be viable litigants, some facilitating instruments are required.

One solution to tackle the obstacles to private antitrust enforcement by final consumers may be to introduce simplified court procedures for small claims. It is in that context that one has to situate the Commission's 2005 proposal for a Regulation establishing a European Small Claims Procedure.<sup>2</sup>

In addition to the European Small Claims Procedure, it may be appropriate to offer consumers means of collective redress by way of a representative action by consumer associations or other qualified entities. The option of a collective consumer action in form of a class action has not been envisaged because there is a risk of excesses, in particular that consumers lose control of the litigation process, so that the specific interests of consumers become secondary to other interests (the principle agent problem).

Therefore, the Commission has only put forward an option enabling the interests of consumers to be concentrated in a representative action brought by a consumer association. It is believed that such representative action offers a more appropriate alternative for final consumers. It goes without saying that a representative action should not deprive **individual** consumers from bringing an action if they should wish so.

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<sup>1</sup> Green Paper on Damage actions for breach of the EC antitrust rules [COM(2005) 672 final]

<sup>2</sup> Commission's proposal for a Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure, COM(2005)87 of 15 March 2005.

### *1.1.2 A collective action for groups of other purchasers than final consumers*

Collective and representative actions are particularly important in the context of defending consumer interests. However, also beyond the specific context of consumer claims, collective and representative actions can ensure that action is effectively taken and that the efficiency of the litigation process is improved by consolidating a potentially large number of different actions into one action.

In particular, the Green Paper has put forward for discussion an opt-in collective action by purchasers other than final consumers (e.g. retailers). This may add to the awareness raising of the claim and ensure a more attractive cost/benefit analysis as to the prospects of litigation. Such form of collective action can therefore be important in balancing the resources and bargaining position of otherwise diffuse claimants against well organised and financially stronger defendants.

Different from collective actions by consumers, the Commission considers the risk of a principle agent problem in collective actions by retailers or other groups of purchasers to be lower than is the case of collective actions by final consumers. That is mainly so because those purchasers will normally have a commercially stronger position than consumers, their numbers are likely to be more limited and their claims more substantial. For these purchasers, collective actions can be a real leverage, putting them in a better position to litigate.

## **2. The interface between public and private enforcement**

### **2.1 Summary**

The Commission is convinced that leniency programmes and rules on antitrust damages claims can be formulated in such a way that they mutually strengthen each other. It is therefore necessary to consider whether successful leniency applicants should also get financial incentives on the civil side (i.e. in national court decisions awarding damages). Any diminishing of exposure for the leniency applicant should be at the cost of the other members of the cartel, not at the cost of the victims of the cartel.

The Commission favours direct discovery between parties in national court proceedings of documents submitted by either of the parties to a competition authority in the context of an earlier or parallel investigation by that authority. Leniency applications are to be protected.

The Commission promotes the idea of giving evidential value to a final infringement decision of a national competition authority. That value could arise from a shifting in the burden of proof or the binding force of an authority decision on national courts.

#### *2.1.1 The relationship between leniency programmes and damages claims*

Both private and public antitrust enforcement aim at increasing compliance with the competition rules. A strengthening of one enforcement arm does not have to signify a lessening of the other enforcement arm. It is, however, necessary to ensure an optimal coordination of public and private enforcement procedures in order to avoid possible negative interference between them. That is particularly the case when it comes to protecting the effectiveness of the leniency programmes operated by the competition authorities.

Now that the Commission aims at facilitating antitrust damages actions, some fear a negative impact on the success of the leniency programmes. The development of a negative effect is by no means certain given the fact that a cartel member is already today exposed to civil claims and is unlikely to want to forego the chance to at least reduce his liability to fines in favour of some other cartel member who may at any time choose to apply for leniency; in which case the potential applicant would be exposed to both fines

and civil damages. However, any measure which optimises the combined deterrent effect of leniency programs and private enforcement should be considered. Therefore, the Green Paper puts forward as an option, to diminish the exposure of the successful immunity/leniency applicant in the subsequent damages litigation. Obviously, such an option should not imply that victims of an antitrust infringement are not compensated for the loss suffered. The Commission has therefore put forward two options that respect both objectives: one is to offer the successful immunity/leniency applicant a rebate, while the other members of the cartel remain jointly liable for the whole damage; another one is to remove the joint liability of the successful immunity/leniency applicant.

### 2.1.2 *The access to documents held by the Commission*

#### 2.1.2.1 Requests by litigants for access to documents

Most, if not all Member States have rules concerning the administrative openness of their institutions. For the European Union, that principle of transparency is laid down in Article 255 EC, which allows EU citizens and those residing in the EU to have access to the documents of the European institutions. The principle of transparency has been further elaborated in Regulation 1049/2001.<sup>3</sup> Persons making an application for access to documents under this Regulation do not have to give reasons for their request and the interest of the applicant is not relevant for the purpose of assessing whether or not a document should be disclosed.

It is clear that the protection of private interests in claiming damages is not the central objective of Regulation 1049/2001. The Commission considers it more appropriate to create a discovery right for private litigants to obtain evidence directly from the other parties in the private litigation. In order to protect the leniency programme, the leniency applications can never be divulged.

#### 2.1.2.2 Requests by national courts for access to documents

The access to documents held by the Commission follows different rules where a national court makes the request. The basic rule for the co-operation of the Commission with the national courts is based on the duty of loyal co-operation between the Commission and the Member States as laid down in Article 10 EC. That Treaty provision obliges the Commission to transmit to the national court whatever information the latter is requesting.

In its case law, the Court of Justice, however, formulated exceptions to that duty to transmit the requested information. A first exception is information, transmission of which could jeopardise the interests of the Community or which could interfere with its functioning or independence. It is on the basis of this exception that the Commission announced in its notice on co-operation with national courts that it will only transmit to national courts information submitted by a leniency applicant with the latter's consent.<sup>4</sup> Next to that, the Commission is also obliged to refuse transmission of confidential information when the national court cannot guarantee its confidentiality.

### 2.1.3 *The effect of final infringement decisions on a follow-on damages action*

According to Article 16(1) of Regulation 1/2003 “[w]hen national courts rule on agreements, decisions or practices under Article 81 or Article 82 EC which are already the subject of a Commission

<sup>3</sup> Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145/43.

<sup>4</sup> Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ 2004 C 101/54, paragraph 26.

decision, they cannot take decisions running counter to the decision adopted by the Commission.”<sup>5</sup> That means that in a subsequent proceeding before a national court, a claimant can rely on the Commission’s infringement decision in relation to the same behaviour as proof of the infringement.

It should be noted that Commission commitment decisions, taken on the basis of Article 9 of Regulation 1/2003, do not conclude “whether or not there has been (...) an infringement. Commitment decisions are [thus] without prejudice to the powers of (...) courts of the Member States to make such a finding and decide upon the case”. As a result, damages actions are still possible following an Article 9 commitment decision.

Some national provisions have extended the principle of the binding effect of a final infringement decision to decisions of national competition authorities. The Commission welcomes that evolution and suggested this as best practice in its Green Paper. A less far reaching variant is that in case of a final infringement decision of an NCA, the defendant bears the burden of proving the absence of an infringement.

#### *2.1.4 Limitation periods*

Limitation periods can impose significant restrictions on the recovery of damages. The Green Paper therefore asks for specific consideration of the relationship between limitation periods and procedures before competition authorities. It is suggested suspending the limitation period for damages claims from the date proceedings are instituted by the Commission or any of the national competition authorities. Alternatively, the limitation period could start running after a court of last instance has decided on the issue of infringement.

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<sup>5</sup> See also case C-344/98 Masterfoods [2000] ECR I-11369, paragraph 52.

## INDONESIA

### 1. Background

The increasing number of business actors with a large capital has stimulated current economic activities at the level of severe competition in Indonesia because it occurs that the supply of goods and services is in abundance, but it is not followed by the improvement of purchasing power of the community. The tight competition should provide welfare to the community, but on the other hand, it can give rise to mass loss to the community.

Currently, the Indonesian community has gradually understood their rights in term of law; however, they frequently undergo difficulty because they are in a weak bargaining position so that they are unable to conduct legal opposition in the event of abuse of the right conducted by the business player as well as the ruler who are stronger.

In the event of a case that gives rise to the loss of many people, in possession of the same fact, legal basis and defendant, but the member of community claims it individually, then it will give rise to inefficiency for the plaintiff who will remain to be in a weak position, for the defendant who will encounter hundreds of the same lawsuit, even for the court institution itself. Based on these conditions, the lawmaker creates a possibility to make a lawsuit by some people representing a community called class action.

### 2. Base law for class action lawsuit in Indonesia

Class action lawsuit is not specifically written in Indonesian civil law, yet insert in some regulations, such as Law No. 23 of 1997 on Natural Environment which regulates that class action lawsuit can be conducted by the community that affected by the environmental damage caused by business actors. Government Institution also allowed by this law to conducted class action lawsuit against the business actors who accused responsible for the environmental damage.

Article 46 section (1) of Law No. 8 of 1999 on Consumer Protection, which regulates that the lawsuit against abuse by business actor can be conducted by:

- a consumer who is adversely affected or his/her beneficiary concerned;
- a group of consumers who has the same interest;
- non-government organization for community protection that complies with the requirements, namely in the form of corporate body or foundation, which in its articles of association it is explicitly stipulated that the objective of its establishment is for the interest of consumer protection and it has carried out the activities pursuant to its articles of association;
- the government and or related agency in the event that the goods and or services as consumed or utilized have resulted in considerable loss of materials and or a significant number of victims;

### **3. Supreme Court Regulation (PERMA) No. 1 of 2002**

In responding to the fact that some laws have regulated the possibility of filing the lawsuit by way of class action, but there has been no procedure on class action lawsuit, then the Supreme Court has issued Supreme Court Regulation (PERMA) No. 1 of 2002 on the Procedure on Application of Class Action Lawsuit, so that there is no legal vacuum in the implementation of law that has accommodated the class action lawsuit.

Article 1 point a. of PERMA No. 1 of 2002 has stipulated a definition on class action lawsuit as follows:

*“The Class Action Suit is a procedure for filing a lawsuit, in which one or more persons representing a group for filing a lawsuit himself/herself or themselves and simultaneously representing a group of many people, who have the same fact or legal basis between the group representative and the group members as mentioned.”*

Article 2 PERMA No. 1 of 2002 regulates that a case can be filed as a class action lawsuit if:

- A large number of the group members that become inefficient for the plaintiff if they claim individually.
- There are similarity on facts, occasion, substance of based law, and the plaintiff's type between the group representatives and the group members.
- The group representatives has honesty and sincere to prioritize the group members' interest.

### **4. Class Action Suit in Indonesian Competition Law**

The Indonesian Competition Law has not explicitly stipulated the possible presence of class action suit in the case of business competition; the Indonesian business competition law has stipulated that for an alleged monopolistic practice and or unfair business competition any person who knows that can file a denouncement on the occurrence or proper allegation that such a violation occurred or a denouncement can be filed by the party suffering from the loss as stipulated in Article 38 as follows:

- Any person who knows that a violation against this law has occurred or properly alleged that it has occurred, he/she can file a denouncement on this in writing to the Commission with clear information concerning the occurrence of violation along with the identity of the denouncer.
- A party inflicted by the loss as a result of occurrence of violation against this law can file a denouncement in writing to the Commission with complete and clear information concerning the occurrence of violation as well as the loss as arising out thereof along with the identity of the denouncer.

The details of the above mentioned article does not contain about class action lawsuit, and up the present time KPPU as the authorized institution to handle the case of business competition has never handled any case based on class action.

## **5. Conclusion**

Unlike other countries, Indonesian Law System separate competition law with consumer protection law which have its own institution.

Basic concept of Class Action Lawsuit is a plaintiff filed by the group representative, while in Law No. 5 of 1999 regulates mostly about competition among business actors, not the relation of business actors to consumer because it already have its own regulation which is Consumer Protection Law.

Based on above condition, even though competition law has not regulates the possibility to filed class action lawsuit, KPPU has never been receive a class action lawsuit, which most filed in consumer protection law.



## SUMMARY OF DISCUSSION\*

The Chair opened the program and asked Mr. Donncaadh Woods of the European Commission to summarize the views on collective action and the interface between private and public enforcement in the Commission's Green Paper on private remedies. Mr. Woods explained that the Commission's Green Paper focused on the rights of consumers. Enabling consumers to recover damages could also contribute to greater deterrence. But consumers had very small claims and there should be some option for them to consolidate their claims. The Green Paper did not propose the introduction of class actions. Instead, it mentioned two other options to help consumers bring their claims. First, under pending Community legislation not limited to competition cases, consumers with small claims would be allowed go to court under an expedited procedure and at lesser cost. It would have to be seen whether this was a viable option for competition cases. The second option was introducing a representative action. There was a tradition in Europe for this type of action. The Green Paper did not put forward a proposal for a class action with an opt-out option because of the risk of significant principal/agent issues. Perhaps class action with an opt-in option would be a good alternative for small undertakings where principal/agent issues were less significant.

As to the interface between public and private enforcement, there was not necessarily a conflict between the two systems in the Commission's view. But the relationship between the two regimes could be optimized. It could be considered to reinforce the benefits for leniency applicants through measures in the area of private enforcement: for example, in a system with double damages in private litigation, it would be an option to limit the leniency applicant's liability to single damages. In a system with single damages, it could be considered that the leniency applicant could receive a rebate. Another option was to eliminate joint and several liability for leniency applicants. As to access to documents, it should be kept in mind that access to documents in the possession of the other side in private litigation was possible only in three jurisdictions in Europe. The Commission considered whether there should be an option that a court could order the parties to turn over to the other side documents they supplied to the Commission, with the exception of materials provided by a leniency applicant.

Professor David Hyman focused in his presentation on steps that would help competition regimes to get closer to a system of optimal deterrence and compensation. Designing steps to move a system closer to optimal deterrence would require an analysis of the current situation and the desirable outcome. Substantive as well as procedural changes would be require to bring about necessary changes. Each country had its own history and traditions, and therefore solutions found in the United States would not necessarily work elsewhere.

Class actions were only one piece in a broader enforcement system, and moving a system toward optimal enforcement should not focus only on class actions. In the U.S. enforcement system, many players were involved in enforcement, including federal agencies, state attorney generals and private parties. This would create questions of consistency and harmonization, transaction costs and agency issues. Some of these problems were aggravated by class actions. Different plaintiffs could appear in state courts and federal courts. But multiplicity also had several benefits; it could help overcome budget constraints, and limit the effects of capture of government agencies. Private actions also harnessed the interests of private

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\* This discussion took place in October 2006.

parties to the public good. The deterrent effects of private enforcement would encourage players to internalize the costs of anticompetitive behaviour, which would in turn strengthen compliance norms.

In class actions, when the claims were aggregated, the focus shifted from the client to the lawyer, from damages to attorneys' fees, and from litigation to settlement. Most cases settle in the United States, but this is overwhelmingly so in the case of class actions. Agency costs existed in every litigation system as a result of the attorney client relationship. But the problems would be aggravated if the focus shifted to attorneys. Lawyers might sell out the client by accepting low damages but high attorney's fees. There was a widespread perception of problems with lawyer compensation, but studies suggested that there may actually be less of a problem than it sometimes appeared.

Mr. Laddie Montague spoke about class actions from the perspective of a plaintiff's lawyer. He focused on how and why class actions worked in the United States as a tool to protect competitive markets and the interests of consumers. Mr. Montague explained that in his view there was no abuse of the class action system. Frivolous cases were rare, and generally these cases were dismissed. Weak cases either were dismissed or the class was not certified, or the cases settled for very small amounts. Only strong cases would get settled for large amounts. Not all class actions succeeded, just as public cases; but that was not a sign that class actions were frivolous. Class actions filled a void in antitrust enforcement since they allowed all victims to have a day in court and be compensated. They often exposed violations that were not prosecuted by public enforcers. For example, in the United States the agencies would prosecute only cartel cases with direct evidence. In contrast, class actions would also be brought in cases of circumstantial evidence because a lesser standard of proof applied in civil cases.

Because class actions involved so many risks, class actions were brought only because ethical rules and judicial decisions provided the necessary incentives. These included contingent fee agreements where attorneys were paid only if they are successful. Numerous checks against abuses of contingent fees were built into the system: they had to be awarded by the court; a petition would have to be filed and was given to class members; class members could object to the fee arrangement, and they also had a right to appeal. Checks and balances were also in place to minimize the risk of frivolous law suits. There were in fact very few frivolous antitrust suits and, in any event, the benefits of class actions would greatly exceed any risk and harm. Attorneys had no incentive to invest time and money to file frivolous suits. Defendants could attack weak suits and have them dismissed on several occasions. The Federal Rules of Civil Procedures provided for sanctions against attorneys who bring frivolous suits. In addition, courts must certify that the attorney was adequate to represent the class. Attorneys known for bringing frivolous law suits would not be considered adequate counsel.

As to the fair distribution of awards, defendants usually would have customer lists. Courts could order defendants to make these lists available to plaintiff counsel. Notices would be provided to class members in multiple ways to reach as many potential class members as possible. Once class members had been identified and recovery had been obtained, class members received another notice and had the right to object to the settlement, the distribution and the proposed attorney fees. Customers could also oppose to data that are used for the calculation of the distribution of awards. Distribution typically would occur on a pro-rata basis, and small purchasers would receive smaller shares of the settlement than large purchasers. Coupon settlements were not favoured, but sometimes could be in the best interest of the class.

Mr. Montague concluded by identifying four elements of a successful class action regime: an environment that provided incentives to litigate, including contingency fees and allowing attorneys to advance costs; active court management, including with respect to certification of class, distribution of awards, setting of attorney fees, and awarding of costs; rules to discourage frivolous suits; and a court approved notice procedure to assure fairness to the class.

Mr. Donald Houston pointed out that class actions in competition matters were a relatively recent phenomenon in Canada, as provisions for class actions have been introduced only in the past 10–15 years. Many of the issues discussed in the United States have not yet been resolved. In Canada, two kinds of cases existed in private enforcement: Private parties could on a limited basis bring cases before the Competition Tribunal with leave by the Tribunal. Those cases would not include abuse of dominance cases and mergers. Damages were not available. There was a debate whether access to the Tribunal should be expanded to include dominance cases and allow for damages claims. A second option were private actions for damages before federal or provincial superior courts in cases of criminal conduct. The finding of a criminal violation in an investigation was prima facie evidence of unlawful conduct in private actions. Evidence from criminal proceedings concerning the effects of conduct was also admissible in private actions. The prevailing view was that liability for damages was based on joint and several liability. There were not treble damages, but punitive damages could be imposed.

Class actions were lawyer driven, like in the United States. Contingency fees were available, subject to court approval. There was a significant degree of cooperation between Canadian and U.S. plaintiff counsel, and frequently parallel proceedings in Canada accompanied similar actions in the United States. Certification of the class has become the key issue. On this issue one could see some differences between provincial procedural laws. Once a class had been certified, settlements were likely and court proceedings were rare. Discovery rights were very limited before certification, but broader once the class had been certified. Parties had to provide all relevant documents in their possession except privileged documents. Depositions were more limited than in the United States.

In cases where there had been a prior investigation by the Competition Bureau, files of the Bureau became very interesting for the plaintiffs. Pre-existing documents were not privileged, but negotiations between the parties and the Bureau were protected, under either the public interest privilege or the settlement privilege. The Commissioner did not voluntarily provide documents to plaintiffs in private actions and would assert privilege when available. US courts had been rather generous in providing Canadian parties access to documents that were subject to discovery in the United States.

Indirect purchaser and passing on issues had not yet been settled. Certification of classes of indirect purchasers could be denied if plaintiffs are too removed from the harmful conduct which could apply to indirect purchasers. But courts had approved settlements where claims were brought on behalf of classes that included indirect purchasers. Courts had developed a two step approach where total damages were determined first, and the allocation among all purchasers could be adjudicated in a second step. Final consumers did not always participate in the awards because small damage awards were sometimes distributed under *cy pres* procedures.

The Chair asked the speakers about principal/agent issues that can arise in a class action setting as the interests of counsel may diverge from those of the class. Mr. Montague replied that calling class actions "lawyer driven" was a misnomer. While lawyers would bring the action to the client's attention, especially in federal courts where direct purchasers sue the class members had commercial relations with the defendants and a strong interest in monitoring the case. Second, the plaintiffs frequently had evidence that was relevant for the case and therefore they got involved in the case. Third, a system of checks and balances was largely effective in ensuring that a lawyer could not run away with a case and settle. In particular, class representatives had direct access to the courts and courts were willing to listen to their concerns.

Mr. Houston agreed that this was less of an issue in direct purchaser actions, but thought that it was a greater concern in cases of indirect purchasers. In those cases the lawyers were much more in control. But courts could exercise oversight. Professor Hyman added that principal/agent issues could arise. They would be less likely in direct purchaser actions, but direct purchasers were less likely to sue. There was

judicial oversight, but it was an imperfect system and there could be bad outcomes. A good way to address principal/agent issues was to identify a lead plaintiff who could monitor the development of the case on behalf of the class.

The European Commission raised four questions: First, relating to the relationship between individual actions and class actions, the Commission asked whether a system without class actions would be a sufficient deterrent for companies or whether class actions should be considered an essential element of an effective enforcement regime. If so, would it be essential to have class actions for direct and indirect purchasers, or would direct purchaser class actions be sufficient? Second, was there already experience in Canada as to whether opt-in regimes or opt-out regimes worked better? Third, the Commission asked whether contingency fees would influence the lawyers' interest and conduct, and whether they would create a conflict of interests that could not be overcome by checks and balance. Last, the Commission asked about the Canadian debate as to whether private actions should be allowed in abuse of dominance cases.

Mr. Montague replied that in his view in a system without class actions only the wealthy, those who could afford to bring individual cases, would recover. Smaller claimants, including smaller businesses, would not be compensated. Even if there were contingency fees, the recovery of their claims would not be big enough to compensate attorneys. A class action actually sometimes encouraged individual plaintiffs with large claims to bring separate cases because they rationalize that the defendant would get sued anyway so their action is less exposed. In sum, much fewer cases would be brought without class actions. Contingency fees had a long tradition in the United States and therefore did not offend anyone. This might not be the case in Europe. There would be other systems to ensure that the lawyers would get paid which could be regulated by courts. As to conflicts of interests, until recovery was obtained a contingency fee system actually ensured that the interests of counsel and the class were synchronized. Once the award was obtained, a conflict of interests might arise. But that would be true in any case with a contingency fee, regardless of whether the case was brought as a class action. In class actions, there was added protection as courts could intervene to ensure a fair distribution and a fair fee.

Mr. Houston explained that the opt-out option worked much better in Canada. Settlements had occurred mostly in provinces with an opt-out system and most provinces would move toward such a system. As to private action in abuse cases, some would argue that recovery of damages was necessary because only an order to stop certain conduct would not be a sufficient deterrent. On the other hand, others have argued that dominance in itself was permissible under the Canadian system and that there should be no monetary penalties just because a firm was in a dominant position.

France referred to the recent public interest in the question of class actions. For example, the president of the Cour de cassation had recently expressed his support for class actions to remedy unequal power of firms and individuals who had only small claims, but whose aggregated claims could be substantial. France asked whether data were available about the sectors in which class actions were most common, such as securities, health, antitrust, environmental actions, and about damage awards in various sectors.

Canada asked with respect to private actions for damages in dominance cases whether there were any other jurisdictions with similar limitations on private litigation. If private actions were allowed in this area, would there be a reason to limit any such claims to individual actions, and not to allow class actions?

The United Kingdom raised the question whether effective private enforcement required active judicial control, in particular to avoid frivolous law suits, and whether there was an advantage in having specialised courts, rather than having generalist courts. The United Kingdom also asked whether there was a risk that very active private enforcement and public enforcement develop into different directions and result in conflicts.

Germany turned to the issue of collective actions. Collective actions generally were acceptable in Germany, whereas class actions were not. Germany raised a question about the differences between the two systems. It could be that in a collective action system, each individual action was combined into a collective action.

Professor Hyman explained that available surveys and data were not completely reliable. The best available summary was in a 2004 paper which suggested that securities accounted for approximately 60% of all class actions. Antitrust and consumer actions combined accounted for approximately 25%, with antitrust alone accounting for approximately 10% of all actions. Torts and mass torts represented less than 10%. As to attorney fees, Professor Hyman commented that various forms of paying for attorneys existed. Contingency fee arrangements were frequently back stopped by a load star calculation which was based on the hours spent on a case and market based hourly rates. In general, increasing scale of damages resulted in decreasing percentages for attorneys fees.

Mr. Montague referred to Canada's question about limitations on private antitrust suits and emphasized that not every antitrust case in the United States was a class action. As suggested by Canada, class actions were most typical in cartel cases, where all purchasers were affected in the same way. In case of competitor actions under Section 2 of the Sherman Act, certification of a class was unlikely because there was a conflict of interests among the plaintiffs which were not in the same position with respect to lost profits. Class actions were a very specific case. Concerning specialist judges, it was generally not an accepted concept in the United States. Exceptions could exist on a local level.

Australia reported that private action in principle had existed for 30 years with respect to all competition provisions. The system had been inspired by the U.S. system, but there were no contingency fees or treble damages. But there had been quite a number of private cases, including in the area of abuse of dominance. Not much was known about settlements, but it was apparent that quite a few cases were going on. Private enforcement did strengthen the effects of public enforcement. In addition, under the Trade Practices Act, the ACCC could bring representative class actions. The Federal Court rules also provide for an opt-in procedures under the Trade Practices Act which should assist smaller businesses who perhaps could not bring their own cases. They could instead approach the Commission about bringing a class action on behalf of affected persons. But this type of representative class action was difficult to bring in competition cases, including in cases of cartel conduct. Lawyers had been in favour of more class actions, despite limitations such as the absence of contingency fees. The leniency program also generated more cases that could result in private cases. When it revised its leniency program last year, the ACCC removed the restitution requirement to increase the incentives for leniency applicants. This had started a debate about whether the ACCC should assist plaintiffs in private actions, including class actions.

Korea explained that class actions currently were possible only in securities cases. But the KFTC reviewed two possible options to introduce class actions or collective actions in competition cases and promote private litigation. One proposal pending before Parliament provided for an extension of the current regime for class actions from the area of securities to all sectors, including competition law violations. The other option was a representative action, similar to what was already used in consumer protection cases. Korea also added that the current system for class actions in securities had too many limitations which should not be adopted when class actions are introduced in competition cases.

Denmark next discussed a proposal made by a Committee that class members should bear some responsibility for legal fees in class action. The proposal was currently under review by Parliament. It was true that a guarantee for legal fees could discourage victims from bringing an action. But the proposal envisaged that a court could decide that the plaintiff did not have the necessary means to pay legal fees, in which case the state would bear the legal fees. In addition, it was possible to take out insurance for legal costs. Thus, measures would be in place to ensure that the system would not create a disincentive to bring

class actions. The Danish competition authority had responded positive to the proposal for class actions, but suggested that notice to potential victims should be improved. The reaction of business initially had been negative, but at the end, if some changes were accepted, there would probably be no opposition to class actions.

Japan also described its current discussions about the introduction of collection action. The current discussion was part of a broader reform of the judicial system which should provide better access to the courts. The JFTC also became interested in the project. It was seeking the views of legal experts, and research into other systems was ongoing. There had not yet been any public consultation, but Japan expected that the public would support the project of collective action because in general it supported the judicial reform project.

The Chair asked the delegates for their views on coupon settlements and to explain in particular how valuable coupon settlements could be for class members and how they related to the fees which the attorneys received as compensation. Mr. Montague explained that he was not an advocate of coupon settlements. He referred to a case where the defendant would have gone bankrupt if it had to pay money. It instead provided plaintiffs with 50% discount coupons. The attorney's fees in that case were very low, below the value of the services provided. In a second case, counsel determined after discovery that the case was relatively weak. Defendants offered a relatively low settlement, and it was determined that plaintiffs were better off with coupons. In the Sotheby's case, the settlement included substantial cash and substantial coupons, and the judge required the attorneys to accept coupons as part of their compensation. In general, coupon settlements should not be encouraged. The recent Class Action Fairness Act also sent out a signal that coupon settlements should not be favored. There might be lawyers that might try to take advantage of the possibility of coupon settlements, but most members of the plaintiffs bar acted reasonably and accepted smaller amounts of compensation.

Mr. Houston added that there had not been any experience with coupon settlements in Canada. Instead, courts had favoured a cy pres approach where the damage award would go to charitable organizations or similar institutions. This showed a problem with class actions: they were designed to compensate consumers with small claims, but if the claims were too small, consumers would not recover. The cy pres approach was the best thing available in Canada in this situation.

Professor Hyman added that several papers prepared for a recent workshop by the U.S. FTC on class actions had been published which discussed the concerns about coupon settlements. Concerns could arise if attorneys tried to get fees based on the face value of coupons, without regard to actual redemption rates. There were also ways in which defendants could attempt to lower the cost of coupons, for example by prohibiting transfers or stacking with other offers, or very short redemption terms. Fees should be determined based on realistic market values of coupons. Coupons could be a potentially valuable remedy, but there were situations where one should be wary of them.

Germany added that following the recent cement cartel case, private claims for more than 120 million Euros were pending. In this case, claimants sold their claims to the attorney and the attorney promised to share future rewards with the claimants. They could sell their rights to future claims to third parties. Thus, this was somewhat similar to a coupon system.

The Chair invited France to explain the current status of the discussion on the introduction of class actions in France. France explained that the issue of class actions has been of great political interest. The discussion originated from concerns that consumer with small claims were not effectively protected under the current judicial system. The discussion was not specifically limited to competition cases, but covered a broader area, including consumer protection claims. An important case for the development of the debate was the mobile telephone operator cartel in which three operators were found to have restricted price

competition. After the decision finding an infringement, a consumer organization contacted consumers and brought 10,000 individual claims before a court in Paris. This was primarily to highlight the absence of a class action regime. Three proposals were under considerations: The extension of the current regime of representative actions, but this was considered inadequate. The other two options included a system in place in the United States and Canada, or a middle solution based on the current French system of civil actions which would include two phases to determine liability and then decide the issue of compensation.

France mentioned that there were a number of open issues under discussion: the scope of application (only consumers or broader scope); direct action for classes of consumers or representation by consumer organizations; opt-in system or opt-out system; punitive damages or merely compensation; determination of damages; interface between public and private enforcement and effects on leniency program. There has been repeated emphasis that reforms should take place within the framework of the European discussion.

The Chair suggested turning to the question whether there were other measures to accomplish the goals of class actions, such as selling claims to a single plaintiff or a test case scenario. The European Commission explained that it was still an open question whether a system with test cases was a viable alternative.

The Chair then turned to the interaction between public enforcement and private enforcement. He pointed out that the issue was particularly relevant in the case of cartel enforcement, especially in light of leniency programs. Mr. Montague explained that there has not yet much experience with recent reforms in the United States which had de-trebled damages for leniency applicants and also exclude them from joint and several liability. A condition for these benefits was the leniency applicant's cooperation with private plaintiffs. He opined that the new provisions should assist public enforcement even though it was unsatisfactory that a participant in a cartel would get off the hook.

The European Commission posed a question about the recent reforms in the United States. De-trebling of damages presumably was based on concerns that treble damages could discourage leniency applications. Was there any indication that the number of leniency applications had increased? Second, had the obligation to assist plaintiffs had any impact on the ability of victims to recover damages?

The United Kingdom emphasized that it was important that private actions would not interfere with leniency programs. But it was unclear whether the threat of private action would affect leniency applications because other factors might drive leniency applications, in particular corporate governance issues. Companies may seek leniency also for a number of other reasons, including change of management, and the end of the life of a cartel. The United Kingdom also mentioned with respect to joint and several liability that leniency applicants should not be put in a better position and that the rights of consumers and third parties should not be affected by leniency programs. A leniency applicant who was found liable for private damages could seek contributions from other cartel participants. In addition, a court may find it attractive to reward a leniency applicant by protecting it from being liable for a large share of the damages.

Professor Hyman added that a key question was how much companies should be rewarded for contrition. In antitrust, how much should be given up for a confession by the leniency applicant? Increased sanctions in the form of treble damages were necessary when the risk of detection was low. But if a leniency applicant had disclosed a cartel, the violation was apparent and there was not justification for treble damages. High sanctions would discourage people from coming forward. But it was harder to decide what to do if there were single damages from the outset, although the question was whether single damages were a good system in the case of cartels. Joint and several liability issues were more difficult because of the third party interaction.

BIAC stated that it was concerned that private remedies should not be expanded at the expense of public enforcement. The leniency program in the United States may have an unintended consequence as in started with the assumption that everyone is guilty, while in reality only a few companies may be guilty and many others were not. The current US system would incentivize the guilty to go in and get leniency, or settle a class action, and the less culpable would hang back and become the victim in the class action. The damage exposure was so great that no company could afford assuming the risk of going to trial. It was the combination of treble damages, joint and several liability and attorney's fees that forced companies to settle. A mechanism would have to be set up to protect those innocent defendants.

The United States responded to the question of the European Commission concerning the effects of the 2004 amendments that the legislative changes created several incentives to seek leniency and it would be difficult to disaggregate these factors; but as a logical matter one should assume that reduced damages should have a positive effect on the government's leniency program.

Germany presented the results of a recent survey among private practitioners concerning the effects of private enforcement on leniency applications. The respondents suggested that the risk of private enforcement was one factor, although not a decisive one. It remained to be seen whether increased private actions in Germany will affect leniency applications. The benefits of leniency applications appeared to outweigh the risks of private actions. Private actions did affect the willingness to apply for reductions in fines in exchange for cooperation. It also affected the willingness to settle cases with the Cartel Office because companies were concerned about private litigation. This really affected public enforcement because if defendants did not settle the court proceedings were very burdensome.

The European Commission added that it was thinking along the line proposed by the United Kingdom about the limited impact of civil enforcement on leniency applications. A member of a cartel was always at risk that another participant might go in and disclose the activities of the cartel. In addition, not only private enforcement was increasing, but public enforcement substantially increased as well. A cartel participant would also have to be concerned about being exposed to multiple public enforcement and would not only be concerned about private enforcement. In addition, the Commission reacted to Germany's contribution and pointed out that private litigation might create an incentive to settle with the competition authority as a deeper investigation might uncover more cartel activities; by settling a defendant might be able to limit exposure to civil liability.

Ireland explained that in Ireland competition law violations were criminal and that the right of private action had existed for 15 years. A leniency program existed for three years. There was no scope for negotiations of fines. Fines were an all or nothing issue. The only question was whether to charge or not to charge. If there was a fine, it was completely in the discretion of the judge. In addition, as a result of discovery rules in private actions it was not possible to completely protect the documents of the leniency applicant. The competition authority would resist such requests, but the decision would be for the court. It was important to ask the question why the immunization against follow-on civil action which typically was granted to leniency applicants was not available in any other areas of criminal enforcement. The question was why there was any special treatment for violators of competition laws.

Canada added that in its experience in negotiations of plea agreements and fines the competition authority might be willing to narrow the scope of the guilty plea in light of possible subsequent civil action, and might seek a relatively higher fine to compensate for the reduce charge to ensure that the fine was adequate in light of the volume of affected commerce. In the consent agreement the level of the fine might appear distorted because the trade off struck between lesser charge and higher fine might not be apparent to the outside observer.

Switzerland explained that if an investigation was opened following a leniency application, normal procedural rights would apply. This included the right to be heard, including the right of access to file. Targets of investigations would be able to find out the identity of the leniency applicant, and this might discourage cartel participants from coming forward and disclose the cartel in the first place. As the leniency program is rather new, these issues have not yet been encountered in practice. In order to protect the effectiveness of leniency programs, it may be necessary to delete references to the identity of the leniency applicant from the documents on file.

The Chair invited the panellists to make final remarks. Mr. Woods mentioned the discussion of principal/agent problems. As already addressed in the Green Paper, these problems appeared to be less relevant in the case of class actions by direct purchasers. The comments on the Canadian experience with opt-in and opt-out options were also relevant. It would be necessary to further think about potential excesses in class actions. Last, it had to be noted that most class actions would be settled. This was an issue that needed to be addressed. Concerning the interface between public and private enforcement, private enforcement could protect leniency programs, but it was necessary to coordinate the two pillars of an effective anti-cartel enforcement.

Professor Hyman added that settlements of cases would not mean that there was not judicial scrutiny. There were occasions for judges to dismiss cases, and certification decisions which were recognized as a critical step could be reviewed on appeal. Concerning the opt-in /opt-out regimes, human inertia explained much of the outcomes. Very few people would opt-in or opt-out, and this would say little about their real interest in the case. Leniency programs operated at a different point in competition cases than in other law enforcement areas, although similar incentive systems existed there as well. This was so because competition laws violations did not have an obvious victim. Professor Hyman also noted that notice was an important issue which had not been enough addressed. An adequately designed notice system would be important to set up an effective class action system.

Mr. Houston added that he would be interested in seeing how other countries would deal with the issue of indirect purchasers and how to compensate them.

Mr. Montague agreed that notice was critically important, both in opt-in and opt-out systems. For example, initially in the United States class actions were based on an opt-in system, but there was no adequate notice. This was a very ineffective system. Notice was important, and has come under scrutiny in the United States to ensure that it was clear and comprehensible. Concerning settlements and trial, Mr. Montague mentioned that most antitrust cases settle after discovery was complete or nearly complete so the parties had a good idea about the strength or weakness of their case. There was also pressure on the plaintiff side to settle, in particular because there was significant investment in the case.

The Chair concluded the discussion by noting that there appeared to be consensus that private enforcement was an important component of an effective enforcement system. It was interesting to note that there were a number of jurisdictions considering measures to strengthen private enforcement. But there were also concerns about potential abuses. There was considerable discussion about how to introduce a system of private enforcement without allowing potential abuses to take place.



## COMPTE RENDU DE LA DISCUSSION\*

Le Président ouvre le programme et prie M. Donnadh Woods, de la Commission européenne, de résumer les avis sur l'action collective et l'interface entre les poursuites publiques et privées dans le Livre Vert de la Commission sur les recours privés. M. Woods explique que le Livre Vert est axé sur les droits des consommateurs. Permettre à ces derniers de réclamer des dommages et intérêts pourrait aussi contribuer à renforcer la dissuasion. Cependant, les sommes réclamées par les consommateurs sont très faibles et la possibilité devrait leur être donnée de regrouper leurs demandes. Le Livre Vert ne propose pas l'introduction d'actions de groupe (class actions). Au lieu de quoi il mentionne deux autres possibilités pour aider les consommateurs à faire valoir leurs droits. Premièrement, en vertu de la législation qui sera adoptée par la Communauté européenne et qui ne se limite pas aux affaires de concurrence, les consommateurs dont la réclamation porte sur un faible montant seraient autorisés à intenter un procès dans le cadre d'une procédure accélérée moyennant des frais réduits. Il reste à savoir si cette solution est viable pour les affaires d'atteinte à la concurrence. La deuxième option envisagée est l'introduction d'une action en représentation (representative action). Ce type d'action existe traditionnellement en Europe. Le Livre Vert ne propose pas d'action de groupe avec désistement (opt-out) en raison du risque de conflits significatifs entre mandant et mandataire. Peut-être l'action de groupe avec option de participation (opt-in) offrirait-elle une alternative satisfaisante à de faibles engagements dans lesquels les conflits d'intérêts entre mandant et mandataire sont moins aigus.

S'agissant de l'articulation entre poursuites publiques et privées, la Commission ne pense pas qu'il existe nécessairement un conflit entre les deux systèmes. La relation entre les deux régimes pourrait cependant être optimisée. On pourrait envisager de renforcer les avantages consentis aux défendeurs qui sollicitent la clémence par des mesures dans le domaine des poursuites privées : par exemple, dans un système où des dommages et intérêts égaux à deux fois le préjudice subi (doubles dommages et intérêts ou dommages et intérêts doubles) peuvent être réclamés dans une instance privée, il serait possible de limiter la responsabilité du défendeur qui sollicite la clémence au montant du préjudice subi (dommages et intérêts simples). Dans un système où les dommages et intérêts sont limités au montant du préjudice subi (dommages et intérêts simples), on pourrait envisager d'accorder un rabais au défendeur qui sollicite la clémence. Une autre possibilité consisterait à éliminer la responsabilité solidaire et conjointe des défendeurs qui sollicitent la clémence. Quant à l'accès aux documents, il faut garder présent à l'esprit le fait que l'accès aux documents en possession de l'autre camp dans un litige privé n'est possible que dans trois États européens. La Commission s'est demandé s'il est nécessaire qu'un tribunal puisse ordonner aux parties, à l'exception des documents fournis par un défendeur qui a sollicité la clémence, de remettre à l'autre camp des documents qu'elles ont fournis à la Commission.

Le Professeur David Hyman axe son exposé sur les mesures qui aideraient à rapprocher les règles de la concurrence d'un système de dissuasion et d'indemnisation optimales. Concevoir les étapes qui permettraient de se rapprocher de la dissuasion optimale exigerait une analyse de la situation actuelle et des résultats souhaitables. Les changements nécessaires ne pourraient être obtenus qu'au prix d'une modification des règles de procédure et de changements substantiels du droit. Chaque pays a son histoire et ses traditions, de telle sorte que les solutions trouvées par les États-Unis ne marcheraient pas forcément ailleurs.

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\* Cette discussion a eu lieu en octobre 2006.

Les actions de groupe ne sont qu'une composante du système d'exécution parmi d'autres et les efforts pour se rapprocher d'un système d'exécution optimal ne devraient pas se cantonner aux actions de groupe. Aux États-Unis, de nombreux acteurs concourent au respect des lois, notamment les agences fédérales, les ministres de la Justice des États de l'Union et les acteurs privés. Cela poserait des problèmes de cohérence et d'harmonisation, de frais de transaction et d'agence. Plusieurs de ces inconvénients seraient aggravés par les actions de groupe. Des plaignants différents pourraient porter plainte devant les tribunaux des États de l'Union et devant les tribunaux fédéraux. La multiplicité d'acteurs a néanmoins plusieurs avantages ; elle pourrait aider à surmonter les contraintes budgétaires et limiter les effets de capture des agences de l'État. Les actions privées ont aussi le mérite de faire concourir les intérêts de parties privées au bien public. L'effet dissuasif de poursuites privées inciterait les acteurs à internaliser les coûts des comportements anticoncurrentiels, ce qui à son tour renforcerait les normes déontologiques.

Dans les actions de groupe, dans lesquelles les demandes sont agrégées, l'avocat prend le pas sur le client, ses honoraires comptent plus que les dommages et intérêts et le règlement amiable l'emporte sur le procès. La plupart des affaires se règlent à l'amiable aux États-Unis, mais dans la grande majorité des cas cela n'est vrai que pour les actions de groupe. Les coûts d'agence existent dans tout système de procédure du fait de la relation entre l'avocat et son client. Mais les problèmes deviendraient plus aigus si les avocats devenaient les maîtres du jeu. En effet, les avocats pourraient être tentés de trahir leur client en acceptant des dommages et intérêts de faible montant pour obtenir des honoraires élevés. Le sentiment que la rémunération des avocats pose problème est largement répandu mais les études donneraient à penser qu'en fait les problèmes sont moins graves qu'on ne l'avait cru.

M. Laddie Montague aborde les actions de groupe du point de vue de l'avocat d'un plaignant. Il se demande surtout comment et pourquoi, aux États-Unis, ces actions sont un outil permettant de protéger la concurrence sur le marché et de défendre les intérêts des consommateurs. M. Montague explique que, à son avis, le système des actions de groupe n'engendre pas d'abus. Les plaintes sont rares et en général leurs auteurs sont déboutés. Soit les dossiers fragiles sont rejetés, soit le tribunal refuse d'autoriser l'action de groupe d'une classe de plaignants (refus de certification d'une classe), soit l'affaire se conclut par une transaction de très faible montant. Seuls les dossiers solides aboutissent à un règlement amiable stipulant le paiement d'une forte somme. Toutes les actions de groupe ne prospèrent pas, de même que les poursuites publiques ; mais cela ne signifie pas que les actions de groupe sont fantaisistes. Elles comblent une lacune des procédures antitrust parce qu'elles permettent à toutes les victimes de faire valoir leurs droits devant les tribunaux et d'obtenir des indemnités. Elles mettent fréquemment au jour des infractions que les agences chargées de l'application de la loi n'ont pas poursuivies. A titre d'illustration, aux États-Unis, ces dernières n'engagent de poursuites contre les cartels que si elles disposent de preuves directes. Au contraire, des actions de groupe pourraient être intentées dans le cas où il n'existe que des preuves indirectes parce que la charge de la preuve est moins lourde en matière civile.

Parce que les actions de groupe font courir beaucoup de risques, elles ne sont intentées que si des règles éthiques et des décisions judiciaires fournissent des incitations suffisamment puissantes pour le faire. Elles sont notamment favorisées par la conclusion avec les avocats d'un accord de rémunération conditionnelle, dans lequel ils ne sont payés qu'en cas de succès. Le système incorpore de nombreux garde-fous contre l'abus de la rémunération conditionnelle : elle doit être attribuée par le Cour et doit donner lieu à une demande transmise aux plaignants participant à l'action de groupe ; ces derniers peuvent opposer des objections à l'accord sur les honoraires et ont en outre le droit de faire appel. De nombreux mécanismes de contrôle ont été mis en place pour minimiser le risque de plaintes fantaisistes. En fait, celles-ci sont rarissimes et, de toute manière, les avantages résultant des actions de groupe seraient très supérieurs aux risques et dommages éventuels qui en découleraient. Les avocats n'ont aucune raison de perdre du temps et de l'argent en intentant des actions fantaisistes. Les défendeurs ont pu attaquer des plaignants dont le dossier était fragile et obtenir qu'ils soient déboutés à plusieurs occasions. Les Règles de procédure civile fédérales prévoient des sanctions contre les avocats qui intentent des actions dénuées

de fondement. De plus, l'avocat doit obtenir des tribunaux une attestation selon laquelle il est apte à représenter les auteurs de l'action de groupe. Les avocats connus pour leur propension à intenter des actions fantaisistes ne sont pas considérés comme des conseils appropriés.

Quant à la juste répartition des indemnités, les défendeurs disposent généralement de listes de clients. Les tribunaux peuvent ordonner aux défendeurs de mettre ces listes à la disposition de l'avocat des plaignants. Les personnes lésées susceptibles de participer à l'action de groupe sont avisées par de multiples moyens de manière à en toucher le plus grand nombre possible. Une fois que les personnes lésées susceptibles de bénéficier de l'action de groupe ont été identifiées et que les indemnités ont été recouvrées, elles reçoivent un nouvel avis et ont le droit de s'opposer au règlement amiable, à la répartition des indemnités et aux honoraires de l'avocat proposés. Les clients ont aussi la faculté de s'opposer aux données qui sont employées pour calculer la répartition des indemnités. Le plus souvent, la répartition est effectuée au prorata, de telle sorte que les petits acheteurs ont droit à une part plus faible des indemnités que les gros. Quoique le règlement sous forme de coupons ne soit pas favorisé, il est parfois la solution la plus conforme aux intérêts de la classe de personnes lésées participant à l'action de groupe.

M. Montague conclut en recensant les quatre éléments nécessaires au succès des actions de groupe : un environnement incitant à intenter des actions en justice et autorisant notamment les honoraires conditionnels et l'avance de frais par les avocats ; une gestion active des tribunaux, notamment pour ce qui a trait à la certification d'une catégorie de personnes lésées (classe), la répartition des indemnités, la fixation des honoraires d'avocat et l'attribution des dépens ; l'existence de règles décourageant les actions fantaisistes ; enfin, une procédure de notification approuvée par le tribunal pour garantir un traitement équitable des personnes lésées.

M. Donald Houston souligne que, dans les affaires de concurrence, les actions de groupe sont un phénomène relativement récent au Canada parce que ce type de procédure n'y existe que depuis 10 à 15 ans. De nombreuses questions faisant débat aux États-Unis ne sont toujours pas réglées. Au Canada, il existe deux types de procédures privées. Les plaideurs privés peuvent, dans certaines limites, saisir le Tribunal de la concurrence avec l'autorisation de ce dernier. Ces instances ne peuvent porter sur les fusions et l'abus de position dominante. Les plaignants ne peuvent prétendre à des dommages et intérêts. Il a été débattu de l'opportunité d'étendre la saisine du Tribunal aux affaires d'abus de position dominante et de donner aux plaignants la possibilité de réclamer des dommages et intérêts. Le deuxième type de procédure est l'action privée en demande de dommages et intérêts devant un tribunal fédéral ou une cour d'appel provinciale en cas de faits relevant d'une qualification pénale. Si une enquête met en évidence un délit de nature pénale, cela constitue un commencement de preuve de conduite illégale ouvrant la voie à une action privée. Les preuves issues d'une procédure pénale relative aux effets de la conduite du défendeur sont aussi admises dans les actions privées. L'avis général est que les dommages et intérêts sont dus au titre de la responsabilité conjointe et solidaire entre les défendeurs. Il n'existe pas de disposition permettant d'infliger des dommages et intérêts égaux à trois fois le montant du préjudice subi (dommages et intérêts triples), mais une pénalité peut être infligée.

Comme aux États-Unis, les avocats sont les moteurs des actions de groupe. Ils peuvent être rémunérés par des honoraires conditionnels sous réserve de l'accord du tribunal. Les avocats des plaignants entretiennent une collaboration assez étroite au Canada et aux États-Unis et il n'est pas rare qu'une procédure soit ouverte au Canada parallèlement à une instance aux États-Unis. La principale difficulté consiste à faire reconnaître une catégorie de personnes lésées (classe) selon la procédure de certification. Il existe quelques dissimilitudes entre les règles de procédure des diverses provinces dans ce domaine. Une fois qu'une classe a reçu l'agrément du juge, un règlement amiable est probable, la voie contentieuse étant rarement employée. Le droit de communication de pièces est très limité avant la certification d'une classe, mais il est plus largement accordé une fois qu'elle a été obtenue. Les parties

sont tenues de fournir tous les documents pertinents en leur possession à l'exception des documents couverts par le secret professionnel. Les dépositions sont plus limitées qu'aux États-Unis.

Si une enquête préalable a été effectuée par le Bureau de la concurrence, les dossiers de ce dernier deviennent très intéressants pour les plaignants. Les documents préexistants ne sont pas couverts par le secret professionnel, mais les négociations entre les parties et le Bureau sont protégées soit par le secret destiné à préserver l'intérêt public, soit par le secret couvrant un accord amiable. Le Commissaire ne fournit pas volontairement de documents aux plaignants dans le cadre d'actions privées et il invoque le secret professionnel lorsque cela est possible. Les tribunaux des États-Unis se sont montrés assez généreux en donnant accès aux parties canadiennes aux documents qui ont fait l'objet d'une divulgation de preuves aux États-Unis.

L'achat indirect et la transmission des affaires ne sont pas encore réglés. La certification des classes d'acheteurs indirects peut être refusée si les plaignants ne sont pas concernés d'assez près par la conduite dommageable dont les acheteurs indirects pourraient avoir eu à souffrir. Les tribunaux ont néanmoins approuvé des accords amiables dans lesquels des demandes ont été présentées au nom de classes incluant des acheteurs indirects. Les tribunaux ont conçu une approche en deux temps, dans laquelle le préjudice total est calculé en premier lieu, la décision sur la répartition des indemnités entre tous les acheteurs n'intervenant que dans un second temps. Les clients finaux ne bénéficient pas toujours d'indemnités parce que les indemnités de faible montant sont parfois distribuées selon des procédures *cy-près*.

Le Président interroge les orateurs sur les différends entre mandant et mandataire qui peuvent surgir dans le cadre d'une procédure d'action de groupe, les intérêts de l'avocat pouvant diverger de ceux de la classe qu'il représente. M. Montague réplique qu'il est impropre de dire que les avocats sont les moteurs des actions de groupe. Ce sont les avocats qui attirent l'attention des clients sur l'action de groupe, en particulier devant les tribunaux fédéraux saisis par les acheteurs directs, les membres de la classe ont des relations commerciales avec les défendeurs et ils ont tout intérêt à suivre l'affaire de près. Deuxièmement, il n'est pas rare que les plaignants disposent de preuves pertinentes pour l'affaire, de telle sorte qu'ils y participent. Troisièmement, de nombreux mécanismes de contrôle efficaces garantissent dans une large mesure qu'un avocat ne s'empressera pas de conclure une affaire à l'amiable au détriment de ses mandants. En particulier, les représentants de la classe ont directement accès au tribunal et ce dernier est disposé à écouter leurs craintes.

M. Houston convient que la question revêt moins d'acuité dans les actions intentées par les acheteurs directs mais pense qu'elle est plus préoccupante en ce qui concerne les acheteurs indirects. S'agissant de ces derniers, les avocats ont pratiquement le contrôle de la procédure. Mais les tribunaux peuvent exercer un contrôle. Le Professeur Hyman ajoute que des divergences d'intérêts entre mandant et mandataire sont possibles. Elles seront moins probables dans les actions intentées par les acheteurs directs, mais ces derniers sont moins enclins à saisir la justice. Les tribunaux exercent un contrôle, mais ce système est imparfait et peut donner des résultats aberrants. Un bon moyen de régler le problème des divergences d'intérêts entre mandants et mandataires est de désigner un plaignant chef de file qui pourrait surveiller l'évolution de l'affaire pour le compte de la classe à laquelle il appartient.

La Commission européenne soulève quatre questions. Premièrement, en ce qui concerne la relation entre les actions individuelles et de groupe, elle demande si un système dans lequel il n'existe pas d'actions de groupe serait suffisamment dissuasif pour les entreprises ou si les actions de groupe doivent être regardées comme une composante essentielle des procédures d'exécution. Dans l'affirmative, serait-il nécessaire que la possibilité d'intenter une action de groupe soit ouverte aux acheteurs directs et indirects ou peut-on la réserver aux seuls acheteurs directs? Deuxièmement, le Canada a-t-il une pratique des actions de groupe suffisamment longue pour savoir, entre les options de participation et de désistement, lequel des deux systèmes est préférable? Troisièmement, la Commission demande si les honoraires

conditionnels influenceraient les intérêts et le comportement des avocats et s'ils engendreraient un conflit d'intérêts impossible à surmonter par des mécanismes de contrôle poussé. Enfin, à propos du débat canadien, la Commission demande s'il convient d'autoriser les actions privées dans les affaires d'abus de position dominante.

M. Montague répond que, à son avis, dans un système sans actions de groupe, seuls ceux qui sont assez riches pour supporter le coût d'une procédure individuelle peuvent obtenir des indemnités. Les petits plaideurs, notamment les petites entreprises, ne sont pas indemnisés. Même si les honoraires conditionnels étaient autorisés, les indemnités récupérées ne seraient pas suffisantes pour dédommager les avocats. En fait, il arrive parfois qu'une action de groupe amène certains plaignants réclamant de grosses sommes à introduire une instance séparée parce qu'ils font le raisonnement que le défendeur sera attaqué de toute manière, si bien que leur action est moins exposée. Au total, sans actions de groupe, le nombre de procès intentés sera nettement plus faible. Les honoraires conditionnels sont employés depuis longtemps aux États-Unis, de telle sorte qu'ils ne choquent plus personne. Il n'est pas certain qu'il en aille de même en Europe. D'autres dispositifs garantiraient que la rémunération des avocats soit fixée par les tribunaux. Quant aux conflits d'intérêts, tant que les indemnités n'ont pas été versées, les honoraires conditionnels garantissent effectivement que les intérêts de l'avocat et de la classe qu'il représente concordent. Un conflit d'intérêts peut surgir une fois que le tribunal a fixé le montant des indemnités. Mais, dès lors que l'avocat est rémunéré par des honoraires conditionnels, ce risque existe pour toutes les affaires, qu'il s'agisse ou non d'actions de groupe. L'action de groupe confère une protection supplémentaire parce que les tribunaux peuvent intervenir afin de garantir une répartition équitable et de justes honoraires.

M. Houston explique que l'option de désistement fonctionne beaucoup mieux au Canada. La plupart des accords amiables ont été conclus dans les provinces où elle est proposée et la plupart d'entre elles adopteront ce dispositif. Quant aux actions privées dans les affaires d'abus, d'aucuns argumenteront que les dommages et intérêts ne sont nécessaires que parce qu'une ordonnance de mettre fin à certains comportements ne serait pas suffisamment dissuasive. D'autres cependant soutiennent que, dans le système canadien, une position dominante n'est pas condamnable en soi et qu'une société ne doit pas se voir infliger des pénalités financières au seul motif qu'elle jouit d'une position dominante.

La France souligne l'intérêt que la question des actions de groupe a récemment suscité. A titre d'illustration, le président de la Cour de cassation s'y est récemment déclaré favorable afin de remédier au déséquilibre entre les entreprises et les particuliers réclamant réparation d'un préjudice de faible montant mais qui, une fois qu'on additionne les demandes de tous ces particuliers, représente une somme parfois considérable. La France demande si l'on dispose de données sur les secteurs dans lesquels les actions de groupe sont les plus fréquentes, notamment les valeurs mobilières, la santé et les atteintes à la concurrence ou à l'environnement, ainsi que sur les dommages et intérêts attribués dans les divers secteurs.

A propos des actions privées en dommages et intérêts contre les abus de position dominante, le Canada demande si d'autres États soumettent les poursuites privées à des restrictions similaires. Si les actions privées étaient autorisées dans ce domaine, existerait-il une raison de les limiter aux actions individuelles et d'interdire les actions de groupe ?

Le Royaume-Uni demande si, pour être efficaces, les poursuites privées ont besoin d'un contrôle judiciaire actif, notamment pour prévenir les actions fantaisistes, et s'il y a avantage à spécialiser les juridictions au lieu de s'en tenir à des tribunaux généralistes. Le Royaume-Uni demande en outre s'il existe un risque que des poursuites privées et publiques menées très activement évoluent dans des directions différentes et aboutissent à des conflits.

L'Allemagne pose la question des actions collectives. Ces dernières sont généralement acceptées alors que les actions de groupe ne le sont pas. L'Allemagne pose une question sur les différences entre les deux

systèmes. Il se peut que, dans un système d'actions collectives, chaque action individuelle soit combinée avec d'autres de manière à former une action collective.

Le Professeur Hyman explique que les enquêtes et données disponibles ne sont pas parfaitement fiables. La meilleure synthèse dont on dispose est un rapport paru en 2004, d'où il ressort que les valeurs mobilières représentent près de 60 % du nombre total d'actions de groupe. La lutte contre les atteintes à la concurrence et les poursuites exercées par les consommateurs représentent ensemble près de 25 % du total, les premières expliquant à elles seules environ 10 % des actions de groupe. Les actions en réparation d'un préjudice (tort actions) et les actions en réparation d'un préjudice intentées par un grand nombre de plaignants (mass tort actions) en représentent moins de 10 %. Quant aux frais d'avocat, le Professeur Hyman fait remarquer qu'il existe plusieurs formes de rémunération. Les accords d'honoraires conditionnels sont souvent encadrés par un barème déterminé en fonction du nombre d'heures consacré à une affaire et du taux horaire pratiqué sur le marché. En général, plus les dommages et intérêts sont élevés, plus le pourcentage revenant aux avocats sous la forme d'honoraires diminue.

M. Montague, revenant sur la question du Canada concernant les limites imparties aux poursuites antitrust privées, souligne que les affaires antitrust intentées aux États-Unis ne sont pas toutes des actions de groupe. Comme le Canada l'a fait remarquer, les actions de groupe sont plus fréquentes dans les affaires de cartel, où tous les acheteurs ont été affectés de la même manière. Dans le cas où des concurrents intentent des poursuites en vertu de la Section 2 de la loi Sherman antitrust, il est rare qu'une classe soit certifiée par le juge en raison de l'existence de conflits d'intérêts entre les plaignants, qui ne se trouvent pas tous dans la même situation au regard du manque à gagner. Les actions de groupe sont un cas à part. En général, le recours à un juge spécialisé n'est pas admis aux États-Unis. Néanmoins, il peut être dérogé à cette règle au niveau local.

L'Australie rapporte que le principe de l'action privée existe depuis 30 ans pour tout ce qui concerne la concurrence. Son système s'inspire de celui des États-Unis, mais il n'existe ni honoraires conditionnels, ni dommages et intérêts triples. Pourtant, beaucoup d'actions ont été intentées par des acteurs privés, notamment dans le domaine des abus de position dominante. On ne sait pas grand-chose des règlements amiables, mais il apparaît qu'un assez grand nombre d'affaires sont en cours. Les poursuites privées rendent les poursuites publiques plus efficaces. En outre, en vertu du Trade Practices Act, les règles de la Cour fédérale prévoient une procédure avec option de participation qui devrait aider les petites entreprises qui, autrement, n'auraient peut-être pas les moyens d'intenter des poursuites. Elles ont la faculté de sonder la Commission sur l'ouverture d'une action de groupe au nom des personnes affectées. Mais il est délicat d'intenter une action de groupe de ce genre dans une affaire de concurrence, notamment si elle concerne la conduite d'un cartel. Les avocats sont favorables à une augmentation du nombre d'actions de groupe malgré leurs limites, notamment l'absence d'honoraires conditionnels. Le programme de clémence a aussi entraîné une augmentation du nombre d'affaires qui sont susceptibles de motiver des actions privées. Lorsqu'elle a révisé son programme de clémence l'an dernier, l'ACCC a supprimé l'obligation de restitution de manière à rendre la clémence plus incitative pour ceux qui la sollicitent. Il en est résulté un débat sur la nécessité ou non pour l'ACCC d'assister les plaignants dans les actions privées, y compris les actions de groupe.

La Corée explique que, actuellement, les actions de groupe ne sont possibles que dans les affaires concernant les valeurs mobilières. La Korea Fair Trade Commission (KFTC) a toutefois examiné deux options envisageables pour étendre les actions de groupe ou les actions collectives aux affaires de concurrence et pour inciter les acteurs privés à intenter des poursuites. Ainsi, le Parlement a été saisi d'une proposition d'extension du régime actuel des actions de groupe du domaine des titres à tous les autres secteurs, y compris les violations du droit de la concurrence. L'autre option envisagée est l'action en représentation selon un schéma similaire à celui qui est déjà utilisé dans les affaires de protection des consommateurs. La Corée ajoute en outre que le système actuel qui régit les actions de groupe concernant

les valeurs mobilières comporte trop de restrictions qu'il ne faudra pas adopter lorsque les actions de groupe seront étendues aux affaires de concurrence.

Le Danemark discute ensuite d'une proposition du Comité selon laquelle les membres d'une classe devraient prendre à leur charge une partie des frais de justice dans une action de groupe. Cette proposition est en cours d'examen par le Parlement. Il est vrai que, si les victimes étaient tenues de constituer un dépôt de garantie pour les frais de justice, cela pourrait les dissuader de porter plainte. Mais la proposition prévoit qu'un tribunal pourra décider que le plaignant n'a pas les moyens de payer des frais de justice, auquel cas l'État les prendra à sa charge. De plus, il est possible de contracter une assurance pour les frais de justice. Ces mesures seraient propres à empêcher que le système ne dissuade les actions de groupe. L'autorité de la concurrence danoise a bien accueilli la proposition d'actions de groupe tout en suggérant que l'information des victimes potentielles soit améliorée. La réaction initiale des milieux d'affaires a été négative mais finalement, si certaines modifications sont acceptées, les actions de groupe ne susciteront vraisemblablement pas d'opposition.

Le Japon fait aussi le point sur les discussions en cours au sujet de l'introduction d'actions collectives. Ces discussions s'inscrivent dans une réforme plus vaste du système judiciaire qui devrait se solder par un accès plus aisé à la justice. La Commission japonaise des pratiques commerciales loyales (JFTC) s'est aussi intéressée à ce projet. Elle a sollicité l'avis d'experts juridiques et des recherches sur les autres systèmes sont en cours. Aucune consultation publique n'a encore eu lieu, mais le Japon s'attend à ce que l'opinion publique se montre favorable au projet d'action collective parce que, en général, elle soutient le projet de réforme judiciaire.

Le Président demande aux délégués leur avis sur le règlement des dommages et intérêts sous forme de coupons et les prie en particulier d'expliquer quelle serait la valeur de dommages et intérêts réglés par ce moyen pour les membres d'une classe ainsi que leur rapport avec les honoraires reçus par les avocats à titre de rémunération. M. Montague explique qu'il n'est pas favorable au règlement des dommages et intérêts sous forme de coupons. Il rappelle une affaire dans laquelle le défendeur aurait fait faillite s'il avait dû régler les dommages et intérêts en espèces. Ce défendeur avait préféré indemniser les plaignants au moyen de coupons leur donnant droit à une réduction de 50 %. Dans cette affaire, les honoraires de l'avocat étaient très faibles et même inférieurs à la valeur des services rendus. Les défendeurs ont proposé une indemnité relativement faible et il fut décidé que les plaignants gagneraient à être indemnisés au moyen de coupons. Dans l'affaire *Sotheby's*, les indemnités représentaient un montant substantiel, à la fois sous forme d'espèces et de coupons, et le juge obligea les avocats à accepter d'être rémunérés en partie par des coupons. En général, le paiement des indemnités sous forme de coupons ne doit pas être encouragé. Le *Class Action Fairness Act* récemment adopté confirme que le règlement sous forme de coupons ne doit pas être favorisé. Il peut arriver que des avocats tentent de tirer avantage de la possibilité d'un règlement sous forme de coupons, mais la plupart des membres du barreau qui représentent les plaignants se comportent de manière raisonnable et acceptent une diminution de leur rémunération.

M. Houston ajoute que des indemnités n'ont jamais été réglées au moyen de coupons au Canada. Les tribunaux leur préfèrent une approche *cy-près* dans laquelle les dommages et intérêts sont affectés à des œuvres charitables ou institutions similaires. Cette pratique met en lumière un défaut des actions de groupe : elles visent à indemniser les consommateurs dont la réclamation porte sur un faible montant, mais si celui-ci est trop faible, ils ne reçoivent rien. La meilleure solution dont dispose le Canada pour faire face à cette situation est l'approche *cy-près*.

Le Professeur Hyman ajoute que plusieurs rapports sur les actions de groupe que la FTC américaine a préparés en vue d'un récent atelier et qui discutent des craintes suscitées par le règlement des indemnités sous forme de coupons ont été publiés. Des inquiétudes peuvent se faire jour si les avocats tentent de faire en sorte que leurs honoraires soient fixés en fonction de la valeur faciale des coupons sans égard pour le

taux auquel ils sont effectivement honorés. Les défendeurs ont d'autres moyens de réduire le coût des coupons, par exemple en interdisant leur cession, en les couplant à d'autres offres ou en imposant un délai très court pour leur remboursement. Les coupons pourraient constituer un dédommagement approprié dans certains cas, mais il est des cas dans lesquels il faut s'en méfier.

L'Allemagne déclare que, dans l'entente sur les ciments qui a récemment été jugée, les sommes en jeu pour le règlement des instances privées dépassent les 120 millions d'EUR. Dans cette affaire, les plaignants ont vendu leur créance à l'avocat et ce dernier a promis de partager les indemnités futures avec eux. Il leur est loisible de vendre leurs droits aux indemnités futures à des tiers. Cette solution s'apparente donc à un système de coupons.

Le Président invite la France à expliquer où en est le débat sur l'instauration des actions de groupe dans ce pays. La France explique que, politiquement, cette question suscite un vif intérêt. Le débat fait suite au constat que les consommateurs ayant subi un préjudice faible ne sont pas protégés efficacement par les règles actuelles. Le débat n'est pas confiné aux affaires de concurrence mais couvre un domaine plus vaste, notamment la protection des consommateurs. L'une de ses causes les plus importantes est l'entente dans le secteur de la téléphonie mobile, les trois exploitants de réseaux ayant été convaincus d'entraves à la concurrence sur les tarifs. Dans le sillage du jugement concluant à la violation des règles de concurrence, une association de consommateurs s'est mise en rapport avec des particuliers et a intenté 10 000 actions individuelles devant un tribunal à Paris. Le but principal de cette initiative était d'attirer l'attention sur l'absence des actions de groupe en droit français. Trois propositions sont à l'étude. La première, en l'occurrence l'extension du champ des actions en représentation, est jugée inappropriée. Les deux autres sont soit l'adoption du système en vigueur aux États-Unis et au Canada, soit une solution intermédiaire reposant sur les actions civiles, qui existent déjà en droit français et qui comporteraient deux phases, dont la première aurait pour objet la détermination de la responsabilité et la seconde, celle des indemnités.

La France précise que le débat demeure ouvert sur plusieurs points : le champ d'application (faut-il réserver les actions de groupe aux consommateurs ou les ouvrir à d'autres ?) ; l'action directe pour certaines classes de consommateurs ou la représentation par des associations de consommateurs ; une option de participation ou de désistement ; une simple indemnisation ou l'instauration de pénalités ; la détermination du préjudice ; l'interface entre les poursuites publiques et privées et les répercussions sur le programme de clémence. Il a été rappelé à plusieurs reprises que toute réforme doit s'inscrire dans le cadre du débat ouvert en Europe.

Le Président propose d'en venir à la question de savoir si d'autres mesures, comme la vente de ses droits à indemnisation à un seul plaignant ou une affaire destinée à faire jurisprudence, permettent d'atteindre les objectifs des actions de groupe. La Commission européenne explique qu'il n'a pas encore été décidé si un système s'inspirant d'affaires faisant jurisprudence est une solution viable.

Le Président aborde ensuite le sujet de l'interaction entre les poursuites publiques et privées. Il souligne que cette question revêt une importance particulière dans le domaine de la lutte contre les ententes, notamment pour ce qui a trait aux programmes de clémence. M. Montague explique que les réformes adoptées aux États-Unis, où les défendeurs sollicitant la clémence ne sont pas solidairement et conjointement responsables avec les autres défendeurs et ne peuvent être condamnés à payer des dommages et intérêts trois fois plus élevés que le montant du préjudice, sont trop récentes pour qu'on puisse en tirer des enseignements. Ces avantages sont subordonnés à la coopération du défendeur qui demande la clémence avec les plaignants de droit privé. M. Montague convient que les nouvelles dispositions devraient faciliter les poursuites publiques bien que la clémence envers un participant à une entente ne soit pas satisfaisante.

La Commission européenne pose une question sur les réformes récemment adoptées par les États-Unis. On peut supposer que la protection contre le paiement de dommages et intérêts trois fois plus élevés que le montant du préjudice a été dictée par le souci qu'en son absence le risque d'une telle sanction ne dissuade les entreprises de solliciter la clémence. Existe-t-il de quelconques signes montrant une augmentation du nombre de demandes de clémence ? Deuxièmement, l'obligation d'aider les plaignants a-t-elle eu de quelconques répercussions sur la possibilité pour les victimes d'obtenir des dommages et intérêts ?

Le Royaume-Uni souligne qu'il est crucial que les poursuites privées ne gênent pas les programmes de clémence. On ignore cependant si la menace de poursuites privées affecterait les demandes de clémence parce que ces dernières peuvent obéir à d'autres facteurs, notamment le gouvernement d'entreprise. Il peut aussi arriver que les entreprises demandent la clémence pour diverses autres raisons telles qu'un remaniement de leur équipe de direction ou la fin d'une entente. Le Royaume-Uni ajoute, à propos de la responsabilité conjointe et solidaire des défendeurs qui sollicitent la clémence, qu'ils ne doivent pas se retrouver dans une position plus favorable et que les droits des consommateurs et des tiers ne doivent pas être affectés par les programmes de clémence. Une société demandant à bénéficier de la clémence qui est condamnée à payer des dommages et intérêts aux plaignants de droit privé pourrait réclamer une contribution aux autres membres de l'entente. De plus, un tribunal peut juger opportun de récompenser un défendeur sollicitant la clémence en le mettant à l'abri d'une bonne part des dommages et intérêts à acquitter.

Le Professeur Hyman ajoute que l'une des questions les plus graves qui se posent est la mesure dans laquelle les entreprises qui font acte de contrition doivent en être récompensées. Dans le domaine des atteintes à la concurrence, quelle contrepartie faut-il donner à l'aveu de la société qui demande la clémence ? Un durcissement des sanctions sous la forme d'un triplement des dommages et intérêts est nécessaire quand le risque de détection est faible. Cependant, si une société demandant la clémence a révélé l'existence d'une entente, le délit est manifeste et infliger des dommages et intérêts d'un montant triple de celui du préjudice ne se justifie pas. Des sanctions élevées dissuadent les coupables de se dénoncer. En revanche, il est plus délicat de décider ce qu'il convient de faire si des dommages et intérêts sont dus d'entrée de jeu pour un montant égal au préjudice, encore que la question qui importe vraiment soit de savoir si des dommages et intérêts simplement égaux au préjudice constituent une bonne solution en matière d'ententes. La question de la responsabilité conjointe et solidaire est plus épineuse à cause de l'interaction avec les tiers.

Le Comité consultatif économique et industriel (BIAC) fait part de sa crainte que les possibilités de recours par des acteurs de droit privé ne soient étendues au détriment des poursuites publiques. Le programme de clémence des États-Unis peut avoir eu des effets pervers parce qu'il part du principe que tout le monde est coupable alors que, en réalité, il peut arriver que seules quelques sociétés soient coupables tandis que beaucoup d'autres ne le sont pas. Dans sa configuration actuelle, le système américain incite les coupables soit à se dénoncer pour obtenir la clémence, soit à régler à l'amiable une action de groupe, tandis que ceux qui sont moins coupables attendent et sont les victimes de l'action de groupe. Les dommages et intérêts que les sociétés risquent d'avoir à payer sont si lourds qu'aucune société ne peut se permettre d'aller jusqu'au procès pour se défendre. C'est la conjonction des dommages et intérêts triples, de la responsabilité conjointe et solidaire et des frais d'avocat qui oblige les entreprises à conclure un accord amiable. Il est impératif de mettre en place un mécanisme pour protéger ces défendeurs innocents.

Les États-Unis répondent à la Commission européenne qui, à propos des répercussions des amendements de 2004, a fait observer que les modifications apportées à la législation ont créé plusieurs incitations à demander la clémence et que ces facteurs sont difficiles à isoler ; cependant, on doit

logiquement supposer qu'une réduction des dommages et intérêts ne peut qu'avoir des effets positifs sur le programme de clémence.

L'Allemagne présente les résultats d'un sondage récent auprès de praticiens privés sur les répercussions des poursuites privées sur les demandes de clémence. Les personnes interrogées ont répondu que le risque présenté par les poursuites privées est un facteur qui a son importance sans être décisif pour autant. On ignore encore si une fréquence accrue des poursuites privées en Allemagne affectera les demandes de clémence. Il semble que les avantages d'une demande de clémence l'emportent sur le risque posé par les poursuites privées. Ces dernières affectent réellement la volonté des entreprises de demander une diminution des amendes en échange de leur coopération. Il en va de même pour le souhait de conclure une transaction avec l'Autorité de la concurrence allemande parce que les entreprises s'inquiètent de la menace de poursuites privées. Les poursuites publiques en souffrent réellement parce que, faute de règlement amiable, il faut s'engager dans une procédure judiciaire extrêmement lourde.

La Commission européenne ajoute qu'elle envisage de s'inspirer de la solution proposée par le Royaume-Uni pour le problème de l'impact limité des poursuites privées sur les demandes de clémence. Tout membre d'un cartel est constamment exposé au risque qu'un autre de ses membres ne révèle les activités du cartel. De plus, si le nombre d'instances privées augmente, celui des poursuites publiques aussi a fortement progressé. Les participants à une entente doivent donc se soucier non seulement des poursuites privées, mais aussi du risque d'actions publiques multiples. De plus, la Commission a réagi à l'exposé de l'Allemagne en soulignant que les poursuites privées peuvent inciter les entreprises à transiger avec l'autorité de la concurrence parce qu'une enquête plus approfondie pourrait mettre au jour d'autres activités du cartel, de telle sorte que la conclusion d'un accord amiable peut permettre à un défendeur de limiter son exposition au risque de poursuites civiles.

L'Irlande explique que, chez elle, les violations du droit de la concurrence sont passibles de sanctions pénales et que le droit d'intenter des poursuites est reconnu aux acteurs privés depuis 15 ans. Un programme de clémence existe depuis trois ans. Les amendes ne sont pas négociables. Soit les entreprises sont condamnées à les régler dans leur intégralité, soit elles en sont déchargées dans leur totalité. La seule question qui vaille est de savoir s'il y a lieu ou non d'infliger des amendes. Dans l'affirmative, ces dernières sont à l'entière discrétion du juge. De plus, les règles de divulgation des preuves dans les actions privées ne permettent pas de maintenir un secret total sur les documents de l'entreprise qui demande la clémence. L'autorité de la concurrence s'oppose aux demandes de divulgation de preuves, mais c'est le tribunal qui décide d'y faire droit ou non. Il faut se demander pourquoi l'immunité contre les poursuites civiles intentées par des acteurs de droit privé qui est systématiquement accordée aux entreprises qui demandent la clémence n'existe dans aucun autre domaine des poursuites pénales. La question est de savoir pourquoi ceux qui violent le droit de la concurrence devraient bénéficier d'un traitement de faveur.

Le Canada précise qu'il ressort des accords amiables qu'il a conclus à l'issue d'un marchandage judiciaire et des amendes prononcées par l'autorité de la concurrence que cette dernière pourrait accepter de restreindre le champ de la reconnaissance de culpabilité à la lumière d'éventuelles procédures civiles ultérieures et qu'elle pourrait chercher à obtenir une amende plus élevée pour compenser la réduction de la charge supportée par l'entreprise fautive de telle sorte que l'amende soit appropriée au regard du commerce affecté. Dans l'accord de consentement, le niveau de l'amende peut sembler anormal parce que le compromis trouvé entre diminution de la charge et augmentation de l'amende ne saute pas forcément aux yeux d'un observateur extérieur.

La Suisse explique que, si une enquête est ouverte à la suite d'une demande de clémence, les droits de procédure normaux s'appliquent. Ils comprennent notamment le droit d'être entendu et celui d'accéder au dossier. Les cibles des enquêtes ont le droit de connaître l'identité de l'entreprise qui demande la clémence, ce qui peut dissuader les participants à une entente de s'en dissocier et d'en révéler l'existence.

Comme le programme de clémence est assez récent, ces problèmes ne se sont pas encore présentés en pratique. Pour préserver l'efficacité des programmes de clémence, il peut être nécessaire de ne pas faire apparaître l'identité de l'entreprise qui demande la clémence dans les documents versés au dossier.

Le Président invite les membres de la commission à faire part de leurs ultimes remarques. M. Woods évoque le débat sur les problèmes de conflit entre mandant et mandataire. Comme cela a été indiqué dans le Livre Vert, ils semblent peu pertinents dans le cas d'une action de groupe intentée par des clients directs. Les commentaires sur l'expérience du Canada à propos des options de participation et de désistement sont aussi pertinents. Il serait nécessaire de réfléchir davantage au risque d'excès dans les actions de groupe. Enfin, il convient de relever que la plupart des actions de groupe seront réglées à l'amiable. Cette question mérite réflexion. S'agissant de l'interface entre poursuites publiques et privées, ces dernières peuvent conforter les programmes de clémence, mais il est nécessaire de coordonner les deux piliers d'une lutte efficace contre les ententes.

Le Professeur Hyman ajoute que le règlement amiable des affaires n'est pas synonyme d'absence de contrôle du juge. Il existe des cas où celui-ci peut rendre une ordonnance de non-lieu et les décisions de certification qui sont reconnues comme formant une étape cruciale du processus peuvent être révisées en appel. En ce qui concerne les options de participation ou de désistement, les résultats s'expliquent souvent par l'inertie humaine. Dans les affaires de concurrence, les programmes de clémence entrent en jeu à un stade différent des autres domaines bien que des systèmes incitatifs similaires y existent. En effet, il est délicat d'identifier les victimes des infractions au droit de la concurrence. Le Professeur Hyman fait aussi remarquer que la notification est un problème majeur que l'on a eu tendance à négliger. Or, il est essentiel de mettre en place un système de notification bien conçu pour que les actions de groupe soient efficaces.

M. Houston déclare qu'il aimerait savoir comment les autres pays aborderaient la question des clients indirects et des modalités de leur indemnisation.

M. Montague convient que la notification revêt une importance cruciale, aussi bien dans les systèmes avec option de participation que dans ceux qui offrent une option de désistement. A titre d'illustration, aux États-Unis, les actions de groupe reposaient initialement sur un système d'option de participation, mais aucun mécanisme de notification adéquat n'était prévu. Ce système était donc très inefficace. La question de la notification est importante et les États-Unis se sont interrogés à son sujet pour savoir si elle a été traitée de façon claire et compréhensible. A propos des règlements amiables et des procès, M. Montague souligne que la plupart des règlements amiables en matière de concurrence sont conclus après que la totalité ou la quasi-totalité des preuves a été divulguée, de telle sorte que les parties ont une idée assez précise de la solidité – ou de la faiblesse – de leur dossier. La pression en vue d'un règlement amiable est aussi vive du côté des plaignants, ne fût-ce que parce que l'affaire exige beaucoup de temps et de moyens.

Le Président conclut les débats en prenant acte qu'un consensus semble se dégager sur le fait que les poursuites privées sont une composante essentielle d'un système d'exécution efficace. Il relève avec intérêt qu'un certain nombre d'États envisagent des mesures pour faciliter les poursuites privées. Le risque d'abus suscite néanmoins des inquiétudes. La manière dont on pourrait instaurer un système de poursuites privées sans ouvrir la voie à des abus suscite un vif débat.