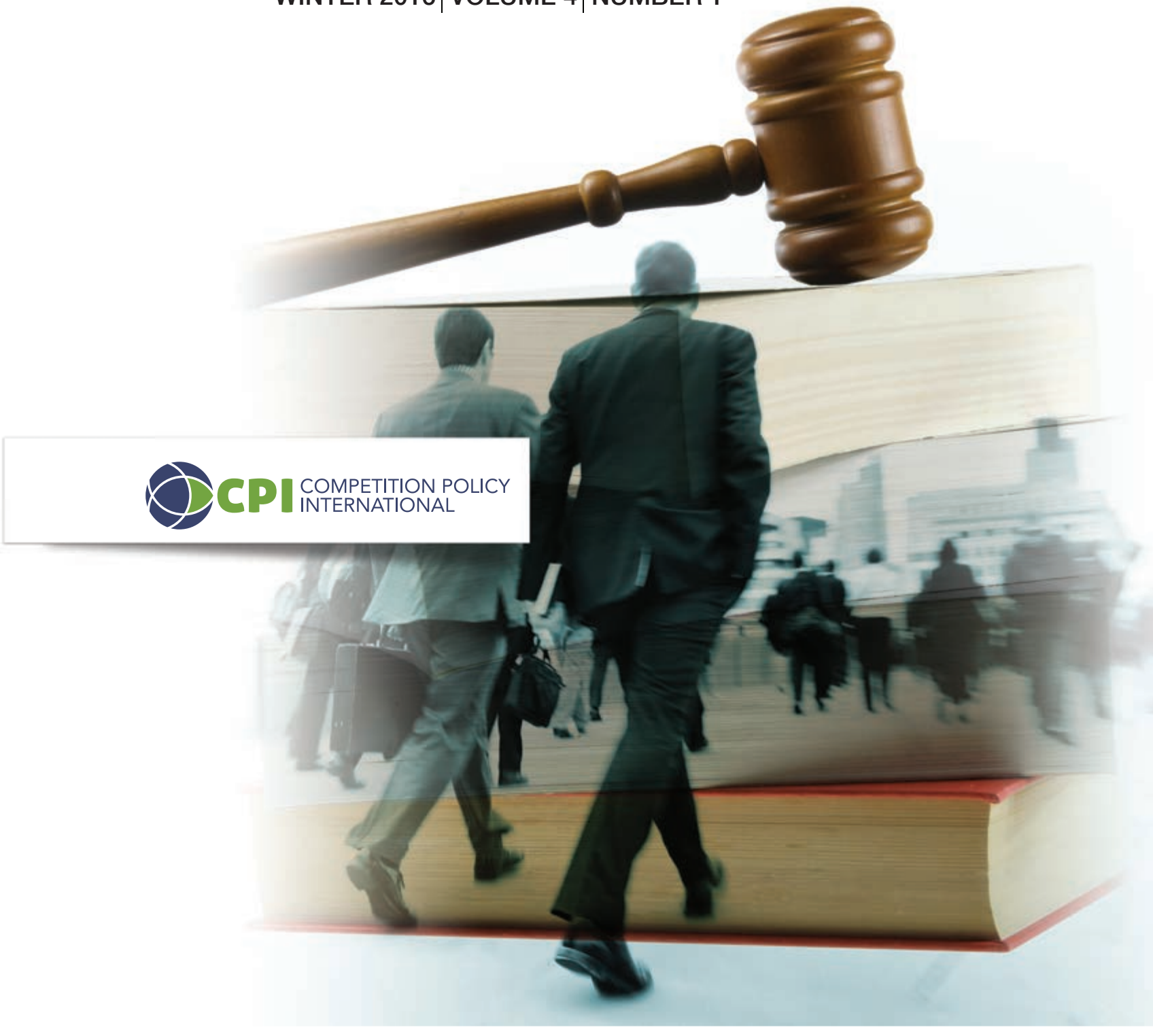
Antitrust Chronicle

PRIVATE DAMAGES & CLASS ACTIONS

WINTER 2016 | VOLUME 4 | NUMBER 1



CPI COMPETITION POLICY INTERNATIONAL

TABLE OF CONTENT

LETTER FROM THE EDITOR

Dear Reader,

A new year represents for CPI a new opportunity to provide valuable resources to the global antitrust community. As many of you observed, the new year brought with it a completely new website with new features, more content and a more user-friendly experience to our members.

Along with the website and our logo, the Antirust Chronicle (AC) has also changed. The AC is now a full fledged antitrust magazine, the only one of its kind. This online magazine, available also in PDF and eBook format, contains not only outstanding articles and commentaries about a given topic, but it also inaugurates a new section, the CPI Talks, where every month CPI interviews a renowned antitrust expert. The AC magazine now allows more interaction with our readers since people from the antirust community can contact us for our announcement section or to partner with us. At CPI we want you to share with us your ideas and suggestions to offer you better products and services.

For the first AC magazine of 2016, we have chosen a very popular and international topic as Private Damages & Class Actions. The reader will enjoy this journey, exploring the difficulties and commonalities of private damages and class actions in seven different countries.

One may think that everything has been said about these subjects, but this is far from the true. The reality is that every year countries around the globe are enacting new legislations encouraging companies and individuals to pursue compensation in the courts. This is the case, for instance, of Australia and United Kingdom. The former issued a set of recommendations in 2015 that, inter alia, seek to amend the competition act to facilitate the exercise of private actions. Similarly, U.K. enacted new legislation in 2015 including interesting figures in the law like the opt-out clause that will also ease consumers to obtain compensation.

Other countries, however, enacted legislation recently but the results are far from satisfactory. The European Union passed a Directive on antitrust damages actions more than a year ago but the implementation thereof is, at least, questionable. Mexico adopted a new competition law in 2013 enabling private actions, but with so many procedural hurdles that no one has even tried. India, in addition to the usual problems of having access to certain documents or quantify the damage, there are some jurisdictional controversies that render the claim of damages particularly hard.

Thus, in this issue our readers will have a deeper understanding of the challenges that a complainant faces in those countries to obtain full restitution of the damage suffered by antitrust violations.

As mentioned above, the new AC magazine inaugurates the CPI Talks section where every month a renowned antitrust expert is questioned by our staff on hot antitrust issues. This month we are delighted to have Professor and former judge Frederic Jenny answering our questions, including private actions.

To conclude, we hope that all the efforts devoted to create new products meets your expectations and together we continue improving in 2016 and in the years to come.

Thank you,
Sincerely,

CPI Team

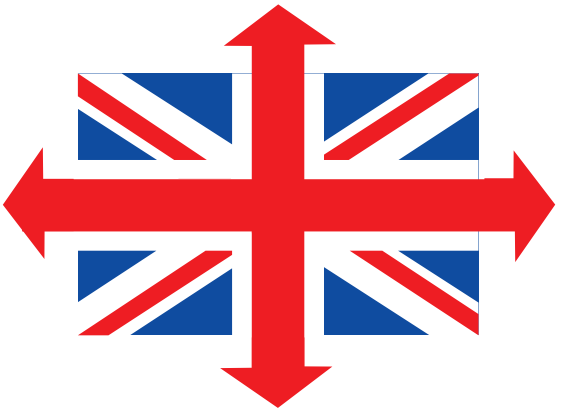
CPI Talks...

Interview with Professor Frederic Jenny

Private Damages and Class Actions Around the World

Some of our most highly read articles early last year were on the subjects of class actions and private damages. New legislations were passed in Europe, Australia or United Kingdom ever since to empower consumers to claim full restitution for the damages suffered from antitrust violations. We thought it would be a valuable idea to take a look at the topic now and find out if these legislations were as effective as were supposed to be and if the new ones contain the necessary elements to unfold its true power.

page 7



Consumer compensation and private antitrust enforcement in the U.K. – setting a trend for Europe?

By Sebastian Peyer

In 2015, the U.K. government introduced opt-out group actions for claims based on breaches of competition law. The Consumer Rights Act 2015 sets out the details of the new class action regime and also introduces the opportunity for undertakings to set up a voluntary consumer redress scheme. These legal innovations in one of the larger economies in the EU may well encourage other Member States to become more adventurous too

page 17

The Changing Landscape in U.S. Antitrust Class Actions

By Dean Hansell and William L. Monts III

No longer are antitrust damages class actions routinely certified with little factual inquiry, forcing defendants into settlements of potentially marginal claims. Rather, the courts focus extensively now on whether named plaintiffs can prove injury to class members on the entire class before permitting cases to proceed on a class basis.

page 11

Balancing public and private enforcement – an Australian perspective

By Rebecca Gilsenan and Marcus Bezzi

The lack of compensation flowing to the victims of cartel conduct in Australia is a matter of significant concern to those victims but it is also a matter of some concern in terms of how effectively cartel conduct can be deterred. The Harper Committee Recommendations on private actions, accepted by the Australian Government, offers new possibilities for companies and individuals to obtain compensation.

page 23

Private Damages and Class Action in India

By Pranav Mehra and Ritam Arora

Indian companies face enormous challenges to effectively apply and obtain restitution for damages from antirust violations. In addition to the common problems that other jurisdictions share such as access to documents or quantification of the damage, institutional and jurisdictional controversies may jeopardize claimants' efforts to obtain compensation.


page 32

Private Damages in Brazil: Early Beginnings, Big Stumbling Blocks

By Ana Paula Martinez & Mariana Tavares de Araujo

Private antitrust enforcement in Brazil has been on the rise over the past six years. This may be due to such reasons as the global trend of antitrust authorities encouraging damage litigation by potential injured parties; the growing number of infringement decisions issued by Brazil's antitrust agency, and the increasing general awareness of competition law in Brazil. However, Brazil's private antitrust enforcement it is still in its infancy if compared to other systems, such as the United States.


page 38

Antitrust Damages Claims: is Mexico in The Right Path?

By Miguel Flores & Abel Rivera

Never in the history of Mexico has an individual antitrust damages claim been successful. However, in May 2014, the new Federal Law on Economic Competition (FLEC) provided clearer criteria for when and how a claim of antitrust damages may be carried, this brings new hope in the system. Nonetheless, to be successful, the new specialized competition courts will need to develop new interpretations of Civil Law institutions (civil liability) so that affected parties are able to recover damages from antitrust injuries.


page 45

Private Damages and Collective Redress in the EU — where do we stand a year after the introduction of the EU Damages Directive?

By Pontus Lindfelt & Sophie Sahlin

The EU Member States now have a bit less than a year left to implement the Damages Directive. In some jurisdictions, the implementation of the Directive will require significant amendments to the current regimes. For instance, the presumption that a cartel infringement causes harm is a novelty in many jurisdictions.

page 50

The development of private enforcement regarding damages actions in Chile

By Nicolás Lewin & Francisco Borquez

The Chilean damages actions originated in competition infractions are emerging in Chile. Yet, there are some amendments and corrections that are needed for the perfection of the system. For instance, those related to the passing-on defense and indirect purchasers.

page 55

CPI Spotlight

At CPI we know that your time is valuable and it is difficult to be constantly informed about the latest news and articles. This section is perfect for you, CPI encapsulates for you the one most read CPI products, from news to columns and briefing rooms.

UK Retail Banking Investigation Fails to Meet Challenger Banks' Expectations

By Alan Davis & Matt Evans
(Jones Day, London)

New market entrants and challenger banks have criticized the UK Competition and Markets Authority's ("CMA") recent market investigation of competition in retail banking for not addressing the core issues and failing to improve the outcome for consumers. After an investigation lasting 18 months, the CMA provisionally concluded that, although there is a lack of effective competition in the market, it is not necessary to impose

structural remedies, such as breaking up the largest retail banks or requiring them to cease offering so-called "free-if-in-credit" ("FIIC") banking. Instead, the CMA has proposed a number of remedies to improve customers' knowledge and awareness, encourage them to switch providers, and make it easier for them to do so.

The problem of weak customer engagement when it comes to shopping around for better prices and switching suppliers was at the heart of the CMA's investigation. The CMA concluded that this consumer inertia affects competition negatively. In particular, it results in a lack of switching, an absence of incentives for banks to innovate through better products and prices, and greater difficulty for new entrants to gain a foothold in the market. Challenger banks have long argued that the FIIC model plays a key role in consumer inertia on the basis that it is misleading to consumers because it does not provide a true picture of what they are being charged and makes them less likely to switch. However, the CMA found that there was evidence that FIIC accounts offer a reasonable deal to many consumers and no convincing evidence that they distort competition.

(This is an excerpt from the Europe Column, to see the complete text please go to https://www.competitionpolicyinternational.com/uk-retail-banking-investigation-fails-to-meet-challenger-banks-expectations/)

Announcements

Don't miss the upcoming release of our new CPI Journal at the end of this month. In this new Journal you will find two Symposia:

1) The First one about the famous Tencent case ruled by China Supreme People's Court, where the traditional tools and boundaries to define market definition and market power are examined for the online industry.

2) The second one about new market economies. Companies such as Uber, Lyft or Blablacar are challenging and re-shaping the current status quo of antitrust and regulation. Different experts analyze the pros and cons of pushing legal boundaries in the name of progress and consumers.

This edition of the Journal also contains articles about Net Neutrality, Barriers to exit and the analysis of the classic case Microsoft in light of the new antitrust disputes in online markets.

We also invite all our readers to visit our new website and get familiarized with the new features, content and applications. If you have not visited yet the website, go to : www.competitionpolicyinternational.com.

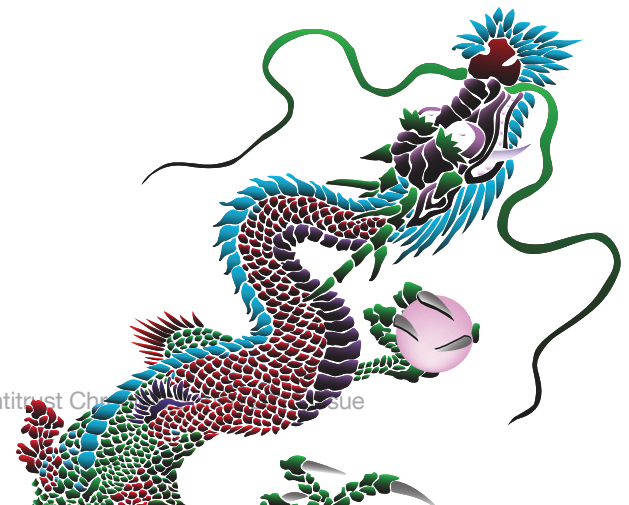
Last, but not least, follow us on Linkedin to have more interactive discussions with our personnel and with experts from the antitrust community. Leave your comments, opinions or simply open a discussion group about your favorite topic. If something is of your interest, share it with us because you are not the only one interested.

What is Next?

This section is dedicated to those who cannot wait to know what CPI is preparing for you for the next month. Thus, we should include a spoiler alert, do not continue reading if you prefer to wait until next month!

Our February issue of the AC magazine welcomes the New Chinese Year and it will address the recent developments on Chinese Antitrust regime. For this edition, we will have articles from regulators, practitioners and Judges that will offer their views on the most controversial aspects of the Anti-Monopoly Law and its implementation as well as the most relevant antitrust cases.

The CPI Talks will interview a very prestigious judge from China Supreme People's Court.



COMPETITION POLICY INTERNATIONAL PRESENTS

INTERVIEW WITH **PROF. FREDERIC JENNY**

INTERVIEW TRANSCRIPT

Who is best placed to grant damages in competition cases, regular courts or specialised courts?

FJ: I'm not sure I'd put it in those terms. It seems clear that courts in general are better placed than Competition Authorities. But on the other hand, competition authorities have a big advantage because they have teams of economists together with their legal teams. So I think one of the questions is the extent to which competition authorities should play a role in providing as much information or help as possible to the courts that handle damage cases. To help courts assess for example elasticity of demand, things like this.

Now, between specialized courts and regular courts - I think that courts, whether regular or specialised, are used to dealing with damages issues - that's what civil judges do. So they do have quite a bit of experience in the kind of techniques, the before-and-after, counterfactuals, benchmarking comparisons between two sectors, and so on. So I don't think that the issue is so much on how you assess the effect of the practice, it's more how does one provide the courts with the data and the economic nterpretation of the data. That's why I think that, in follow on cases, competition authorities that could be very helpful for the courts.

There are some interesting provisions organizing a cooperation between the competition authority and the court in some countries. For example, in Spain the Court can ask the Competition Authority to give an opinion the methodology of the economic expertise that is presented by the parties to the civil proceeding in front of the court. So it helps the Court understand what makes sense, what doesn't make sense, seems to me that the important point is to organize the cooperation between the competition authorities and the courts to enable the courts to have as much information and methodological support as possible when they assess damages due to anticompetitive authorities.-

Why is it so difficult to grant damages?

I don't know if it is difficult. There is an argument that there are few , maybe too few, damage cases in Europe. But I think that the figures which show that indeed there are few judgments awarding damages to the victims of antitrust violations are somewhat misleading. A lot of cases end up with the parties settling out of court and therefore no court decision. So when we count the number of judgments awarding damages we may underestimate the importance of civil enforcement in Europe.

One serious difficulty, however in many European jurisdictions is the fact that in civil proceedings, the firms alleged to have violated the competition law can defend themselves by arguing that their increase in price has been passed-on by the victims to their customers. This imposes a heavy burden both on the victims but also on the courts because it is usually extremely complex to assess if there has been a pass-on and if so what the magnitude of the pass-on is. The pass-on defence is a serious obstacle to the successful development of civil enforcement.

The second difficulty is that general procedural rules which apply to damage cases in the competition law area as they apply to damage cases in other areas are not as favourable to victims as they are in the United States and that the legal concept of damages that can be compensated is fairly narrow.

How effective is the EU Commission's Competition Directive on Class Actions?

The directive has had an effect, in the sense that a number of countries have adopted legislation to at least facilitate somewhat Class Actions. But you must realise that in continental Europe there has been considerable opposition to the development of class action in general with the result that the Directive, is somewhat watered-down compared to the initial idea. This opposition was led by the business community, which was concerned not so much by class actions in the area of competition, but much more by the prospect of the possible development of class action in areas like food-safety the environment or medicine. One cannot treat the legal regime of class actions in the area of competition issue as a separate regime from the general legal regime of class actions.

What is the OECD's view of the new Sharing platforms and multi-sided technologies?

One of the things that we discuss extensively at the OECD is, what is the impact of disruptive technologies on competition. Disruptive technologies may be linked to the development of the digital economy, but not necessarily. Like Tesla for example - it's a car that you don't need to maintain so the economy of the car's distribution and maintenance is completely changed. One typical reaction of firms displaced by disruptive technologies, for example taxis displaced by services like Uber, is to lobby the government or the parliament to pass protectionist regulations, that work against the public interest and against the development of the new technologies and competition, but in favor of own interest of the firms which may be displaced. Competition

Authorities should be very active on the front of Advocacy, to these forces pushing for anti-competitive or protectionist regulations.

But there is also a necessity to look at disruptive technologies from a different angle.
Disruptive technologies are often technologies which destroys an existing business model and replaces it with a different business model. But in such cases the traditional tools of economic analysis are not always relevant or useful to assess the situation from the competition standpoint. For example, take the notion of market definition . Is it relevant to assess the competitive situation between Uber and the taxis ?- is Uber in the taxi market? Is Uber in a different market? Who knows? One can argue forever. I think, is that most of these new disruptive technologies don't lead newcomers to 'Invade' a market with a new technology or a new process or a new product. They lead newcomers to invent something which is completely new but which destroys the value of an established market. Also, very often when a new type of service is created nobody knows for sure what the business model of this new service is going to be. Hence it is very difficult to know what is competition on the merits because there is no established business model. So the competition issue is not easy to analyze with the traditional tools of economics. One needs to develop new instruments to assess the competition issue or at least to adapt our tools.

Concepts that work pretty well in fairly static industries - even in industries that have innovation like new products and more efficient processes, but with stable business do not work very well in those cases of disruptive technologies.

We need to adapt our instruments to those situations, to see when we can use the traditional instruments, what are their limits, how much they can do. There's still work to do in this area, and we have started to look into those issues OECD.

What should judges and regulators do about the sharing economy ?

The emergence of the sharing economy, which disrupts established markets and firms, may requires some regulationory intervention. The issue is that of competitive neutrality: to what extent is it acceptable to allow people to use the new technology to offer a service which is competing with an established service which is subject to a regulation(for example , on safety or on public health)? It may be that the old regulation which applied to the service providers before the arrival of the disrupters is no longer necessary or that similar standards should apply to the newcomers. Whatever the case may be you have to think about how the regulatory environment could promote neutral competition between the different providers of substitutable services.

Aside from this, we should encourage both the development of innovative ways to provide services and an effective competition between the providers of substitutable services.

What are the challenges for authorities and regulators when dealing with two-sided markets?

The challenge is first to have a precise definition of what is a two-sided market and second when we want to analyze competition on such a market to adapt our traditional tools of analysis and not to fall into the trap of looking at one side first and then at the other side as if the two side were independent of each other.

We have to adapt our analytical tools because our traditional tools are not designed for two sided markets. Take for example the hypothetical monopoly test. When you are on a two sided market you have two prices, one for each side. How do you apply the hypothetical monopoly test when you have two prices to consider ? Should you increase both of them by 5% or should you increase one of them holding the other constant ? How should you administer the test of predation? Certainly

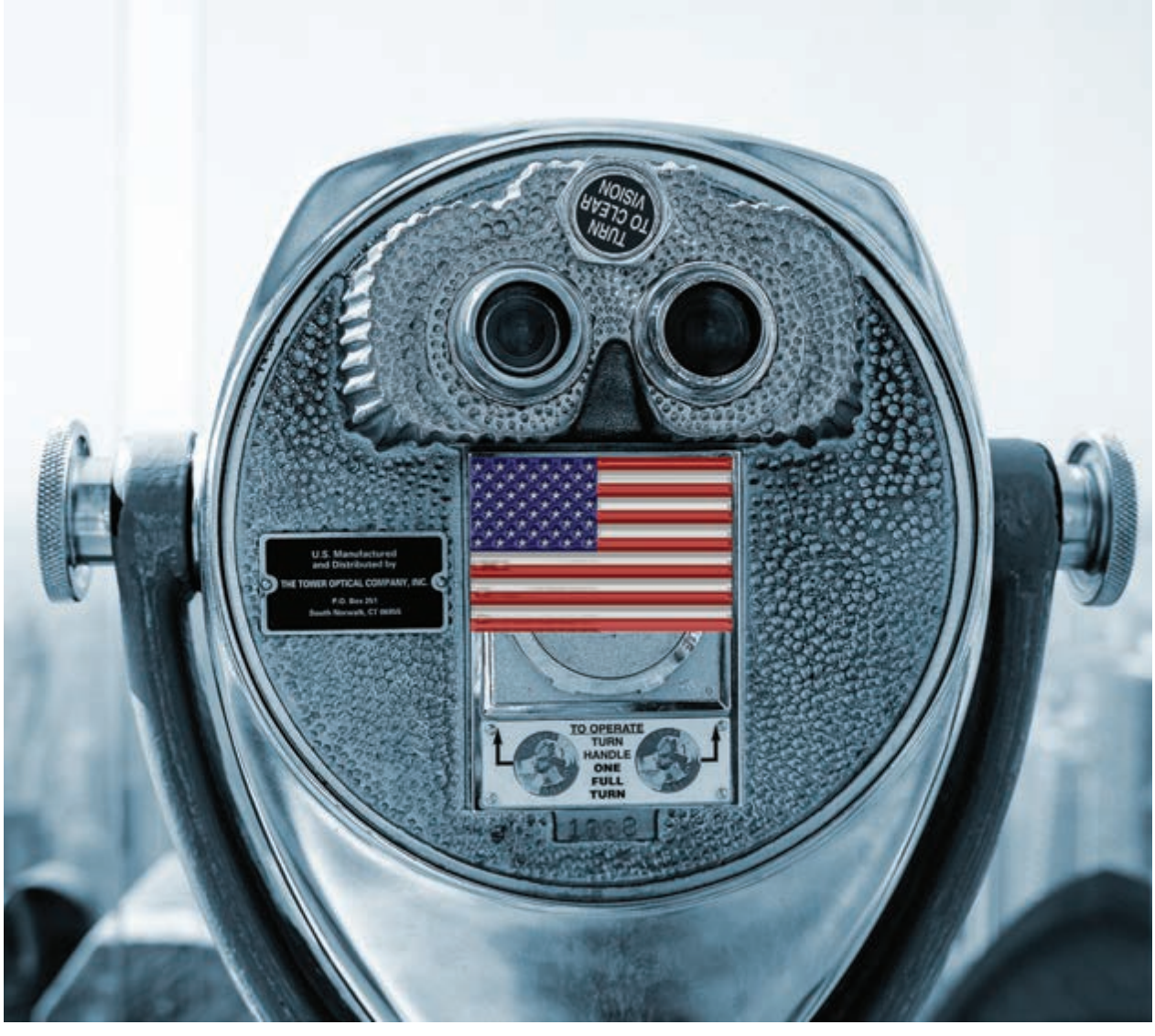
not by looking at each price separately ! etc… The one thing that I wish would disappear, is what still exist I in many jurisdictions where there's a possible issue with a 2-sided market: the decision of the judge or the decision of the competition authority have one paragraph explaining that the market they look at is a 2-sided market, and then the rest of the decision forgets completely about it and talks about the competition issues on one side or on the other. We should at least agree that, if a competition authority believes examines a 2-sided market, it should (in the course of its competitive analysis) systematically take into consideration the interdependence between the two sides, to arrive at the decision, either that there's been a violation or there hasn't been a violation.

However, we have to face the fact that the analysis becomes quite a bit more complex when one takes into consideration the interactions between the two sides of a two –sided market. The analysis will depend among other things on the strength of the interdependence between the two sides, and the way in which people on each side are either single-homing or multi-homing.

So what we really need is a guideline for how to apply the competition analysis to 2-sided markets. I think that competitions authorities will do it in the near future.

THE CHANGING LANDSCAPE IN U.S. ANTITRUST CLASS ACTIONS

BY **DEAN HANSELL** [1]
& **WILLIAM L. MONTS III** [2]



1 Partner, Hogan Lovells, Los Angeles specializing in antitrust and other complex litigation. Former antitrust prosecutor at the United States Federal Trade Commission. Dean.Hansell@hoganlovells.com. (001) 310 785 4665

2 Partner, Hogan Lovells, Washington, D.C. specializing in antitrust and complex litigation. He has represented private companies, state-owned businesses and foreign governments. William.monts@hoganlovells.com. (001) 202 637-6440.

In 1966, prompted by an amendment to the procedural rules applicable to cases in U.S. federal courts, the United States embarked on an "adventuresome innovation" in litigation[3] in which one or a few named plaintiffs would be authorized, under judicial oversight and supervision, to litigate in a single lawsuit not only their own individual damages claims but similar damages claims of other persons not party to the case. Under this approach, not only would claims be aggregated, but non-parties who chose not to opt-out of the litigation would be bound by the outcome of a case in which they did not participate. Thus was born the modern American class action. The aim was to streamline litigation and allow the resolution of many claims arising from a single practice or set of facts to be adjudicated efficiently, including claims in which the potential recovery was far too small to warrant the investment of time and resources into litigation on an individual basis.

While the rise of class action damages actions altered litigation in many areas of law, it certainly changed the landscape in antitrust. Armed with a potent weapon, the ability to aggregate many claims into a single proceeding, antitrust plaintiffs and their counsel began pursuing cases, notably price-fixing claims in which the injured parties were consumers who each had small individual damages, that had previously not been the subject of private litigation. With the development of class actions, those alleged to have violated U.S. antitrust law faced a significant additional threat. Not only were there potential fines in criminal case or potentially broad injunctions in civil proceedings brought by the Department of Justice or Federal Trade Commission, but the rise of damages class actions through private litigation, brought the possibility of massive treble damages claims as well. Today, businesses facing antitrust investigations by the United States government will inevitably consider the potential civil liabilities resulting from follow-on private antitrust class actions in crafting an overall strategy for dealing with the investigation. Private damages class actions have also spawned legal questions that have shaped U.S. antitrust cases in a number of ways.[4]

For many years, private antitrust claims, certainly those alleging price-fixing or other per se violations in which conduct is conclusively presumed to be anticompetitive, were thought to be especially suited for class treatment. Typically, a single course of conduct affected thousands, if not millions, of persons or entities. The aggregate harm might be significant, but in many situations, the amount of individual damages was too small for a single plaintiff to pursue a claim. If single plaintiffs did pursue their claims individually, the courts might be inundated with cases challenging the same conduct. The class action, therefore, seemed tailor-made for private antitrust litigation, so much so that for a number of years courts routinely certified antitrust class actions with little factual inquiry. In fact, as late as 1997, the United States Supreme Court cited antitrust claims as being especially amenable for resolution on a classwide basis.[5]

In the past ten years, however, the landscape has changed. Prompted by developments in class action law generally, antitrust class actions have undergone a significant evolution. Today, no longer is certification of a damages claim a foregone conclusion. Rather, the United States Supreme Court has instructed federal trial courts to undertake a rigorous analysis of the requirements of Rule 23 of the Federal Rules of Civil Procedure to ensure that a case is amenable to class treatment. That analysis may include extensive factual inquiry and may touch on the merits of a claim and includes

3 *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (2011) (internal citation omitted).

4 *See, e.g.*, *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013); *California v. ARC America Corp.*, 490 U.S. 93 (1989) (federal rule limiting private antitrust damage recoveries to direct purchasers does not preclude indirect purchasers from recovering damages for the same conduct under state antitrust law).

5 *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

resolution of factual disputes relevant to the certification inquiry. In antitrust, that evolution has most recently been seen in the predominance inquiry, the requirement that common questions of law or fact predominate over individual questions. Today, many antirust class actions, even those in cases in which there is little doubt about the existence of an underlying violation of the law, may founder on this issue. In the past, the courts, with little factual inquiry, often held that common issues predominated in antitrust cases. That is not true any more. Now, courts effectively require named plaintiffs to establish with evidence at a relatively early stage of the litigation that they have a reasonable methodology, based on evidence applicable to the class as a whole, that will allow the factfinder to determine whether the challenged conduct has affected and injured all or substantially all members of the class.[6] The failure to make a showing that such a methodology exists precludes certification of a damages class.

I. WHAT IS NECESSARY TO CERTIFY AN ANTITRUST CLASS ACTION IN THE UNITED STATES?

A. *The Requirements for Certification of an Antitrust Class Action*

Most antitrust class actions in the United States are brought under section 1 of the Sherman Act, which is the basic U.S. competition law statute. That statute prohibits "every contract, combination . . . and conspiracy in restraint of trade."[7] But to recover damages, private plaintiffs must do more than show a violation of the Sherman Act. They must also show antitrust injury, which is an actual injury suffered by the plaintiff flowing from an anticompetitive aspect of the challenged conduct.[8] Without a showing of antitrust injury, private plaintiffs lose their cases even if they establish that defendants' conduct violates the Sherman Act. As we explain, that requirement has become increasingly important in class action analysis in recent years.

Antitrust damages class actions are subject to the same procedural rules applicable to damages class actions in any substantive area of law. To obtain class certification, a plaintiff must satisfy six elements:

1. Numerosity – The proposed class must be so numerous that joinder of all potential plaintiffs in a single suit is not practical. In most antitrust class actions, the numerosity requirement is easily met, especially when the putative class is a group of consumers.

2. Commonality – There must be at least one question of law or fact common to every member of the class. In most antitrust class actions, the requirement is often satisfied because the existence of concerted action, anticompetitive effects, and injury to class members are typically common issues applicable to all. A legal or factual question is "common" to the class if a single litigation proceeding may determine its outcome for all or substantially all of the absent class members.

3. Typicality – The named plaintiff – that is, the person who wishes to represent the class – must have claims that are typical of those of other class members. This means that the named plaintiff's claim must be arise from the same course of conduct and raise the same legal theory as claims of the absent class members. Minor factual differences will not defeat typicality if the named plaintiff's claim meets

6 *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) (classwide injury and damages theory must be limited to injuries and damages occurring from anticompetitive conduct challenged on the merits); *In re New Motor Vehicles Canadian Export Litigation*, 522 F.3d 6, 20 (1st Cir. 2008) ("In antitrust class actions, common issues do not predominate if the fact of antitrust violation and the fact of antitrust impact cannot be established through common proof.").

7 15 U.S.C. § 1.

8 *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

those requirements. Typicality will not be present, however, when the named plaintiff is subject to a unique defense, such as lack of standing, statute of limitations, obligation to arbitrate, or some other defense that could potentially cause the named plaintiff to put her own interest ahead of those of members of the class.

4. Adequacy of Representation – The named plaintiff must be an adequate representative of the class. This element addresses three issues. First, the named plaintiff must be a member of the class, and her interests must not conflict with those of absent class members that she wishes to represent. Second, the named plaintiff must be willing to prosecute the claims vigorously on behalf of all class members. Third, counsel for the class must be competent and able to represent it zealously. While courts sometimes deny certification in antitrust damages class actions on the second and third issues, more often, if certification is denied for lack of adequacy, it is because the named plaintiff has some interest that is antagonistic to the interests of absent class members. A named plaintiff that cannot meet the typicality requirement will, in many cases, also be an inadequate class representative.

5. Predominance – The common issues of fact or law identified under the commonality element must predominate over the individual issues applicable to class members. This inquiry is more demanding than the commonality requirement.[9] In other words, the principal focus of the litigation must be the common questions identified in the commonality inquiry. If proof of essential elements of the claim require individual inquiry to resolve, then common questions do not predominate. This element has become a central focus of antitrust damages class actions, as we discuss below.

6. Superiority – A class must be a superior means for resolving the litigation when compared to individual litigation. This determination turns on a number of factors, including: (a) class members' interests in individually controlling prosecution of separate actions; (b) the nature and extent of any litigation concerning the challenged conduct already begun by class members; (c) the desirability (or lack thereof) of concentrating the litigation in a single forum; and (d) likely difficulties in managing a class action. Superiority is a fact-bound inquiry and will vary depending on the facts and circumstances of the litigation.

In addition to these express requirements, a number of courts hold that the class must be "ascertainable" – that is, identifying the persons in the class must be possible and feasible.[10]

Before certifying a class, a court must rigorously analyze each of these elements and make a determination that the facts to support a finding that each has been satisfied. Failure to meet any one of these elements means a case cannot be certified as a class action.

B. *Predominance as the Central Focus in Antitrust Damages Class Actions*

As we note, in the early years of class actions, the courts regularly certified antitrust damages classes with little analysis of whether common questions predominated over individual inquiries. Indeed, as late as 1997, the Supreme Court in dicta stated that "[p]redominance is a test readily met in certain cases alleging . . . violations of the

9 *Comcast Corp.*, 133 S. Ct. at 1432; *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 187 (3d Cir. 2001).

10 *Carrera v. Bayer Corp.*, 727 F.3d 300, 305-08 (3d Cir. 2013) (class not ascertainable when individual fact-finding required to show membership in the class).

antitrust laws."[11] Today, however, as a number of recent cases show, predominance is not as "readily" established as the Supreme Court's dictum in *Amchen* may have suggested. Courts are focusing far more on the predominance inquiry, especially as it relates to whether a named plaintiff can establish classwide injury resulting from the challenged conduct. In fact, today, predominance is often the fulcrum of antitrust damages class actions, which rise or fall on whether a named plaintiff can show that the challenged conduct injured all or substantially all members of the class using evidence that is applicable to the class as a whole.

To understand why this inquiry is so important, the focus is on what is actually litigated in many antitrust class actions. The antitrust injury requirement is crucial in civil antitrust litigation in the United States. Without a showing of antitrust injury, not only does a plaintiff not recover any damages, but judgment is entered for the defendants. Thus, as a number of courts have noted, injury is the gravamen of the private antitrust action.[12] Unless that issue can be resolved for virtually all class members using evidence common to all of them, individual questions will predominate over common questions. Particularly when the existence of a conspiracy is readily established, such as by a finding of unlawful agreement in a prior government proceeding, the antitrust inquiry may become the only significant issue to be litigated in a private damages case. Unless that issue can be resolved on a classwide basis, however, an antitrust damages class may not be certified.

Since proof of classwide injury from common evidence is often the central issue in antitrust class actions today, the analysis often turns on expert testimony. Most commonly, antitrust plaintiffs seeking class certification will offer testimony from an economist who will put forth a methodology attempting to show that they can demonstrate that the challenged conduct harmed each and every member of the class, or at the very least a methodology that can determine whether each and every member of the class has been harmed, and the amount of aggregate damages suffered by the class. Named plaintiffs do not have to prove that the challenged conduct actually harms each member of the class at the class certification stage. Rather, their burden is to show that the question *can be answered* for all class members, whether the answer be affirmative or negative, in a single proceeding and on the basis of evidence applicable to all class members. Defendants, on the other hand, will typically offer contrary expert economic testimony explaining why injury to class members cannot be established on a classwide basis or necessarily requires individualized inquiry.

The courts must conduct a rigorous analysis of the evidence offered on predominance (and any other elements of class certification that are contested) and resolve any factual disputes. In the past, courts often accepted assertions that plaintiffs could or would develop a methodology to establish injury to class members. But today, such assertions are not accepted. The allegations must be supported by concrete evidence. When the issue turns on the conflicting evidence of economic experts, the trial judge must now determine which expert is more credible and offers the sounder economic analysis. Often that determination hinges on the judge's view of the thoroughness of the economic analysis and how closely it fits with the factual evidence presented and on which it is based. Moreover, courts no longer shy away from at least some inquiry into the merits of the injury issue at the class certification stage.

C. *The Practical Effect of the Evolution of the Predominance Inquiry in Antitrust Damages Class Actions*

The ramifications of this evolution from limited factual inquiry and ready finding

11 *Amchem Prods., Inc.*, 521 U.S. at 625.

12 *Windham v. American Brands, Inc.*, 565 F.2d 59, 66 (4th Cir. 1977) ("The gravamen of the [private antitrust] complaint is not the conspiracy; the crux of the action is injury, individual injury."); *Burnham Chem. Co. v. Borax Consol.*, 170 F.2d 569, 571 (9th Cir. 1948).

of predominance to a rigorous inquiry into whether antitrust injury can be established on a classwide basis using evidence applicable to the class as a whole has great practical significance. In antitrust damages class actions, the class certification decision often determines the outcome of the litigation. Antitrust damages class actions are rarely tried. Antitrust defendants in cases with certified classes usually face enormous potential liabilities; prevailing plaintiffs recover three times their actual damages plus costs and reasonable attorneys' fees. In addition, liability for defendants is joint and several, meaning that a prevailing plaintiff can collect the entire judgment from one defendant, even if that defendant sold only a small percentage of the product affected by the violation. A defendant that pays the entire judgment has no claim for contribution or indemnity against other defendants. With the size of the potential liabilities and the risk of being obligated to pay the full amount of any judgment, few defendants will risk a trial. Certification of a class, therefore, almost always forces defendants to settle.

On the other hand, denial of class certification often effectively ends the lawsuit. Particularly in consumer antitrust class actions in which individual damages are small, the inability to aggregate many claims into a single proceeding means that, even with the prospect of recovering attorneys' fees, the value of the claim is too low to justify further investment in the litigation. That is particularly true for plaintiffs' counsel, most of whom are paid a percentage of what they recover. Thus, in a real sense the class certification decision is tantamount to a trial for plaintiffs as well.

II. CONCLUSION

Given the stakes, the shift in the last decade to fact-intensive inquiries on the elements of class certification, particularly the demand that requirement that named show that classwide injury can be established using evidence common to the class as a whole are significant developments. No longer are antitrust damages class actions routinely certified with little factual inquiry, forcing defendants into settlements of potentially marginal claims. Rather, the courts focus extensively now on whether named plaintiffs can prove injury to class members on the entire class before permitting cases to proceed on a class basis. While the damages class action remains a potent weapon in the arsenal of antitrust plaintiffs, doctrinal developments in the last ten years, most notably the focus on antitrust injury and predominance, have given defendants the ability to contest and to defeat certification motions in antitrust cases that routinely were granted in the past.

CONSUMER COMPENSATION AND PRIVATE ANTITRUST ENFORCEMENT IN THE UNITED KINGDOM – SETTING A TREND FOR EUROPE?

BY **SEBASTIAN PEYER** [1]

1 Lecturer in Law, UEA Law School, University of East Anglia and Centre for Competition Policy. The author can be contacted at s.peyer@uea.ac.uk

I. INTRODUCTION

In past years the compensation of victims of anticompetitive activity has been high on the agenda in Europe and the United Kingdom. It has been acknowledged that many of those who were overcharged by firms breaching EU or U.K. competition law are not compensated for their losses. Breaches of competition law typically cause relatively small individual losses to consumers and businesses, especially when they are passed on along the chain of production. For many harmed individuals the costs of litigation outweigh the potential benefits. Claim aggregation is one way to address the issue: One representative is allowed to bring an action on behalf of all victims and the accumulated claims make it worthwhile to initiate legal proceedings against the culprits. While many EU Member States have proceeded gingerly on the road to group actions, the idea finally seems to be catching on. Despite the still prevalent cautious attitude towards "U.S.-style class action" – many stakeholders still hold on to the view that there is a "U.S. litigation culture" in which class actions are rampant and innocent firms are being blackmailed into settlements – policy makers have begun to introduce measures that aim at more flexibility with regards to group claims. Denmark introduced (opt-out) group actions in 2008, Italy in 2009 (opt-in) and the Netherlands have adopted an opt-out settlement procedure. The EU Commission identified a need for a coherent EU-wide approach and recommended Common Principles for group actions in 2013. The Common Principles favor an opt-in group action, i.e. a procedure in which every claimant has to be identified and explicitly join the claim, and a loser pays rule. In 2015, the U.K. government introduced opt-out group actions for claims based on breaches of competition law. The Consumer Rights Act 2015 sets out the details of the new class action regime and also introduces the opportunity for undertakings to set up a voluntary consumer redress scheme that can be approved by the U.K. Competition and Markets Authority ("CMA"). These legal innovations in one of the larger economies in the EU may well encourage other Member States to become more adventurous too. The U.K. government has certainly gone beyond the Commission's recommendation on group actions that confined group actions to opt-in procedures. In this short article I will summarize the recent developments and look at the potential implications of the U.K. developments.

II. THE NEED FOR BETTER COMPENSATION TOOLS

The U.K. system of private antitrust enforcement had long been criticized for being ineffective in compensating small businesses and consumers. Tools to aggregate claims had been available for some time but they proved to be ineffective. The Civil Procedure rules provide for representative actions in CPR 19.6 according to which a claim can be brought by a representative when more than one person has the same interest in the claim. However, this route to class actions was shut in *Emerald Supplies v. British Airways* (2010) when the High Court held that it was not possible to determine the "same interest" of all members of the class until the question of liability had been tried. The High Court also denied a mass claim on behalf of 64,697 claimants in another case against British Airways (*Bao Xiang v. British Airways* (2015)) because the solicitors had not obtained proper authorization from the purported claimants.

Another route to seek compensation for breaches of competition law was provided by the old section 47B of the Competition Act 1998. It gave specified bodies the right to bring a competition claim on behalf of consumers in the Competition Appeal Tribunal – a specialist competition court that hears appeals against decisions of the competition authorities as well as private antitrust claims. When section 47B (old) was in force, only the consumer organization called "Which?" received the status of a specified body. Under the old regime the representative had to identify individual consumers that had suffered a loss and encourage them to join the claim

(opt-in). This proved to be burdensome for the consumer organization. In the only opt-in representative action, "Which?" sued JJB Sports for fixing prices of Manchester United and England replica football shirts. The consumer organization was able to identify 130 individuals – a tiny fraction of those who were harmed. The case settled and it is estimated that the procedure provided benefits of around £20,000 whereas the costs were likely to be in the region of several hundred thousand.

The limitations of the old system for group compensation were obvious. The opt-in representative action had too narrow a focus and the consumer organization "Which?" made clear that it would not try to bring another case under section 47B (old). The opt-in consumer action was restricted to follow-on proceedings and there was no latitude to prove an infringement beyond the scope and timeframe that had been established by the competition authority. More importantly, the opt-in nature made it difficult to aggregate a sufficient number of claims to make the proceedings financially viable. Apart from the compensation problems, the ineffective system to deal with dispersed losses also raised fundamental questions about the deterrence effect of private antitrust claims. In response to the criticism, the U.K. government introduced an opt-out group action as well as a voluntary consumer redress scheme with the Consumer Rights Act 2015.

III. THE OPT-OUT GROUP ACTION

The Consumer Rights Act 2015 completely replaced section 47B. The new section 47B permits opt-out collective actions to be brought as either stand-alone or follow-on cases on behalf of U.K. citizens in the CAT; non-U.K. consumer can join a group action on an opt-in basis. According to section 47B (new), collective actions are a combination of two or more claims, brought either as stand-alone or follow-on damages actions or injunction claims for breaches of U.K. or EU competition law. A representative can combine two or more claims if they deal with the same, similar or related issues of fact or law. The representative can be a member of the class but this is not a compulsory requirement. However, the BIS consultation of 2012 indicated some reluctance to accept collective actions from entities that are not members of the class, especially law firms. According to the CAT Rules consumer organizations and other claim vehicles are allowed to bring claims but the Tribunal will consider whether it is just and reasonable to do so.

The material test for the new class action appears to be modelled after Rule 23(a)(b)(3) of the U.S. Federal Rules of Civil Procedure. Section 47(B) is fairly generous stating that claims are eligible for collective proceedings if "they raise the same, similar or related issues of fact or law." The CAT rules specify the requirements: The claim can be brought if the lead claimant represents an identifiable class of persons and raises common issues that are suitable to be brought in collective proceedings. Unlike the U.S. class action rules, there is no numerosity requirement, i.e. a rule stating explicitly that a joinder of claims must be impractical. It has been pointed out that the opt-out class action may not be available to claimants for years to come due to the unfortunate phrasing of the rules that guide the transition from the old regime to the reformed opt-out process.[2] In essence, the transition rules declare the time when the damage accrued as the point of reference for the use of section 47B (new). Infringements of competition law are often discovered many years after they occurred and those infringements that occurred before 2015 will have to be dealt with under the old, ineffective regime if the transition rules are taken at face value. Even if the courts find a way around this, it may take a while before the first opt-out group action is being brought.

Even if the transition period can be adjusted, the Consumer Rights Act 2015 has

2 http://competitionbulletin.com/2015/10/01/private-actions-the-cra-2015-giveth-and-the-2015-cat-rules-taketh-away/.

built safeguards into the class action regime that are to prevent the emergence of a "litigation culture" and "speculative litigation" because the government and many stakeholders had expressed concerns during the drafting process that opt-out class actions may lead to excessive litigation and litigation blackmail. For example, section 47C (1) prohibits exemplary damages. Exemplary damages are rarely awarded in English civil litigation *2 Travel Group Plc v. Cardiff City Transport Services* Ltd being the only competition case where the defendant was punished. Exemplary damages are not normally available in follow-on proceedings as they would punish the offender twice. Even if they were available, potential windfall profits from exemplary damages are unlikely to play a large role in the claimant's profit calculation and, thus, have probably little influence on the incentives to bring an opt-out class action.

Section 47C (8) (new) is potentially more limiting, declaring damages-based funding agreements unenforceable. Under a damages-based agreement the lawyer's pay is determined by a percentage of the damages award if the case is won. The damages-based funding agreement would allow lawyers to pursue a claim without financial risk to the claimants. While damages-based agreements are prohibited, conditional fee agreements, i.e. so-called "no-win, no-fee" agreements, are still permitted. In a "no-win, no-fee" agreement, the lawyer's fee is normally based on an hourly rate with a success fee if the case is won. The Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 does no longer permit claimants to recover the success fee from the defendant (or the costs of after-the-event insurance if it is taken out). It means that the claimant has to pay the success fee, after-the-event insurance premium or, for example, costs for experts out of the damages award. In a jurisdiction with high litigation cost this can be substantial. The success fee that the claimant has to pay is likely to reduce the potential gains from litigation and will lessen the incentives to bring class actions. Section 47C (6) stipulates that representatives can request that unclaimed sums of money are to be paid to them to cover the litigation expenses. However, this payment is rather uncertain. Overall, the opt-out class action certainly requires some fine-tuning and the next few years will show whether the procedure is being used to claim compensation.

IV. THE CONSUMER REDRESS SCHEME

If class litigation is intended to be the stick with which to threaten infringers, the U.K. government has also offered a carrot in the shape of a voluntary consumer redress scheme that may encourage firms to offer compensation to consumers in exchange for a discount on the fine. The Consumer Rights Act 2015 encourages firms to settle their disputes and set up compensation funds for consumers. The new sections 49C-49E of the Competition Act 1998 give powers to the Competition and Markets Authority to approve such voluntary redress schemes. The idea of the redress scheme is to provide more effective compensation to victims of anticompetitive conduct and, at the same time, avoid the risks and expenses of litigation. Companies that apply for the redress scheme during the investigation process may receive a discount on the fine of up to 20% of that fine. This discount can only be applied by the CMA and cannot be offered to firms that have been fined by the EU Commission. Parties compensated under the scheme will normally lose their right to claim compensation in the courts. Under the redress scheme, a company that has infringed competition law may apply to the CMA for approval of a redress scheme during or after the public investigation has been completed. In both instances the redress scheme will be approved at the same times as the infringement decision or afterwards. In making the decision, the CMA has to evaluate the scheme, taking into account the amount or the value of the compensation offered under the scheme, the setup and the governance of the scheme. Once the scheme has been approved, individuals can claim compensation against production of adequate evidence. More details on the appli-

cation and approval of redress schemes are provided in the CMA's Guidance document.

It is generally a good idea to avoid costly litigation and solve disputes pre-judicially. However, the redress scheme may be open to misuse and undermine the efforts to establish an opt-out class action regime. I have criticized the Guidance in more detail elsewhere but there is one point that becomes rather important in the light of the new group action regime.[3] Assuming that even a low compensation offer is better than no compensation (given that courts are too expensive), there is a risk that the Consumer Redress Scheme may be used strategically to undermine opt-out class actions. It is in the nature of settlements, like the Consumer Redress Scheme, that individuals gain nominally lower but hassle-free compensation. Those who claim compensation under the redress scheme will not be able to claim compensation in the courts. Consequently, a successful redress scheme will reduce the size of the potential class of claimants. It is also unlikely that all injured consumers will come forward, leaving a class of injured parties without compensation. Thus, the redress scheme could be used to reduce the size of a class of potential claimants to the point where it is no longer profitable to bring a collective action on behalf of those who are dissatisfied with the settlement offer and decided not to make use of it. It may also make it more difficult to estimate the size of the class but some kind of limited disclosure may help with this problem. Finally, when certifying a group action the CAT takes into account whether there have been any efforts to resolve the dispute outside the courts, e.g. via an approved redress scheme. Thus, setting up a redress scheme may help to demonstrate that a collective action is not needed to dispose of the dispute.

The involvement of the U.K. competition authority in approving a settlement agreement between companies and consumers raises questions as to the role competition authorities ought to play in compensation claims. Competition authorities commonly fine a company that is subsequently asked to pay out compensation either by settling with groups of consumers or by paying a damages award following litigation. In the current system the competition authority deals with the entire case bar the calculation of the overcharge although it is probably best placed to obtain the relevant information, including data proving overcharges. If compensation is deemed so important, would it not make more sense to involve the competition authority in the provision of compensation (calculation)? The division of private compensation and public enforcement creates two layers of enforcement that are fairly disconnected. Many issues that have been (or could have been) addressed on the public level are (re) litigated on the private enforcement level. If an authority based its fines on overcharges, it would potentially raise the overall punishment (i.e. public fines and private damages added together) and facilitate the coordination of public and private enforcement. I admit that this may be an unpopular proposal with the authorities as their fining guidelines look at crude measures for harm such as affected markets with various factors that reduce or increase the fine. However, the existing system potentially creates more waste by duplicating enforcement efforts. Having the competition authority to approve a redress scheme can only be the beginning of a better integration of public and private enforcement.

V. OUTLOOK

What do the developments in the United Kingdom mean for private antitrust enforcement in Europe? It is likely that some Member States will follow the U.K.'s template if they are not already contemplating similar measures. EU Member States have been reluctant to accept that consumers will only receive some kind of compensation if legal devices are created that would allow claims to be aggregated. More recently, policy makers appear to open up to the

3 For my criticism on the draft Rules see https://competitionpolicy.wordpress.com/2015/06/12/why-harmed-consumers-may-be-more-satisfied-in-the-future-the-cmas-new-redress-scheme/.

full potential of private antitrust enforcement. While class actions are certainly a viable option to provide compensation, schemes like, for example, the consumer redress scheme that avoid courts may be a good alternative. Litigation is costly and if parties can agree on some kind of adjustment for the harm suffered from breaches of the competition rules outside court, it would help to save resources. The U.K. experience with opt-in class actions has also been a striking demonstration why this type of group compensation may not be worthwhile in antitrust enforcement.

Despite the recent developments, some problems remain with the direction of private antitrust policy. U.K. and EU policy makers view private antitrust actions litigation primarily as a tool to compensate. This is too narrow a focus. It essentially ignores two important aspects of private antitrust enforcement: deterrence and the wider range of remedies available. If group actions are used to their full potential, they may not only help to compensate victims but hey will also create a threat for those undertakings that consider a breach of the antitrust laws. It is commonly held in Europe that public authorities provide deterrence and private antitrust enforcement pursues a compensation function only. Given that fines are regularly reduced on appeal and there is little evidence that public authorities over-deter, this sounds like a fanciful division of functions. If private antitrust actions in general, and group claims in particular, were used to their full potential, they could help to properly deter firms from breaching the antitrust laws in the first place, thus, reducing the need for costly legal actions to compensate. An add-on to this argument is that the current focus on compensation may justify the existence of damages group actions but it fails to include, for example, injunctions. Section 47B (new) permits victims of anticompetitive conduct to bring an injunction group claim. The existence of this remedy cannot be reconciled with a compensation-based approach. Overall, the new measures introduced to facilitate compensation for consumers may have a long-term effect by influencing other European jurisdictions as well as the policy debate about the role of private antitrust enforcement.

BALANCING PUBLIC AND PRIVATE ENFORCEMENT – AN AUSTRALIAN PERSPECTIVE

BY **REBECCA GILSENAN** [1]
& **MARCUS BEZZI** [2]

1 Principal, Maurice Blackburn Lawyers

2 Executive General Manager, Competition Enforcement, Australian Competition and Consumer Commission. Unless specifically noted as ACCC or Government positions, the views expressed in the paper expressing a "public enforcement perspective" are those of Marcus and do not necessarily reflect any official ACCC position or the views of ACCC Commissioners or other senior ACCC officials.

I. INTRODUCTION

This paper is written from two perspectives. In part 1 Rebecca discusses the current state of private enforcement of cartel laws in Australia. In part 2 Marcus provides a flavor of recent public enforcement cases in Australia and then they each discuss a recent Australian Government Competition Policy Review Committee *('the Harper Committee")* reform proposal designed to improve private competition enforcement. The focus is on recommendation 41 of the Harper Committee report that relates to private actions and which has been considered and now accepted by the Australian Government.

II. THE PRIVATE ENFORCEMENT PERSPECTIVE

Private enforcement of laws prohibiting cartel conduct in Australia has been rare and has dwindled to almost nothing in recent years. To the extent that there has been some private enforcement, it has largely been in the form of class actions on behalf of the victims of cartel conduct who are seeking to recover compensation for their losses. The rarity of private enforcement actions in relation to cartel conduct in Australia is in contrast to the frequent public enforcement by the Australian Competition and Consumer Commission (ACCC). This tends to indicate that the absence of private enforcement is not due to a lack of cartel conduct occurring. It is also in particular contrast to the fact that cartel class actions are both very common and far more numerous than public enforcement actions in the United States.

In Australia, private enforcement action is expensive, complex, slow and difficult to conclude. For all but the wealthiest of companies, private enforcement is inaccessible. Even in the context of class actions, where litigants can band together to share in the cost and may be able to access litigation funding for the action, the legal costs are disproportionately high.

A recent empirical study of class actions in Australia found that in the first 22 years of operation of the Federal Court of Australia's class action regime, just five (or 1.5 percent) of class actions were cartel claims.[3] Those claims alleged cartel conduct in the domestic pre-mixed concrete industry, the international animal nutrition vitamins industry, the domestic corrugated fiberboard packaging industry, the international air cargo industry and the international rubber chemicals industry. No cartel class actions are currently underway and none have been commenced since 2007. After 2007, there has been just one private enforcement action that was in part based on cartel conduct (albeit not a class action) determined under the cartel provisions of the Competition and Consumer Act ("CCA").[4]

At a time when steps are being taken in Europe, including in the United Kingdom, to strengthen, increase and simplify private enforcement and where it is already vigorous in the United States and to a lesser but still significant extent in Canada, in Australia it has dwindled to the point of virtual extinction. This is regrettable, since private enforcement provides compensation to the victims of cartel conduct, it increases deterrence by ensuring that the risks outweigh the potential benefits and it does not consume limited public resources. For these reasons, private enforcement strengthens the effect of competition laws, enhances consumer welfare and complements publicly funded enforcement action.

One of the reasons that private enforcement is so rare is because of the significant challenges faced in running cartel class actions. The cartel class actions that have been brought have taken around five or more years to resolve. This is in contrast to the average duration of all types of class actions that was

3 Vince Morabito, "An Empirical Study Of Australia's Class Action Regimes, Third Report, *Class Action Facts And Figures – Five Years Later*" (2014) <http://ssrn.com/abstract=2523275>.

4 *Norcast S.ár.L* v *Bradken Limited (No 2)* [2013] FCA 235 (Gordon J).

around two years[5] and the average duration of the public enforcement proceedings commenced and concluded by the ACCC since 2007 was less than two years. Despite their long duration, only one cartel class action has reached the stage of trial. The cases were beset by protracted interlocutory disputes about pleadings, access to regulator documents and work product, the scope of discovery, and jurisdiction and related issues such as ministerial consent to rely on extra-territorial conduct.

The main challenges faced in private prosecutions of cartel conduct in Australia include:

(a) the fundamental challenge of proving covert conduct in the absence of investigative powers, such as examinations or depositions, or access to regulator materials. Closely related to this is the struggle to obtain adequate documentary discovery;

(b) uncertainty that arises in relation to limitation periods where contravening conduct is covert and may not be discovered until some years after it has started;

(c) uncertainty in relation to the use to which admissions of contraventions elsewhere might be put in a private enforcement action;

(d) the cost and complexity of proving and quantifying loss which is compounded by the fact that no Australian court has made a determination as to the appropriate method or methods by which to measure the loss caused by price-fixing;

(e) uncertainty as to the treatment of 'pass through' of losses in the supply chain;

(f) the inability of Australian courts to make 'bar orders' that would facilitate early settlement by some parties where not all parties are willing to settle and would allow private litigants to obtain co-operation from willing parties;[6]

(g) uncertainty in relation to the scope of the business residence test as it applies to participants in overseas cartel conduct that has an impact in Australia; and

(h) the absence of any "cy-pres"[7] remedies that would facilitate the distribution of quantified losses where it is not possible to specifically identify victims.

In cartel class actions, these difficulties are amplified due to the high stakes nature of class action litigation as well as procedural complexities that attend class actions generally. The terms of reference of the Harper Review included considering whether enforcement and redress mechanisms can be effectively used by people, in particular small business, to enforce their rights. It is in this context that the Harper Review examined some of the areas that have created challenges for private

5 Vince Morabito, "An Empirical Study Of Australia's Class Action Regimes, Third Report, *Class Action Facts And Figures – Five Years Later* (2014)" <http://ssrn.com/abstract=2523275>.

6 The prospect of contribution claims makes it virtually impossible to settle a private enforcement action involving more than one respondent unless settlement can be reached with all respondents. Bar orders would block non-settling respondents from claiming contribution from a settling respondent.

7 In the context of a class action, a cy-pres mechanism is one that would facilitate the distribution of some or all of a pool of damages to a charitable cause, the objects of which are usually consistent with or promote the interests of class members. Such a mechanism would be employed where it is not economically rational to distribute the fund to class members, for example where per capita damages are very small, not possible to distribute to class members or where part of the pool of damages remains unclaimed.

enforcement of cartel laws. The recommendations of the Harper Review, if implemented, would go some way to alleviating some of the difficulties however substantial impediments would remain.

III. THE PUBLIC ENFORCEMENT PERSPECTIVE

A. Recent Public Law Enforcement Highlights

The ACCC has a very active program of public competition law enforcement. In recent years it has had sufficient resources to enable it to investigate and take enforcement action in between six and eight complex matters each year. This includes misuse of market power, exclusionary conduct and cartel cases. Some recent cases illustrating the breadth and scope of the ACCC's public enforcement include:

- *The "Informed Sources" litigation* – Proceedings taken by the ACCC against a number of petrol retailers and a price collection and exchange service – resolved by the ACCC accepting commitments from petrol retailers to only subscribe to a petrol price exchange service if the service shares the information exchanged with consumers and certain regulators, researchers and third parties.

- *Visa Worldwide Pte Ltd* – The Federal Court ordered Visa Worldwide to pay a pecuniary penalty of $18 million for engaging in anti-competitive conduct.

- *Renegade Gas Pty Ltd, Speed-E-Gas (NSW) Pty Ltd* and 3 current and former senior executives were penalized a total of $8.3 million for engaging in a cartel in the Sydney region over many years.

- *Air cargo* – 13 airlines have paid a total of $98.5 million to date for cartel conduct, including:
  - Malaysia Airlines - $6 million
  - Korean Airlines - $5.5 million
  - Japan Airlines - $5.5 million
  - Emirates - $10 million
  - Singapore airlines - $11.75 million
  - Cathay Pacific - $11.25 million
  - Thai airways International - $7.5 million
  - Garuda and Air NZ are subject to appeal.

- *Mitsubishi Electric* ordered to pay a $2.2 million penalty for resale price maintenance.

- *NSK Australia and Koyo* – $3 million and $2 million penalties for cartel conduct.

- *Yazaki Corporation* – The Federal Court recently determined that Yazaki Corporation engaged in collusive conduct with its competitor in the supply of wire harnesses to Toyota Motor Corporation (Toyota) in Australia – a penalty is to be determined in a separate hearing.

The ACCC also has a busy civil litigation program and a very active Serious Cartel Group. That group is working closely with the Commonwealth Director of Public Prosecutions in considering whether there is a basis for taking a criminal prosecution in respect of alleged cartel conduct investigated by the ACCC.

B. Private Enforcement And The ACCC

There have been very few private competition law enforcement cases in recent years. These include a class action relating to the *Air Cargo* case and *Norcast SarL v. Bradken Ltd* [2013] FCA 235 and [2013] FCA 283.

Nevertheless, the ACCC recognizes that private rights of action are an important aspect of competition law enforcement in Australia. Generally they may benefit from related ACCC investigations and proceedings under the CCA, such as in the air cargo case, but in practice such 'follow-on' action has occurred most commonly in the context of cartels.

The ACCC's aims are not identical to those of private action litigants, who primar-

ily seek to recover or prevent loss suffered as a result of CCA contraventions. The level of damages recoverable in a private action is unaffected by fines or penalties that may be awarded as a result of public enforcement. However, there is some judicial support for the suggestion that payment of compensation or restitution to those adversely affected by the illegal conduct may mitigate a penalty [*ACCC v. Bridgestone Corporation* (2010) 186 FCR 214, 223, Justice Finkelstein J (at para. 40)].

Private enforcement can be a useful complement to public enforcement in building compliance and deterring anti-competitive conduct, since it enables action against wrongdoers where the ACCC is not able to respond within its priorities and allocated budget.

Private actions have also helped develop significant judicial precedent relevant to Australian competition law. The ACCC may intervene in private proceedings on matters of general public importance or to clarify the law. High Court examples of such ACCC interventions in the public interest include *NT Power Generation Pty Ltd v. Power & Water Authority* [2004] HCA 48; *Queensland Wire Industries v. Broken Hill Pty Co Ltd* [1989] HCA 6 and *Melway Publishing Pty Ltd v. Robert Hicks Pty Ltd* [2001] HCA 13.

C. *The Harper Committee Recommendations On Private Actions*

Recommendation 41 of the Harper Committee is to amend section 83 of the CCA to allow admissions of fact in a case brought by the ACCC, in addition to findings of fact made by the court in such a case, to be relied upon in subsequent private action.

The Australian Government has announced that it supports the recommendation and intends to develop exposure draft legislation for consultation with the public and states and territories to allow private parties to rely on admissions of fact made in another proceeding.

IV. SECTION 83 AND ADMISSIONS OF FACT - THE ACCC PERSPECTIVE

The ACCC supports the proposed amendment. It considers that it is likely that it will facilitate private enforcement and be a significant complement to public enforcement in building compliance and deterring anti-competitive conduct. Effective deterrence occurs where sanctions, having regard to the likelihood of detection and conviction, outweigh the gains associated with a contravention. The threat of increased 'sanctions' in the form of damages payouts resulting from private litigation can play a vital role in a firm's consideration of the costs and benefits of engaging in anti-competitive conduct.

There are two main categories of private litigation that were relevant to the Harper Committee's considerations, first instance litigation and follow-on actions.

First instance litigation matters are those run by private parties from commencement, with no material involvement by the ACCC. By contrast, follow-on actions are those where private parties seek damages against a firm that has already been found to be in contravention of the CCA by virtue of litigation by the ACCC.

The Committee's recommendation regarding section 83 relates particularly to these latter types of action.

Section 83 assists private actions by making findings of fact that established a contravention in ACCC proceedings to be prima facie evidence of the same facts in later proceedings, including private actions. Its greatest weakness is that certain court decisions interpret findings of fact to mean those made after a contested hearing, but not a settlement hearing in which formal admissions

are made[8]. The Harper Report concluded that section 83 would be more effective if it applied to admissions of fact made in another proceeding, in addition to findings of fact, to remove doubt about its operation [Harper Report pp.71-71, 407-409].

The ACCC raised two concerns about this during the Harper Review process. First, that firms may be less likely to cooperate under the ACCC's Immunity and Cooperation Policy if admissions made to the ACCC may be used in private proceedings. Admissions by cartel participants (other than the immunity applicant) are commonly made in settlement of ACCC proceedings in the form of "agreed facts". These evidence the contraventions on which the parties submit a settlement to the Court. Secondly, the ACCC raised the concern with the section 83 proposal that respondents may be less willing to settle at all with the ACCC, less willing to agree to facts, or willing only to agree to limited facts, meaning more matters would have to be fully litigated.

In principle the ACCC agrees that greater deterrence would be achieved if – all else equal – it were simpler for private firms to pursue such follow-on actions.

Ultimately the ACCC supports the final Harper Committee recommendation. While it may impact on cooperating parties who are not immunity applicants we expect the recommendation will be unlikely to have any impact on the rights or incentives of immunity applicants. This is because immunity applicants do not make admissions of fact in proceedings taken by the ACCC or the Commonwealth Director of Public Prosecutions.

If implemented, both the admissions of fact made by a person in proceedings brought by the ACCC, together with the findings of fact made by the Court, will be available for persons willing to take private action for the harm suffered from anti-competitive conduct. This has some potential to simplify and expedite the process for private litigants as the essential issues that were relied upon by a Court in finding a contravention in the ACCC proceedings may not be in issue in the private proceedings and could facilitate greater access to justice, particularly for businesses that have been impacted by anti-competitive conduct.

V. SECTION 83 AND ADMISSIONS OF FACT – THE PRIVATE ENFORCEMENT PERSPECTIVE

Unsurprisingly, the proponents of private enforcement actions are very much in favor of this reform. Public enforcement actions in relation to cartel conduct are most often resolved by defendants making admissions of contraventions and it is neither a fair nor an efficient use of public and private resources for private litigants to have to re-litigate facts that are admitted or otherwise established in proceedings brought by the ACCC.

Of course, the utility of admissions in private enforcement actions will depend on the scope and nature of the admissions that are negotiated. The party being prosecuted will be motivated to settle on the basis of admissions that are as narrow and as unhelpful to private litigants as possible. It will fall to the ACCC, and to some extent the courts in the penalty hearing process, to counter-balance this motivation and to ensure that the policy object of assisting private litigants is fulfilled.

VI. REDRESS FOR VICTIMS

The ACCC noted in its submission to the Competition Policy Review that section 239 of the Australian Consumer Law allows the ACCC to seek orders from a court for consumer redress (other than damages) after a contravention has been found. We consider that it

8 *ACCC v Monza Imports Pty Ltd* [2001] FCA 1455; *ACCC v Apollo Optical (Aust) Pty Ltd* [2001] FCA 1456 at [24]; *ACCC v ABB Transmission & Distribution Ltd* [2002] FCA 559; *ACCC v Leahy Petroleum Pty Ltd* (No 3) (2005) ALR 301 at [118]; *ACCC v Dataline.net.au Pty Ltd* (2006) 236 ALR 665 at [107].

may be useful if this power was also available for it to seek redress on behalf of identifiable classes of persons, such as consumers or small businesses, impacted by anti-competitive conduct. For example, the ACCC might seek an order requiring the offending firm to honor existing contracts while offering a discount corresponding to the anti-competitive surcharge to its customers. The ACCC considers this could, in appropriate cases, provide a cost effective way to provide redress to victims of breaches of the competition law.

VII. DETECTING CARTELS THROUGH A WELL – FUNCTIONING IMMUNITY PROGRAM

The ACCC strategy for cartel enforcement relies on three key elements:

1. awareness raising,

2. detection and investigation of cartels; and

3. court action to punish cartel conduct.

A significant tool used by the ACCC to detect cartels is the Immunity and Cooperation Policy. The ACCC immunity policy enables it to detect and successfully prosecute breaches of the CCA and in particular, cartel conduct. In fact, the majority of cartels are detected via applications for immunity and the ACCC relies heavily on the policy to prosecute cartels effectively.

The ACCC seeks to maintain incentives for firms seeking to cooperate with the ACCC under its immunity policy. Fewer applicants coming forward with information on the existence of cartels could affect the number of breaches that the ACCC detects and prosecutes each year.

Immunity applicants face the risk that they may be the subject of legal claims or class actions brought against them once the cartel they report becomes public. Specifically, substantial damages in United States cartel class action litigation are often claimed as a significant concern by international immunity applicants.

The perceived risk that information published, admissions made or evidence adduced in Australia could lead to action in the United States (or even in Australia) is regularly cited by legal representatives of parties as a factor that goes into assessing whether to seek immunity in Australia. It is also claimed that total damages awarded in follow on cartel cases in the United States on an annual basis regularly exceed all penalties imposed in global anti cartel public enforcement.

The ACCC operates its immunity program in a way that seeks to maintain high levels of confidence in its ability to keep information from an immunity applicant confidential. This policy has led to a steady flow of immunity applicants to the ACCC immunity program.

Australian and international experience has shown that most cartels are detected, stopped and punished through well-functioning immunity programs. While victims of cartels would like restitution for any loss they have suffered, it is also in their direct interests if those cartels are detected and stopped as soon as possible and that the cartelists are punished to deter future cartels. Public and private interests are aligned in supporting a well-functioning immunity program that detects cartels and supports enforcement action.

VIII. PROTECTED CARTEL INFORMATION – THE ACCC PERSPECTIVE

At times the interests of the ACCC and litigants in private proceedings have the potential to conflict. Private litigants may seek documents held by the ACCC that the ACCC is bound to keep confidential as part of its obligations under the ACCC's Immunity and Cooperation Policy. A number of statutory provisions address the disclosure requirements in litigation in light of the ACCC's public enforcement functions.

Specifically, section 155AAA of the CCA prevents ACCC officials disclosing material obtained by the ACCC using its coercive powers, or that were provided to it in confidence (such as under the Immunity and Cooperation Policy), except in the course of performing their duties or functions, or as "required or permitted" by law. That term would include the various statutory means by which parties to private or public enforcement proceedings may access the documents of other parties.

The Federal Court's rules on discovery allow respondents to ACCC proceedings, and parties to private proceedings, to seek orders relating to the discovery of relevant documents that the ACCC has acquired compulsorily [Federal Court Rules 2011, Part 20]. The ACCC may itself seek discovery orders of material that it has not obtained by its own compulsory processes. The Court will generally fashion any order for discovery to suit the issues in a particular case.

In addition, respondents in ACCC enforcement proceedings for civil penalties have a general right to access documents acquired by the ACCC in connection with the matter that is the subject of those proceedings [See CCA ss.157, 157(1B), 157B and 157C]. In the case of criminal proceedings, the prosecution has broad obligations to disclose material that it intends to use to prove its case, as well as material affecting the credibility or reliability of a prosecution witness, and unused materials. It must also disclose any other material that may assist the defense.

There are, however, certain statutory limits to what the ACCC may be ordered to produce or disclose to the Court, or to a party to non-ACCC proceedings. These were introduced in 2009 as a result of ACCC concerns following the corrugated fiber board litigation (discussed above) about its ability to obtain confidential cartel information from informants if the scope of protection for such information were not clarified. As a consequence, a legislative amendment was made to the effect that the ACCC may refuse to disclose information given to it in confidence if it relates to a breach, or possible breach, of a cartel prohibition ("protected cartel information"), having regard to various criteria, including the fact that the information was given to the ACCC in confidence, and the need to avoid disruption to national and international law enforcement efforts.

In the case of informants, the ACCC must also have regard to their protection and safety, and whether disclosure may deter them in future [CCA s.157(1B)]. For the CCA to meet its objectives it is essential that the ACCC is able to obtain the information necessary to effectively enforce the CCA. If the protection provided to confidential cartel information is not clearly stated, the ACCC's ability to enforce the cartel provisions may be frustrated, especially given the ACCC's reliance on informants, who may otherwise be discouraged from providing it.

The ACCC considers that the protected cartel information scheme appropriately balances the interests of private parties seeking to progress litigation against the public interest in encouraging immunity applicants to come forward and enabling the ACCC to maintain a well-functioning immunity program that allows it to detect and take action to punish cartels.

IX. PROTECTED CARTEL INFORMATION – THE PRIVATE ENFORCEMENT PERSPECTIVE

This is an area in which the perspectives of the ACCC and proponents of private enforcement actions differ. The regime provides that the ACCC cannot be required to make discovery of documents or produce documents containing protected cartel information in proceedings where it is not a party. Where the ACCC or a court receives a request from a party to court proceedings for discovery or for production of documents containing protected cartel information, the ACCC or the court need have

regard only to a finite list of considerations, all of which weigh against production and disclosure, and must not have regard to matters beyond the list. The limited considerations do not give weight to the purpose for which the documents are sought, and therefore prevent a decision being made upon a balancing of interests. In contrast, there are well established principles at general law for dealing with claims for public interest immunity that applied prior to the introduction of the protected cartel information regime. Those principles require that all competing public interests be taken into account.

While it is acknowledged that this is a difficult matter of conflicting policy imperatives and that an effective immunity policy is very much in the interests of private litigants, private enforcement has not been well served by the ACCC's desire to ensure its investigative and immunity processes are not compromised. This approach has produced overbroad legislation that is out of step with the more pragmatic approach to access to documents and information by third party litigants in the United States and Europe.[9] For example, while the protected cartel information provisions are intended to protect the immunity process, they are not limited to information obtained from immunity applicants.

Witness statements, transcripts of compulsory examinations, documents and other material compiled by the ACCC may be critical to the success of private enforcement action. This is particularly so in circumstances where private litigants do not have any rights to conduct depositions to obtain information and struggle to obtain adequate documentary discovery to enable them to establish liability and assess losses. There are no mechanisms available either that would enable a private litigant to obtain co-operation from one of the parties to a cartel, such as bar orders that are available in Canada or a reduction in damages that is available in the United States. Reform is needed to give greater weight to the interests of private litigants in obtaining information to support their claims. This could be by adjusting the Protected Cartel Information regime to facilitate access to documents and work product held by the ACCC and/or by other mechanisms that would allow private litigants to help themselves, such as those just mentioned.

X. CONCLUSION

Public enforcement is in a far healthier state in Australia than private enforcement. For the most part, the interests of public and private litigants are aligned, with both recognizing the critical importance of detecting and stopping cartel conduct although there is some tension when it comes to access by private enforcers to documents and work product held by the ACCC. The lack of compensation flowing to the victims of cartel conduct in Australia is a matter of significant concern to those victims but it is also a matter of some concern in terms of how effectively cartel conduct can be deterred. It is most likely that in Australia, due to the absence of effective private enforcement, a company assessing the risk of participating in a cartel can be reasonably confident that even if it is subject to successful public enforcement action, there is a reasonably good chance it may retain a significant portion of the gains of the unlawful conduct because it is unlikely that private enforcement action will be pursued.

9 Brooke Dellavedova, "Private Enforcement in Australia Plaintiff's Perspective" (2014) (3) *ABA Antitrust Section Civil Redress Committee 2-5; Peta Stevenson* 'Private Enforcement in Australia Defendant's Perspective' (2014) (3) *ABA Antitrust Section Civil Redress Committee 5-7; Laura Guttuso* "Private Enforcement in Australia Comparison (to the EU and US) and Comment" (2014) (3) *ABA Antitrust Section Civil Redress Committee 7-10.*

PRIVATE DAMAGES AND CLASS ACTION IN INDIA

BY **PRANAV MEHRA** [1]
& **RITAM ARORA** [2]

1 Pranav Mehra is the Managing Editor at Indian Competition Law Review and also advises clients both as complainants and as defendants, in behavioural cases before the CCI and appellate and writ courts. In his previous role, Pranav was assisting the Competition Appellate Tribunal in concluding appeals from the orders of CCI. Pranav can be contacted at PranavMehra@Live.com or through the website at www.IndianCompetitionReview.org

2 Ritam Arora is an Assistant Editor at Indian Competition Review. She has been a merit scholar and a gold medallist throughout law school. She has recently completed her LL.M from London School of Economics where her main subjects of study was competition law and M&A. She has also worked briefly with International Bar Association, London. Ritam can be contacted at AroraRitam@Gmail.com or through the website at www.IndianCompetitionReview.org

India stands at the threshold of new opportunities. Opportunities that can offer tremendous economic growth, if and only if those opportunities are utilized in a manner not prejudicial to anybody's detriment.[3] Infringement of competition law affects public interest as it has direct repercussions on both structural and proper functioning of market economy and consequently on economic activity of all operators and participants in it.

Anti-competitive conduct is detrimental to the economy. It causes losses to competitors whose business opportunities are curtailed or who are driven out of the market, to suppliers who receive too little and to customers who pay too much. Competition law as a matter of public policy does not generally deal with providing compensation to private parties adversely affected by an infringement but with the investigation and punishment of infringements so as to deter such behavior in the future. While public enforcement of competition law may be appropriate for bringing anti-competitive behavior to an end, however, it does not help the victims.

I. RELEVANT LEGISLATION

The Competition Act 2002 (Act) is the relevant legislation governing antitrust actions and litigation. The authority to adjudicate claim for compensation is the Competition Appellate Tribunal (COMPAT). However the foundation on which the adjudication has to be done arises from the findings of the Commission or the order of the COMPAT itself.[4] Additionally, compensation applications under sections 53N, 42A or 53Q(2) are subject to the Competition Appellate Tribunal (Procedure) Regulations, 2011 and the Competition Appellate Tribunal (Form and Fee for filing an Appeal and Fee for filing Compensation Application) Rules, 2009.

Application can also be made to the COMPAT seeking compensation from any enterprise for any loss or damage shown to have been suffered, by the central government or a state government or a local authority or any enterprise or person as a result of any contravention of the orders of the COMPAT or the Competition Commission of India ("CCI").

II. HISTORICAL BACKGROUND

Private rights of actions have been part of the Competition Act since the beginning. The inception of recovery of compensation for any loss or damage can be traced to the older legislation called the Monopolies and Restrictive Trade Practices Act back in 1969, which after the commencement of the Competition Act 2002 stood repealed. However, the authority to adjudicate and award such compensation went under a change after an amendment, before which the authority used to be the CCI. The earlier section 34 read with 27(c) & 28 (d), now repealed, gave the mandate to the CCI, which after the amendment, was given to the COMPAT under section 53N read with 42A & 53Q of the Act.

III. DEVELOPMENTS IN ENFORCEMENT

While there are rules framed by the COMPAT for filing the compensation application, practically there is no guidance for a person or an enterprise who have suffered a loss from anti-competitive conduct of a competitor. This is also due to the fact in the first three years, the majority of cases were being decided at the CCI level, another two-three years at the COMPAT level, only after succeeding at both the levels, a party could file a claim for compensation.

So far there have only been two applications for compensation at the COMPAT. One is against a builder who was found to be abusing its dominant position in the relevant market. The applicant in this case is a person,[5] while according to some estimates, there were dozens of people who had got affected by the abusive conduct, however, none of them have come so far except one. This estimate is on

3 The basic premise of the National Competition Policy is to unlock full growth potential of Indian economy, which among other things could also help in tapping the opportunities arising from the demographic dividend of our country. (National Competition Policy: Para 4.2)

4 Section 53N(1)

5 Amit Jain v. DLF Limited | CA No. 01/2015 in Appeal No. 20/2011

the basis that the informant before the CCI was a resident welfare association comprising of people from around 600 apartments in one case. There were three such welfare associations who were informants in three separate cases against the same builder, along with some independent informants.

The other is against a stock exchange that was found to be abusing its dominant position in the market for services offered by stock exchanges. The informant in this case was a competitor who had the license to operate only in one service of the entire stock exchange services, and was brutally harmed by the zero (predatory) pricing of that service by the dominant stock exchange.[6]

IV. CHALLENGES

The outcome of these two compensation application will form the basis of jurisprudence in this aspect in time to come. However, even by moderate standards, it would take years before they are taken for adjudication. This is because both cases are now in appeal from the Order of the COMPAT before the Supreme Court of India, the highest court of the country, which may take time to decide given the huge number of pending cases.

In spite of all this, the real challenges are still to come in the forefront. These challenges will actually test the level of proof, economic models, and social cost of enforcement. We list down some real challenges:

1. **Access to evidence** – One of the key issues that an applicant may have to tackle is the access to evidence. Private claimants can only seek monetary relief to the extent that they can demonstrate the compensation owed to them from any findings of the CCI or the orders of the COMPAT.

The term "compensation" is not defined under the Act. However, as per section 53N (3) of the Act, COMPAT can be approached for compensation for any loss or damage shown to have been suffered by the applicant before COMPAT as a result of any contravention of the provisions of chapter II of the Act by the enterprise from whom compensation is being claimed. In these circumstances, it is probable that the term "compensation" will be interpreted in its most general sense, meaning "something meant to make good any loss or damage shown to have been suffered by the applicant." The word "shown" clearly implies that the applicant seeking compensation will have the responsibility of proving its claim with documentary or oral evidence, or both.

Looking at the judicial precedents, the word "Compensation" has been interpreted in more ways than one:

(a) The word compensation is of very wide connotation. It may constitute actual loss or expected loss and may extend to compensation for physical, mental or even emotional suffering, insult or injury or loss.[7]

(b) In its dictionary meaning, "compensation" means anything given to make things equal in value; anything given as an equivalent, to make amends for loss or damage[8]; therefore, it does not necessarily need to be in terms of money.[9]

"Damages" on the other hand constitute the sum of money claimed or adjudged to be paid in compensation for loss or injury sustained, the value estimated in money, of something lost or withheld. The term "compensation" etymologically suggests the image of balancing one thing against another; its primary signification is equivalence, and the secondary and more common meaning is something given or obtained as an equivalent.

Justice requires that it should be equal in value, although not alike in kind.[10] Therefore, a

6 Metropolitan Stock Exchange of India Limited v. National Stock Exchange of India Limited | CA No. 01/2014 in Appeal No. 15/2011

7 Ghaziabad Development Authority v. Balbir Singh | (2004) 5 SCC 65

8 RC Cooper v. Union of India | (1970) 1 SCC 248

9 State of Gujarat v. Shantilal Mangaldas | (1969) 1 SCC 509

10 KSRTC v. Mahadeva Shetty (2003) 7 SCC 197. The Supreme Court has also held that a misplaced sympathy,

major question that arises is the calculation of damages.

> **2. Calculating damages** – The second block of difficulty is to prove damages.
>
> In the United States, there is a concept of treble damages for competition violations except for joint ventures. They are mandatory and they are applied by a jury. So if the jury finds a person liable then automatically the judge has to treble the damages. There is no discretion whatsoever. And in addition to that there is a possible accumulation of state action and federal action. A person/enterprise cannot only face treble damages but sextuple damages and theoretically even more, although in practice it does not really happen.
>
> In Europe, the Directive on certain rules governing action for damages, gives the option of a limited multiplier of damages for cartels and only doubling, which means that there is no concept of punitive damages.
>
> In India, the Supreme Court has had a chance to interpret the meaning of damages as below: [11]
>
> The expression "damages" is neither vague nor over-wide. It has more than one signification but the precise import in a given context is not difficult to discern. A plurality of variants stemming out of a core concept is seen in such words as actual damages, civil damages, compensatory damages, consequential damages, contingent damages, continuing damages, double damages, excessive damages, exemplary damages, general damages, irreparable damages, pecuniary damages, prospective damages, special damages, speculative damages, substantial damages, unliquidated damages. But the essentials are (a) detriment to one by the wrong-doing of another (b) reparation awarded to the injured through legal remedies and (c) its quantum being determined by the dual components of pecuniary compensation for the loss suffered and often, not always, a punitive addition as a deterrent-cum-denunciation by the law [...] "

In this respect, our law is more inclined towards the EU directive, but, the claimant will need to demonstrate the loss or damage suffered as a result of a contravention of the provisions of Chapter II of the Competition Act. Therefore, a claimant will have to discharge the burden of showing causation and the loss or damage suffered by it in order to recover compensation. The Competition Act is silent on the standard of proof required in these cases; however, for civil claims such as these, the standard applied should be the balance of probabilities. Accordingly, the claimant must show a connection between its claim and the enterprise against which compensation is sought.

The Indian Evidence Act, 1872 governs the admissibility of evidence. Types of evidence that are admissible include pre-existing evidence (including information under section 19(1) or information in the public domain); evidence such as compulsory requests based on an inquiry under section 36(2); evidence from experts under section 36(3), (4) and (5); and evidence from search-and-seizure procedures under section 41(3). Categories of evidence admissible can be documentary, oral, economic (such as market assessment or demand and supply) and financial (such as financial statement) analysis.

generosity and benevolence cannot be the guiding factor for determining the compensation. The object of providing compensation is to place the claimant(s), to the extent possible, in almost the same financial position, as they were in before the accident and not to make a fortune out of misfortune that has befallen them. (Syed Bashir Ahmed v. Mohammed Jameel & Ors (2009) 2 SCC 225)

11 Organo Chemical Industries v. Union of India (1979) 4 SCC 573

It must be highlighted that under the European Union Directive the only type of evidence under the Directive that enjoys unequivocal protection from disclosure concerns certain categories of documents produced in the context of competition law proceedings, such as leniency and settlement statements. Such protection while granted by CCI in the legislation and by COMPAT through an application for claiming confidentiality, it will be interesting to see how this confidential information is treated for calculating damages.

Unlike the European Union, where the Commission's directive on damages action under Competition Law has two priorities, first being to enhance the effectiveness and efficiency of the overall enforcement scheme, second, to assess the social cost of private enforcement and balance those against increased efficiency, the CCI has not come out with any such paper, nor does it seem that it would be coming anytime soon. This is mainly because of two factors. First, the CCI is not the authority anymore to adjudicate a claim for compensation.[12] Second, the authority to adjudicate on claim for compensation is COMPAT, and therefore the CCI's role is limited. However, a proviso under section 53(N)(3) of the Competition Act mandates, that the COMPAT may have to obtain the recommendations of the CCI before passing an order of compensation. On the other hand, it is not certain whether the COMPAT is bound to follow the CCI's recommendation or not.

It must be highlighted that the COMPAT lacks the support of any economist or accountant or even a professional for that matter to assist it in these matters. Therefore, the role of the CCI becomes not only important but crucial as well.

3. **Class action** – The next challenge that is important particularly from a political point of view is from final consumers who have too small claims to bring individual lawsuits. While a collective action can also be taken under section 53N(4) of the Competition Act, which provides for collective proceedings. The same can be brought by one or more persons on behalf of numerous persons with the same interest to file a class action application with the permission of the COMPAT, on behalf of or for the benefit of all the interested persons. In such cases, the provisions of Rule 8, Order 1 of the Code of Civil Procedure, 1908 shall apply. Unlike the United States, or the European Union, where a product is sold on a bill, and that bill can act as an evidence of overcharge, we foresee a difficulty in finding people who first would have kept a receipt with them after all these years. However, a bigger question is about products that are sold without a bill, like cement, where sometimes a person orders ten packets of ten kg. each of cement through a contractor who is handling the construction. The logistics of identifying and representing such large number of people living in various cities, districts and states also poses a challenge.

Therefore, the substantive law is silent in respect of indirect purchases. Given the lack of jurisprudence, it is not known whether the COMPAT or the Supreme Court will accept the passing-on defence under the Indian competition law. However, there is no provision in the Act that prevents an indirect purchaser from bringing a damage claim.

V. CONCLUSION

High amount of fines can seem to act as a deterrent but in reality they might not. The CCI lacks the mechanism to keep a check and at the most can only assume that a higher amount of fine will act as a deterrent for the enterprise in the future. In any case, fines do not compensate the losses caused.[13]

12 This authority was taken from CCI by way of repeal of section 34 by the Competition (Amendment) Act 2007.

13 Fines are deposited to the Consolidated Fund of India. Section 47: Crediting sums realised by way of penalties to Consolidated Fund of India - All sums realized by way of penalties under this Act shall be credited to the Consolidated Fund of India.

While, it is the duty of the Commission enshrined under the preamble[14] as well as under section 18[15] to eliminate practices having adverse effect on competition, promote and sustain competition, protect interests of consumers and ensure freedom of trade, the Commission has been finding it real difficult to discharge its function properly owing to multitude of reasons. These reasons range from working on less than mandated capacity of staff both at its own office as well as Director General (DG), extensive time taken for investigation and thereafter extended time taken to analyze the investigation report submitted by DG, cases getting remanded back from the Competition Appellate Tribunal, penalties getting reversed on procedural grounds, so on and so forth.

In short, while the Commission attempts to deliver sound decisions, most of the times, it find itself defending its order at COMPAT or various high courts. Therefore, the Commission falls short to deliver what is expected out of it, even though it may not be for its own fault. This has a huge impact on the determination of an anti-competitive liability, and for reasons above, the consumer's interest is not as protected as it should have been. Hence the consumer/applicant fails to get any benefit from either the law or the policy.

14 The Preamble reads as, "An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto."

15 Section 18: Duties of the Commission - Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India.

PRIVATE DAMAGES IN BRAZIL: EARLY BEGINNINGS, BIG STUMBLING BLOCKS

BY **ANA PAULA MARTINEZ** [1]
& **MARIANA TAVARES DE ARAUJO** [2]

1 Ana Paula Martinez is a partner with Levy & Salomão Advogados. She was the Head of the Antitrust Division of the Secretariat of Economic Law from 2007 to 2010, and co-headed the cartel sub-group of the International Competition Network - ICN with the U.S. Department of Justice. Before entering the government, Ms. Martinez was an associate with Cleary Gottlieb Steen and Hamilton LLP. She is licensed to practice law in Brazil and New York and served as an antitrust advisor to UNCTAD, the World Bank, and to the Government of Colombia. Ms. Martinez holds a Master of Laws from both the University of São Paulo and Harvard University and has a Ph.D. Degree in Criminal Law. She is responsible for the Antitrust Law Graduate Program of Fundação Getúlio Vargas-RJ.

2 Mariana Tavares de Araujo is a partner with Levy & Salomão Advogados. Prior to joining the firm, Ms. Araujo worked with the Brazilian government for nine years, four of which she served as head of the government agency in charge of antitrust enforcement and consumer protection policy. Before serving as a political appointee she was the General Counsel of a biotech firm in Brazil. Besides advising private parties, Ms. Araujo provides counseling in competition-related matters for the World Bank and is currently a non-governmental advisor to the ICN. She is also a Law Professor at the Graduate Program of Fundação Getúlio Vargas-RJ. Ms. Araujo has a Master of Laws degree from Georgetown University Law Center.

I. INTRODUCTION

Private antitrust enforcement in Brazil has been on the rise over the past six years. This may be due to such reasons as the global trend of antitrust authorities encouraging damage litigation by potential injured parties; the growing number of infringement decisions issued by Brazil's antitrust agency, Conselho Administrativo de Defesa Econômica ("CADE"); and the increasing general awareness of competition law in Brazil.[3]

More specifically, a decision issued by CADE in 2010, determining for the first time that a copy of its finding of a cartel violation be sent to potentially injured parties, so that such parties could seek damages from the relevant wrongdoers, may have served as particular encouragement. In one of the lawsuits that followed, the first instance court judge issued an injunction, under which the defendants were prohibited from selling the relevant product with any surcharge after the date of the order. The recent *Siemens* case has also raised a number of issues in connection with damage claims in Brazil.

This article aims to provide an overview of the applicable framework for private damages in Brazil, as well as discuss recent developments and challenges ahead.

II. LEGAL FRAMEWORK OVERVIEW

Pursuant to Article 47 of Brazil's Antitrust Law, victims of anticompetitive conduct may recover losses sustained as a result of a violation, apart from an order to cease the illegal conduct. A general provision in the Brazil Civil Code also establishes that one who causes losses shall indemnify those that suffer injuries (Article 927). Plaintiffs may seek compensation of pecuniary damages (actual damages and lost earnings) and moral damages. Under recent case law, companies are also entitled to compensation for moral damages, usually derived from losses related to its reputation in the market.[4]

Apart from complaints based on contracts, a significant percentage of private actions are based on horizontal conduct in Brazil. Similarly to other jurisdictions, both corporations and individuals may be sued individually (*e.g.,* by competitors, suppliers, and direct or indirect purchasers) or collectively for antitrust violations, but the greatest majority of pending cases are against corporations.

Individual v. Collective claims. Individual lawsuits are governed by the general rules set forth in the Brazilian Civil Procedure Code. Collective actions are regulated by different statutes that comprise the country's collective redress system. Standing to file suits aiming at the protection of collective rights is relatively restricted, and only governmental and publicly held entities are allowed to file. State and Federal Prosecutors' Offices have been responsible for the majority of civil suits seeking collective redress, most of which have been related to consumers' rights complaints.

Consumer v. Business claims. Depending on whether the buyers of the cartel's products are businesses or consumers, different statutes may apply. A consumer is defined as any individual or legal entity that acquires or uses a product or service as an end user. Under this definition, businesses may also be deemed consumers as long as they are end-users of a product or service.[5] In

3 Over the last decade the cartel enforcement landscape has significantly changed in Brazil. In 2000 new investigative tools were granted by Congress (dawn raids and leniency agreements), and since 2003 the Brazilian antitrust authorities have promoted a hierarchy of antitrust enforcement that places hard-core cartel prosecution as the top priority. As a result, Brazil now has an increasing number of cartel-related activities, including investigations (including alleged international cartels), record fines for cartel offenses, individuals being held criminally accountable, and increasing cooperation between criminal and administrative enforcers. There has also been a positive change in perception by the criminal prosecutors and judges as to the seriousness of cartels.

4 Punitive damages are not expressly provided for in the law, but some plaintiffs have been awarded those as well.

5 Case law is fully settled on the concept of end user for businesses. There are hundreds of thousands of ongoing court disputes related to several activities, such as bank lending, the utilities sector, and even certain industrial

this case, Brazil's Consumer Protection Code[6] applies, which guarantees a much more favorable standing for claimants. As a general rule, the burden of proof lies with the plaintiff (Article 333 of Brazil's Civil Procedure Code); however, under Brazil's Consumer Protection Code, the burden of proof may be shifted to benefit end-users and courts generally allow this. Any end-user or class end-users is entitled to bring an action against a cartel member, even being an indirect purchaser (see Article 25, Paragraph 2, of Brazil's Consumer Protection Code).

Pass-on defense. Pass-on defense is not allowed in consumer (end user) related claims.[7] There are no statutory provisions or court precedents in different areas, but it is our opinion that antitrust violators may be able to assert that any illegal overcharges were passed on by a plaintiff direct purchaser to indirect purchasers as a defense to reduce (but not to exclude) indemnification.

Multiple Damages. Although Brazil is said to have only single damages, injured third-parties may claim the payment of double damages based on provisions contained in the Civil Code and Brazil's Consumer Protection Code, as the payment of a supra-competitive price was due to a misconduct. We are not aware of any decision awarding double damages for antitrust offenses in Brazil but we believe this possibility constitutes an additional incentive for private enforcement in Brazil and brings legal uncertainty to the business community.

Joint and Several Liability. Under both Brazil's Civil Code and Brazil's Consumer Protection Code, if more than one wrongdoer contributed to the event, their liability shall be joint and several, without apportionment, *i.e.*, each cartel member may be held liable for the entire cartel-related damage. This means that an aggrieved party may bring suits against all cartel members, jointly or separately. The satisfaction of the entirety of the awarded damages by one of the jointly liable wrongdoers releases the remaining wrongdoers from liability before the aggrieved party (Brazil's Civil Code, Article 275). However, if the aggrieved party has only been partially compensated by one of the joint wrongdoers, it may claim the balance from the other wrongdoers (Brazil's Civil Code, Article 277). Pursuant to Articles 283 and 934 of Brazil's Civil Code, the joint wrongdoer who single-handedly compensated all damages awarded to the aggrieved party may seek partial or total reimbursement (contribution) against other joint wrongdoers.

Statute of limitations. Under Article 206, Paragraph 3, V of Brazil's Civil Code, the statute of limitations for private damages claims is three years,[8] but case law is not yet settled whether it should be counted from (a) the date in which the violation occurred (*actio nata* doctrine) or (b) when the claimants became or could reasonably have become aware of the illegal conduct. It is our opinion that the latter shall prevail, due to very nature of most price-fixing schemes. Depending on whether CADE makes the investigation public from the outset and on the level of evidence available for third-parties, courts could take the view that injured parties were aware of the fact even before CADE has issued its decision sanctioning a cartel. Also, the fact that a party confesses its participation in the wrongdoing within a settlement procedure with CADE may also be deemed sufficient to trigger the three-year deadline, as such settlements are made public as of the signing date and posted at CADE's website. CADE's final decisions are public and available at its website, which means that it is accessible to any third-party and potential claimants may be aware of a matter and present claims before courts.

products, if used in peripheral or support activities.

6 The legal and institutional framework of consumer protection law and policy in Brazil is established by Law 8,078, of September 11, 1990 ("Law 8,078/90" or "Consumer Protection Code"). Under Brazil's Federal Constitution, consumer protection has the status of a fundamental right.

7 *See* Brazil's Consumer Protection Code, Article 25.

8 If the claim arises from a direct contractual relationship between plaintiff and defendant and if the case can be construed as a breach of contractual obligations, then it could be argued a five (5) year statute of limitations, but some precedents indicate that three years most likely will prevail (e.g., REsp. 1.238.737).

A second discussion may arise regarding what is the period of time for which damages can be sought when dealing with continuous long term relationships, such as distribution agreements. Again, neither statute nor case law provides clear criteria: courts could consider either the entire period, provided there is continuity and/or concatenation of actions, or three years prior to the last violation or the knowledge thereof.

III. CADE AND FOLLOW-ON LITIGATION

Since 2010, CADE (Brazil's Antitrust Tribunal) has been prompting follow-on damage litigation derived from cartel infringements and a number of alleged injured parties have already filed claims in Brazil, which adds to the deterrent effect of overall enforcement by increasing the economic cost of the misbehavior. In 2010, CADE, for the first time, included in a cartel decision a recommendation for a copy of the decision to be sent to potential injured parties for them to recover losses.[9] Following that, a number of parties allegedly affected by the cartel sued for damages in courts throughout the country.

As it would be expected, follow-on litigation depends on the strength of CADE's case. CADE's decisions lack collateral estoppel effect, and even after a final ruling has been issued, all the evidence of the administrative investigation may be re-examined by the judicial courts, which could potentially lead to two opposite conclusions (administrative and judicial) regarding the same facts. In the generic drugs cartel case, for example, CADE found the companies guilty of price-fixing, and the alleged injured parties sought redress in court. The judge, however, found no antitrust violation and therefore did not award any compensation to the plaintiffs.[10] In any case, we should take this latter example as an exception as, on average, judicial courts confirm over 70 percent of CADE's decisions.

Even before 2010, few collective damages lawsuits had been spontaneously brought by local state prosecutors' offices representing alleged victims to anticompetitive conduct, most if not all in connection with regional fuel retail cartel cases that were initially investigated by the same prosecutors.

Relevant case law includes two investigations by the state prosecutors' office in Rio Grande do Sul. Defendants in the Guaporé investigation were sentenced to two-and-a-half years of jail time for fixing fuel prices. After the criminal investigation was concluded (the administrative case is still pending), the State Prosecutor's Office filed for individual and collective damages and the parties were sentenced to compensate consumers that had been injured by the cartel and pay collective moral damages due to "having offended society, by having abused local consumers that were harmed in their vulnerability." Likewise, in Santa Maria, after retailers were also sentenced to serve jail time (decision under appeal), prosecutors filed for individual and collective redress, both granted by the courts.

In such scenarios, although joint and several liability to cartel participants in general was no longer only a theoretical risk, it had not yet become a real threat to leniency, since those were local cases and private litigation and had not effectively shown up on CADE's agenda. But the agency's pivotal ruling in a high profile case that received international publicity may have tipped the scale. This decision was issued in the midst of the consolidation of Brazil's cartel enforcement program and at a time when the authorities were very committed to promoting consumers' and other stakeholders' awareness of the harm caused by price-fixing, bid-rigging, and other cartel-related conducts. Indeed, in a recent case, a customer sent a letter to a leniency applicant claiming damages after the company voluntarily decided to make public its identity following a raid. This could

9 See Proceedings No. 08012.009888/2003-70 (industrial gases cartel case), adjudicated by CADE on September 1, 2010.

10 See the decision rendered by the 14th Chamber of the State Court of São Paulo in Public Civil Action No. 0029912-22.2001.403.6100.

be happening in the auto parts cases under investigation by CADE. Since few customers are potentially affected in these cases, they could attempt to settle before/instead of going to court.

Another interesting case involves the alleged bid-rigging cartel affecting the subway state company in São Paulo, which has been disclosed to CADE by one of the alleged cartel participants through a leniency agreement signed in 2013 (the *Siemens* case). Following the initiation of CADE's case, public prosecutors and the São Paulo Attorney General's Office filed multiple damage claims.[11] As in Brazil the leniency applicant has no immunity regarding cartel damages, in November 2013 Siemens released a note stating the "it cannot be excluded that significant cartel damages will be brought by customers against Siemens Brazil based on the outcome of the investigations." The case has also attracted the attention of the Court of Auditors in the State of São Paulo, which has already asked CADE to share the evidence of the case so that the agency can audit the contracts at issue. The same holds true for the municipal politicians in São Paulo, who have recommended, in 2014, that the mayor's office monitor CADE's antitrust investigation to gather the necessary information to support the damage claims.

The Brazilian Courts have yet to issue a final ruling on civil antitrust claims. Follow-on lawsuits in the following industries are pending decision: cement, industrial gases, compressors (leniency), fuel retail, sand extraction, steel bars and subway trains (leniency). Such claims were brought by customers or by the Federal Prosecutors on behalf of customers.

IV. CHALLENGES AHEAD

Interplay with the leniency program. If private claims pick up in Brazil before certain amendments to the law are introduced, they could have an adverse effect on the Leniency Program, which is considered to be the pillar of Brazil's Anti-Cartel Program. This is because, in Brazil, cartel members – with no exception for the leniency applicant – are jointly and severally liable for damages caused by their illegal practices, *i.e.*, each cartel member may be held liable for the entire cartel-related damage.

Other jurisdictions provide for incentives for the leniency applicant regarding damage recovery for victims. For example, in the United States, the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA") protects leniency applicants from treble damages and joint and several liability in private lawsuits in exchange for cooperation with plaintiffs. Another example is Hungary: The 2009 Competition Act states that a leniency applicant is not obliged to compensate injured parties unless they are unable to collect their claims from other cartel members.

Brazil executed its first leniency agreement in 2003. Since then, approximately 35 agreements have been signed, a number with parties to international cartels. Since 2010, CADE has continued to strive to broadcast its Leniency Program, but in the background there is now increasing concern that applicants will be exposed in ways that may im-

11 For example, in May 2014, the São Paulo state prosecutors launched a civil claim asking for BRL 2.5 billion (roughly USD 625 million) in damages compensation for cartel practices affecting contracts signed in 2008 and 2009, as well as the prohibition for the targeted companies from taking part in public tenders for three years. In December 2014, a court in São Paulo ordered the state prosecutors to amend their initial petition in a civil action filed earlier that month against 10 companies to recover cartel damages in the amount of BRL 418 million (roughly USD 104 million, including moral damages estimated to be 30 percent of the amount of the affected contracts, which covered 2001-2002) and aiming the companies' dissolution. Under the judicial decision, it is the prosecutors' burden to justify the reasonableness of the request to dissolve the companies, which is an extreme measure under Brazil's legal system. In September 2015, the São Paulo state prosecutors launched a new civil action to recover damages from nine companies suspected of rigging bids for maintenance work contracted by the state subway company CPTM, from 2007 to 2014. Prosecutors are seeking in damages the value of the contracts plus the alleged overcharge, totaling BRL 918 million (roughly USD 230 million).

pair their standing in relation to other cartel participants. The Brazilian Congress needs therefore to pass new legislation excluding the leniency applicant from joint and several liability in order to preserve the incentives to the Leniency Program.

Another important aspect regarding the interplay between leniency and private claims is related to the level of protection offered by the agency to documents put forth by leniency applicants. For the incentives for leniency to be preserved, confidentiality of all documents submitted under the Program must be strictly enforced so as to ensure adequate protection against disclosure in private lawsuits, and thus avoid placing the leniency applicant in a less favorable situation than the other cartel members.

The risk of disclosure of such leniency documents, especially in view of cross-jurisdictional cases, might deter a cartel member from applying for leniency in Brazil. Even though CADE has been adopting a number of measures to ensure that the leniency documents and the identity of the leniency applicant remain confidential throughout the investigation, it is still unclear how it will treat the leniency documents following the adjudication of the case.

Also, if the leniency case involves a dawn raid and/or a parallel criminal investigation, CADE will not have the last word regarding confidentiality of the files, and the courts may not grant adequate protection to it. If that is to happen, those documents would be accessible by any third-party, who could then file damage claims before the courts.

Lengthy proceedings. Brazilian courts are well-known for moving slow, both in view of the significant number of pending cases, as well as due to several tools that allow parties to the case to unduly delay the proceedings. It is not rare for a judicial case to last well over 15 years. Indeed, Brazilian Courts have yet to issue a final ruling on civil antitrust claims despite the fact that the first cases were brought in the mid 2000's. This may prompt injured third parties in Brazil to present damage claims in jurisdictions other than Brazil.

Lack of consolidated case law on fundamental issues. There is little or virtually no consistent case law in Brazil on fundamental issues such as when the statute of limitation should start to count in connection with cartel damages. Another aspect that lacks guidance is how to calculate damages. Criteria for calculation of damages have varied significantly from case to case, and have ranged from approximately BRL 60 million (roughly USD 15 million) in the case brought by the Federal Prosecutor on behalf of customers against steel bar producers to 20 percent of the total market (CADE has referred to surcharges of 20 percent) for the duration of the conduct in another case.

IV. CONCLUSION

Brazil's private antitrust enforcement it is still in its infancy if compared to other systems, such as the United States. At the same time, cases such as *Siemens* illustrate that the road to institutional maturity is not without significant obstacles. Indeed, given transaction costs in Brazil, consumers are more often than not "represented" by public prosecutors (differently from what happens in the United States for instance). And each public prosecutor enjoys significant autonomy, which creates problematic jurisdictional fragmentation. Add to that the lack of clear guidelines as to what is permissible in the damages arena and the end result may be the paradoxical effect of reducing *ex ante* deterrence: extreme measures – *e.g.,* asking for dissolution of corporations or damages with little nexus to actual welfare loss – just ends up paving the path to (expected) reversal by higher courts.

At least in the early stages of development of private antitrust damages, it would be preferable to have actionable "rules of the road" so as to make private damages easier to seek and, ultimately, decisions that are more likely to stick. Although antitrust authorities are not the obvious candidates to issue such guidelines in Brazil, broader cooperation

with the public prosecutors' office would tend to mitigate uncertainties and reduce dispersion in the quality of cases brought to courts. The EU Directive 2014/104 on antitrust damages actions is a good example of an attempt to improve speed and efficiency of private enforcement while, at the same time, reducing dispersion in quantification of damages and thus the potential for absurd and disproportionate awards that might stray away from efficiency goals, and should serve as an example to Brazil.

It is early beginnings for private damages in Brazil, but there are obvious stumbling blocks. The route to overcoming such challenges requires reducing transaction costs for private enforcement while making sure damages awarded are credible and reasonable.

ANTITRUST DAMAGES CLAIMS: IS MEXICO IN THE RIGHT PATH?

BY **MIGUEL FLORES** [1]
& **ABEL RIVERA** [2]

1 Miguel Flores, shareholder Greenberg Traurig, mfbernes@gtlaw.com

2 Abel Rivera, associate Greenberg Traurig, riverapedrozaj@gtlaw.com

Never in the history of Mexico has an individual antitrust damages claim been successful. However, in May 2014, the new Federal Law on Economic Competition (FLEC) provided clearer criteria for when and how a claim of antitrust damages may be carried, this brings new hope in the system. Nonetheless, to be successful, the new specialized competition courts will need to develop new interpretations of Civil Law institutions (civil liability) so that affected parties are able to recover damages from antitrust injuries.

I. INTRODUCTION

The constitutional amendments on antitrust and telecommunications (2013) certainly developed, as never before, the system of competition law and boosted the antitrust authorities to prosecute and punish anti-competitive behaviors. Such changes were mainly achieved by granting constitutional autonomy and unprecedented faculties to the Federal Competition Commission and the Federal Telecommunications Institute (jointly, the competition authorities). It could be argued that, as a counterweight to the reloaded force of the competition authorities, the Federal Courts specialized in competition, broadcasting and telecommunications were also created in order to exercise judicial control over such competition authorities. However, the amendments apparently forgot to strength the system to allow individuals or private parties to claim damages for unlawful monopolistic practices or illicit mergers.

In 2014, the Federal Congress issued the new FLEC, incorporating new provisions that, among other relevant aspects, helped to make clear the rules for the antitrust damages claims. Such claims previously constituted a gray area that did not allow the development of antitrust private enforcement.

Article 134 of the FLEC reads:

"Individuals that may have suffered damages or losses deriving from a monopolistic practice or an unlawful concentration have the right to file judicial actions in defense of their rights before the specialized courts in matters of economic competition, broadcasting and telecommunications, once the Commission's resolution is final and conclusive.

The statute of limitations for lodging damages claims shall be stayed by the decision to initiate an investigation.

The Economic Agent's illegal actions shall be proven with the final resolution issued under the trial-like procedure, for the effects of lodging damages claims."

II. THE PROCEDURAL CHALLENGES WERE ALMOST ALL RESPONDED, BUT THERE STILL SOME MINOR UNSETTLED MATTERS.

Pursuant to article 134, the "statute of limitation" problem was clarified since the term to claim the restitution of damages now will be interrupted from the beginning of the investigation by the Investigative Authority of the Federal Competition Commission or the Federal Telecommunications Institute, accordingly. This would allow the two-years-term established in article 1934 of the Federal Civil Code to be interrupted once an investigation has been initiated.

The new law also clarified that the new specialized District Judges and Federal Collegiate Circuit Courts will have jurisdiction on antitrust damages claims. However, in this regard it should be noted that these courts where created to rule on the writ of Amparo proceedings (a remedy for the protection of constitutional rights) and are considered administrative courts ¾ specialized on competition issues. Therefore, in principle, the judges and magistrates' expertise is not precisely on the application of Civil Law in private disputes. Nevertheless, for the time being, this should not be a problem since the current conformation of the courts includes legal experts capable to adjudicate antitrust damages disputes according to Civil Law criteria.

However, a procedural problem still remains. District Judges might have jurisdic-

tion over antitrust damages claims, but Federal Collegiate Circuits Courts cannot act as appeal courts in those civil cases, (since they only have jurisdiction in the writ of Amparo proceedings). In accordance with the Mexican legal system only Unitary Circuits courts can hear the challenge against rulings issued by the District Courts when they are ruling civil cases, and these Unitary Circuit Courts have not been created; so this particular procedural matter must be corrected as soon as possible by the Federal Judiciary.

III. THE PROBLEM OF THE STANDARD OF DAMAGE UNDER MEXICAN LAW

Antitrust damages are subject to a very rigid standard established by the rules on civil liability developed by scholars and jurisprudence on Mexican Civil Law, both of them, deeply influenced by French Civil Law of Napoleonic heritage.

Under such classical Civil Law, the standard of damage that must be proved before a Court contains the following elements:

Damage to property, which involves procedural and substantive elements. Compensation can only be claimed by the person whose property has been damaged. The damages cannot be claimed by non-victims, abstract damage cannot be argued either (e.g. damage to the competition process or damages to the "economic efficiency" not the "social welfare"). This element might conflict with the damages suffered by a collectivity since the plaintiff is not exactly who suffers the damage in its property, but a group of people recognized by the law as entitled to claim compensation due to damages.

However, the Court settling a claim for damages in an antitrust class action will face the challenge of developing a broader standard of damage considering a recent rule in the Federal Procedural Civil Code (2011). Such rule considers the collective damage by affectation to rights related to diffuse interests that not necessarily holds a legal relation with the plaintiff ("collective damage" shall not be confused with the "aggregate damage", which is the sum of all personal/individual damages that would be claimed in a class action massive tort).

Actual, doctrine and jurisprudence has been establishing that the damage must be actual, certain, and effective, not hypothetical, not conjectural and not merely possible. The Court must be convinced that the damage has occurred, is occurring or will certainly occur. The Court then must reject the harm caused by the assumption attributable only to the imagination. What the Court should look for is certainty about the existence of damage.

This feature also means a major challenge for the specialized courts. The first thing to accept is that the assessment of the accuracy and amount of damages involves complex economic analysis. Analysis that in many cases involve a comparative exercise between the situation after the offense and the hypothetical situation that would have existed without the addition of any anti-competitive conduct besides econometric exercises specifically based on assumptions of hypothetical cases.

At the moment when the economic analysis involves a hypothetical scenario, the certainty of the existence of the damage could be questioned. Therefore, the first thing to accept is that it is impossible to accurately establish the amount of antitrust damages because the evidence on the "hypothetical case" are mere assumptions based on economic theory and analysis and, in the best scenario, accompanied by demonstrative econometric models. Therefore, the judges in such cases will face economic estimates. This will have to be accepted by the specialized courts; otherwise, no case could fit in the very rigid standard of damage outlined by classical civil law. This, not because the estimates were not accurate ¾ such notion should be discarded ¾ but because the certainty of the existence of the damage cannot be challenged on the grounds of lack of accuracy in their estimation.

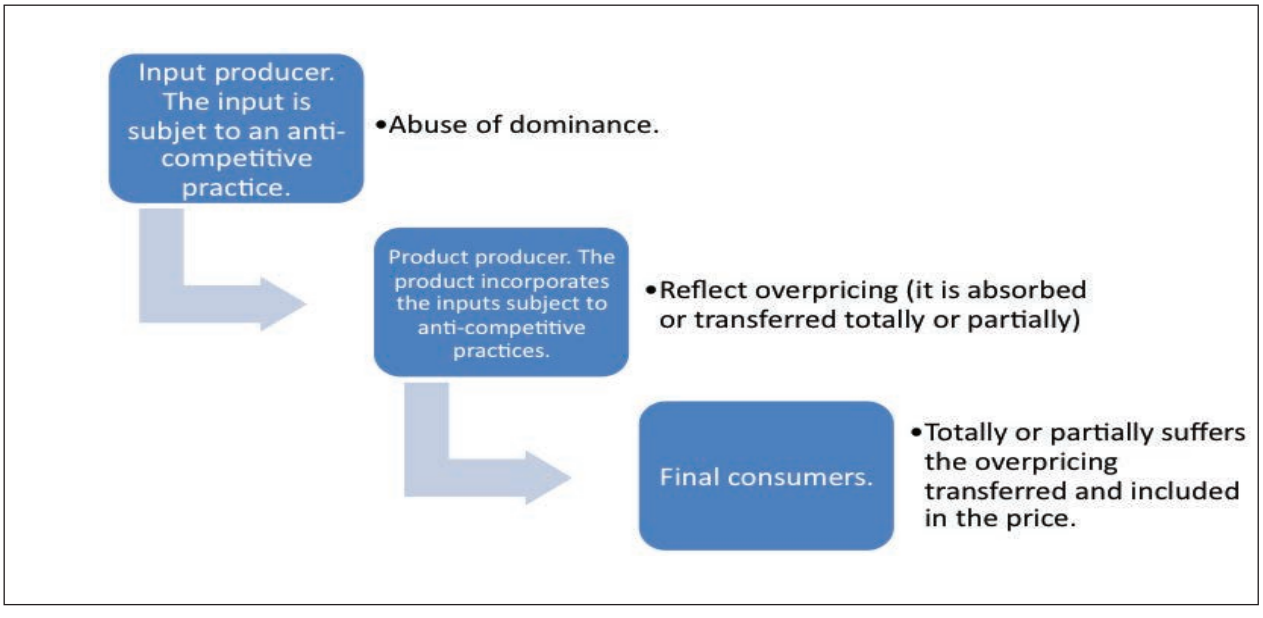
Direct and immediate, it is required that the damage is the direct and immediate consequence of the anti-competitive practice. This feature requires that the link between the damage and its cause can explain that, from the anti-competitive practice ¾ as preponderant cause ¾ damage occurs.

Precisely, this is the most problematic characteristic for the specialized courts because, in most cases related to competition, damages may be indirect and mediate result from successive transfers (passing-on) of the damage (totally or partially) along the value chain and the consumption chain of goods and services affected by anti-competitive practices.

quential damages, as well as a causal link divided into several sections.

Such developments imply updating the characteristics of the damage to complex contemporary life situations that were not necessarily covered by the scholars of the classic civil law nor the editors of the Civil Codes.

Thus, it is necessary to redefine the standard of damage to be required by Courts in order to cover the damage to property and collective damage; actual damage; direct and immediate, as well as indirect and mediate damage, characteristics subject to a control rule: the reasonable foreseeability of the harm.



In this context, specialized courts have a challenge to update the old standard of damage required by the institutions of civil law. Specialized courts cannot ignore that failing to recognize indirect and consequential damages from anticompetitive behavior is tantamount to tolerate damages transferred downstream or upstream, when the direct victim and the one who transfers them do not have a legal duty to absorb such damage.

In Mexico, in environmental law and consumer law, the statutes and jurisprudence has shifted to recognize indirect and conse-

Such standard necessarily must be based on economic theory and judicial experience ¾ of specialized courts, that lead to the construction of a coherent system of antitrust damages.

To achieve this, it is essential that the specialized courts are willing to make a bold judicial interpretation of Article 134 of the FLEC and pursuant to the human rights implied (access to justice, complete compensation and effective access to markets with effective competition) in order to reach a more aggressive system against anticompetitive behavior.

IV. THE CHALLENGE TO IMPROVE THE DESIGN OF CLASS ACTION SYSTEM TO CLAIM AGGREGATE DAMAGE.

There is no credible means in Mexican law to claim the "aggregate damage" from monopolistic practices through a class action. This, understanding the "aggregate damage" as the result from adding all the damages suffered by economic agents and consumers who participated in the affected market or related markets in which the anti-competitive practice take place.

This, because the Mexican class actions system is based on the formula opt-in. In a class action system there are two ways in which the ruling binds to the class: (i) opt-out, in which the outcome of the trial has general effects (win or lose) and only is excluded the persons who expressly unlink, and (ii) opt-in, where the ruling covers only those who expressly added as plaintiff (e.g., from the initial claim until 18 months after judgment is issued in the case of Mexico ¾ cf. Federal Code of Civil Procedures).

In Mexico, besides that the opt-in system prevails, it is excluded the possibility that another class ¾ made up by those who did not adhered themselves to the first trial ¾ claim damages in a subsequent trial. Thus, it is ensured that there is only one massive trial in which the chances of all affected by anti-competitive practices to joint to the outcome of the trial are not only unlikely, but remote.

This situation has led to several practitioners to argue that in Mexico there is no real class action for antitrust damages that allows claiming an "aggregate damage." The effectiveness of the system of class actions is void until the formula opt-in is not replaced by the opt-out, which favors aggregate claiming.

The result of such class action system is to lead to an unlawful enrichment, supported by the legal system itself, which should favor the collective damage claims.

V. CONCLUSIONS

Beyond doubt the new text of the FLEC represents a major step forward for antitrust damages claims in Mexico. Many procedural problems were overcome and the remaining problems for individual claims are solvable in the short term.

Regarding the conflict between the classical civil law standard of damage against the requirements in antitrust cases, it is expected that specialized courts adopt a more flexible view of the concepts of immediate and direct damage. If jurisdictions such as France or Germany have been able to solve that issue, in Mexico it could also happen through judicial interpretation.

Now, concerning class actions, we cannot be so optimistic, the system was not improved and breakthroughs in the short term are not expected until the opt-in system is not adopted in the statutory rules.

PRIVATE DAMAGES AND COLLECTIVE REDRESS IN THE EU — WHERE DO WE STAND A YEAR AFTER THE INTRODUCTION OF THE EU DAMAGES DIRECTIVE?

BY PONTUS LINDFELT [1]
& **SOPHIE SAHLIN** [2]

1 Partner, White & Case, Brussels
2 Associate, White & Case, Brussels

I. INTRODUCTION

The EU Damages Directive entered into force a little over a year ago, on December 25, 2014.[3] On June 11, 2013, the European Commission ("Commission") adopted a proposal for a directive on how citizens and companies can bring damages claims under EU antitrust rules. The proposal was then discussed in the European Parliament and the Council.

The Commission's proposal and the Damages Directive itself was the result of a long process that the Commission initiated a decade before the entry into force of the Directive to encourage claimants to bring damages claims before national courts for competition law violations. The delay seems to be a direct result of the strong reactions from various stakeholders in the public consultation that followed the 2005 Green Paper and the 2008 White Paper on the subject.[4]

The Commission had repeatedly raised the concern that only a small number of its decisions gave rise to successful damages claims, despite the significant harm suffered by European consumers as a result of the antitrust infringements.

The Commission also considered that there were obstacles in a large majority of Member States that affected a claimant's chances for bringing a successful case. Moreover, due to differences in national legislations, some Member States have been considered more favorable for antitrust damages actions. The United Kingdom, Germany and the Netherlands are known to be the most popular EU jurisdictions for follow-on damages actions. The United Kingdom, in particular, benefits from favorable disclosure rules and its courts' willingness to assert jurisdiction.

The Directive includes, among other things, expanded access to evidence for claimants, rules on limitation periods, precedent effect of infringement decisions, presumption of harm, no joint and several liability for immunity recipients, protection from contribution claims from settling defendants, etc.

Unlike the 2008 White Paper, the Directive does not include rules on collective redress. As part of its proposal package, the Commission adopted a recommendation encouraging Member States to set up collective redress mechanisms for victims of violations of EU law generally (Recommendation on Collective Redress). The recommendation was adopted on June 11, 2013 and asks Member States to put in place appropriate measures within two years at the latest.[5]

What has happened since the entry into force of the Damages Directive? We are now one year after its entry into force and the EU Member States have yet another year to implement it and no actual obligation to set up a collective redress mechanism. We have observed both legislative and judicial activity during 2015.

II. AMENDED REGULATION 773/2004 AND NOTICES TO ENSURE CONSISTENCY WITH THE DAMAGES DIRECTIVE

On August 3, 2015, the Commission adopted amendments to Regulation 773/2004 and four related Notices (Access to the File, Leniency, Settlements and Cooperation with National Courts), to ensure the consistency between the Damages Directive on the one hand and the Regulation and Notices on the other hand.[6]

There are two categories of changes: first, certain categories of documents will never be made available for use in follow-on actions,

3 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

4 See alert: http://www.whitecase.com/publications/alert/european-commission-adopts-package-private-damages-actions-antitrust-cases.

5 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law.

6 http://ec.europa.eu/competition/antitrust/actionsdamages/evidence_en.html.

and second, the rules on the subsequent use of documents obtained through access to the Commission's file have been re-drafted.

One interesting precision is the question of access to leniency statements and settlement submissions. Prior to the enactment of the Damages Directive, the question of whether a national court could order a competition authority (including the European Commission) to disclose leniency statements and settlement submissions was governed by the case law of the European Court of Justice ("ECJ"). In *Pfleiderer*,[7] the Court had held that a competition authority could not adopt a blanket prohibition on the disclosure of such documents, but had to consider if the public interest in disclosure was outweighed by the interest against it.

However, the Damages Directive simply prohibits national courts from ordering a party to disclose those categories of evidence, thereby replacing the balancing exercise developed in the case law with a blanket prohibition. The Commission has adapted its Notices to reflect the new position. The Commission Notice on Immunity from Fines now states at paragraph 35 that the Commission will not at any time transmit leniency corporate statements to national courts for use in actions for damages for breaches of the EU competition rules. This is to ensure that leniency applicants and parties to a settlement are not disadvantaged as compared to the other infringing parties in follow-on damages actions. Indeed, because of the importance of the leniency program in the detection and fining of cartels, the Commission cannot risk that leniency applicants be deterred from coming forward.

III. GERMANY — THE QUESTION OF FUNDING OF COLLECTIVE LITIGATION VEHICLES

On February 18, 2015, the Higher Regional Court of Düsseldorf dismissed Cartel Damage Claims' (CDC) multi-million euro claim against six companies involved in the German cement cartel as inadmissible due to lack of sufficient funding.[8]

CDC is a Belgian company for the collection of follow-on damages in antitrust litigation. In this particular case, the assignment of claims to CDC was based on sales contracts according to which a group of companies received a lump sum of EUR 100 and a prospective 65 percent to 85 percent of the damages received in case of success.

The case was dismissed because CDC was insufficiently funded, not because of the pooling itself, which the court did not oppose to in principle. The court found that the principal reason behind the assignment was to shift the financial risk onto the defendant. CDC would not have been able to cover litigation costs in the event of an unsuccessful outcome and openly admitted to this. Due to CDCs insufficient resources, the defendants would have had to bear all costs in the event of a defeat but would not be (fully) reimbursed in the event of a win.

The requirement that follow-on damages claims be properly funded is included in the Recommendation on Collective Redress. The Commission recommended that courts be entitled to stay follow-on damages actions if "*the claimant party has insufficient resources to meet any adverse costs should the collective redress procedure fail*" (para. 15). However, the court perhaps goes even further, as it did not merely stay the action but dismissed it as inadmissible.

Whether Germany will become less popular for follow-on actions as a result of this judgment remains to be seen. It certainly raises the bar for claimant vehicles, that will have to rethink their financing. Unfortunately, the court did not provide guidance on potential funding

7 Judgment of the Court of June 14, 2011, Case C-360/09 Pfleiderer AG v Bundeskartellamt.

8 http://www.justiz.nrw.de/nrwe/lgs/duesseldorf/lg_duesseldorf/j2013/37_O_200_09_Kart_U_Urteil_20131217.html (available in German only) and Alert: http://www.whitecase.com/publications/alert/german-decision-collective-redress.

models and whether the funding needs to cover only the first instance or all instances. Litigating in Germany (and in continental Europe) still remains less costly than litigating in the United Kingdom; Germany should therefore remain an attractive jurisdiction.

IV. UNITED KINGDOM — "OPT-OUT" COLLECTIVE ACTIONS REGIME

On October 1, 2015, the UK Consumer Rights Act 2015 (the "CRA") entered into force. It modifies the Competition Act 1998 and the Enterprise Act 2002.[9]

One of the most significant reforms is the introduction of an "opt-out" collective actions regime. Currently there are only mechanisms by which opt-in actions can be brought, although they are rarely used in practice. The Commission's Recommendation on Collective Redress precisely recommends "opt-in" systems as a general rule, precisely to avoid the introduction of a U.S.-style litigation culture.[10] Arguably, an opt-out regime is the only effective tool in particular for large classes where the individual claim would be small. In that case, an individual who has suffered harm will likely take no action at all.

Certain safeguards have been set up with this risk of creating a U.S.-style litigation culture in mind. The Competition Appeal Tribunal will assess the suitability of the class representative, whether the claim is suitable for a collective action and whether it should be brought on an opt-in or opt-out basis.[11] The regime contains other safeguards against the development of a "litigation culture" by precluding exemplary damages and the use of so-called damages-based awards for opt-out claims.[12]

With the inclusion of an opt-out collective actions regime, the United Kingdom is likely to increase its popularity as a forum for follow-on damages actions. In a number of respects, the United Kingdom rules on follow-on damages claims already go further than the Damages Directive. This is true in particular for disclosure and access to documents.

V. OUTLOOK

The EU Member States now have a bit less than a year left to implement the Damages Directive. In some jurisdictions, the implementation of the Directive will require significant amendments to the current regimes. For instance, the presumption that a cartel infringement causes harm is a novelty in many jurisdictions.

Without having conducted a full survey, it appears that some Member States have progressed in the implementation of the Directive. For instance, in Finland a draft proposal was published during the summer and put out for comments. In Sweden, a first proposal was published in November 2015, only a week before the trial for Sweden's so far largest damages claim kicked off (Yarps SEK 369 million claim against Telia and in April 2016, Tele2's SEK 708 million claim against Telia).[13]

With diverging national rules and litigation cultures and the margin of discretion that each Member State enjoys in the implementation of the Damages Directive, it is difficult to predict what the legislative landscape will look like in a year. A Directive is only an instrument of minimum harmonization and can therefore give rise to rather different results.

Importantly, follow-on damages actions will be brought before national judges whose legal background, culture as well as experience will influence court rulings and could lead to rather different outcomes. They will have to deal with questions that the Directive or the national rules raise; it should there-

9 See Alert: http://www.whitecase.com/publications/alert/new-era-dawns-uk-competition-damages-actions.

10 http://europa.eu/rapid/press-release_MEMO-13-530_en.htm and Recommendation on Collective Redress, paras. 21-24.

11 Schedule 8, part 1, 5.

12 Schedule 8, part 1, 6.

13 See http://www.svd.se/telia-riskerar-over-en-miljard-i-skadestand.

fore not take long before we see requests for preliminary references to the ECJ for guidance and clarification.

Although the Directive should be implemented by December 27, 2016, it will take much longer to assess its effect on the EU damages actions landscape;[14] although in all likelihood it will increase the number of private actions. The United Kingdom, Germany and the Netherlands should keep their "claimant-friendly" status, at least for the near future. Indeed, there are many factors that make these jurisdictions attractive. Claimants are likely to prefer bringing actions before an experienced judge willing to assert jurisdiction, rather than before an unexperienced judge applying brand new rules and principles.

14 In particular, as the new rules often will only apply to facts that occurred after the new rules entered into force.

THE DEVELOPMENT OF PRIVATE ENFORCEMENT REGARDING DAMAGES ACTIONS IN CHILE

BY **NICOLÁS LEWIN** [1]
& **FRANCISCO BORQUEZ** [2]

1 Partner at Noguera Larrain & Dulanto Abogados in Chile. Lawyer from Pontificia Universidad Católica de Chile. Diploma in Competition Law. Member of the International Advisory Board of the Institute for Consumer Antitrust Studies of Loyola University Chicago. Member of the Commission of Competition Law at the Chilean Bar Association. http://www.nld.cl/en/abogados/lewin-m-nicolas/

2 Lawyer from Pontificia Universidad Católica de Chile. LL.M. in Laws and Economics at University College London. British Chevening Scholar. Former Fiscalía Nacional Económica and DG Competition European Commission.

Private enforcement regarding damages actions originating from competition infringements, has slowly emerged in Chile during the last years. In this sense, high profile cartel cases filed by the National Economic Prosecutor Office (FNE) regarding pharmaceutical retail, poultry and toilet paper production, have led to the development of this area. Particularly, consumer protection has been at stake, causing awareness in a matter that prior to these events had little or no treatment in the Chilean system. Thus, it is a good moment to lay some considerations for future legislative modifications, in order to give the right incentives and to close the circle of competition protection in Chile.

Reviewing private enforcement status in Chile requires a brief understanding of some of the institutional framework in national regulation. In general, any party with a direct interest in a particular case may bring a law suit before the Chilean Competition Defense Tribunal (TDLC), where it can seek for injunctive relief, the application of fines or any other remedy established by Chilean Competition Law. While a large percentage of cases in Chile are brought to the TDLC by private parties – mainly related to unilateral conducts or abuse of dominance –, public enforcement focuses in cartel prosecution by the FNE, merger control and other matters regarding antitrust policy.

According to Article 30 of Decree Law N° 211 (Competition Act), private damage actions are pursued before civil courts as follow-on cases, only after the TDLC has decided the case brought by the same party or by the FNE in representation of the general interest. Even though it has been resolved that there is no need to be a party at the TDLC litigation by lower courts, most of the private parties usually participate in the process before the TDLC as a way to preserve their rights of a private course of action.

In these cases, the final decision by the TDLC is binding for the civil court where damages are under discussion. This means that a civil court may not change or challenge the facts and the qualification of those facts made by the TDLC, so the main purpose of the civil litigation is to prove the actual damages and causality between anticompetitive conduct and the damages claimed by plaintiffs (recognized by the Chilean Supreme Court in the *Philip Morris v. Chile Tabacos* Case).

The possibility for stand-alone cases regarding competition law damages is not quite clear. There is a ruling made by the Court of Appeal of Santiago, stating that an action by Article 30 of the Competition Act has no ability to paralyze a case of damages brought by the ordinary (or residual) damages action contemplated on Chilean Civil Code. On the other hand, a ruling by a first instance civil court established that there is a need for the TDLC to establish that a conduct is anticompetitive for the purposes of a successful damage claim under competition law. There are no Supreme Court decisions on these matters, which leads to a practical issue that most of the plaintiffs should not jeopardize their action by trying a stand-alone case. Notwithstanding the above mentioned, there is a recent case known as the "Toilet Paper Cartel" in which a consumer association filed a class action before the TDLC has a decision on the case (there is not yet a resolution by the civil court regarding the admissibility of this action).

In other order of ideas, the Chilean system does not include in the Competition Law class actions, but they have been used under Consumer Protection Law, which works on a similar basis that opt-out class actions. A recent example is the damages class action as a follow-on case on the Drug Stores cartel. In that case, Consumer Protection Act was applicable as the cartel conduct was performed by the last chain of distribution having direct effect on consumers. As mentioned before, in the Toilet Paper Cartel a class action has been filed for recovery of damages. This action should face at least three issues: (i) The action was brought as a stand-alone case; (ii) the case involves consumers as indirect purchasers; and (iii) there is a question whether Consumer Protection Law applies since the

anticompetitive conduct was performed upstream in the productive chain. This issue was addressed at the bill under discussion in the congress, which includes applying consumer protection class actions for the purpose of recovery of damages under Competition Law (it does not make clear yet if this is a follow-on case or a stand-alone action).

In sum, this system has been in force since 2003 and there have been some cases solved by the civil courts. The last case solved by a first instance court was in early 2015 in a case where Telefonica was condemned to pay an amount approximately equivalent to $20 million, on a case of refusal to deal, margin squeeze and price discrimination to the plaintiff, a company that was active on the business of converting landlines calls to cellular calls and calls on the net of one mobile operator to the net of other mobile operator having the effect of diminishing clients cost on access charges made by mobile companies.

However, there are still some issues that need further development. For instance, those related to the passing-on defense and indirect purchasers. There is no case law in Chilean jurisdiction, but there is an interesting discussion between authors in this regards. One of them (Banfi, 2014), is against passing-on defense and sustains an "Illinois Brick Doctrine" alike regarding indirect purchasers, based principally in causality matters. On the other hand, there are some authors that sustain that passing-on defense is available under Chilean Law and that indirect purchasers are legitimated to bring damages actions, based, upon other reasons, on causality matters and general principles of law as part of a whole system of interpretations (Fuchs and Vives, 2014; Lewin, 2009 and 2011). This academic discussion may come to an end after the Toilet Paper Cartel, as both cases involve indirect purchasers and the passing-on defense might be brought by defendants.

Regarding some other general issues in Chile, there are no punitive damages, while costs and fees are subject to general rules (losing party pays only if it was completely defeated). All defendants are jointly and severally liable and right of contribution is allowed under the general principles of torts of our Civil Code. There is no consideration to leniency programs when it comes to damages, being this one of the things that should be improved in order to give more incentives for potential applicants. Regarding the statute of limitation for the action of Article 30 of the Competition Act, is four years since the TDLC's decision is final. In case one party tries to go by a stand-alone case, this should be four years commencing on the perpetration of the conduct. It is very important to consider that there is the possibility that the action for remedies before the TDLC is extinguished by the statute of limitation of the Chilean Competition Law (for cartel cases five years since the exhaustion of the effects of the cartel and for other conducts three years from the materialization of the conduct) but the general damages action is not. In this kind of cases, stand-alone actions are quite relevant as there is no possibility of filing a follow-on case.

Another issue that has not received considerable attention is related to discovery. In Chile, there is no such thing as the discovery in the United States. This leads to a problem for cases where the FNE is not willing to act (most cases where there is little or no public interest involved) and obtaining evidence of a conduct or market becomes difficult for filing a suit before the TDLC and the follow-on action afterwards. In cases where the FNE is involved, the agency uses its powers in order to obtain the evidence needed regarding the conduct and the markets involved.

Finally, it is necessary to highlight a recent amendment to the Competition Act that is currently under study in the Chilean Congress, regarding damages actions originated by anticompetitive infringements, and that is expected to be enforceable during 2016. This modification involves giving jurisdiction to the Competition Tribunal – instead of Civil Courts – to judge these cases. However, it is important to stress out that this legal change must take into consideration that – according to

Chilean law – the objects of competition and damages are different and protect diverse legal interests. Also, it must consider that given the composition of the Competition Tribunal – that includes two economists – it differs from general damages regulation, which is known and ruled by Civil Courts, composed strictly by judges that are lawyers. In this sense, other jurisdictions that have similar competition institutional frame as Chile, like South Africa, have given Civil Courts the power to decide regarding these matters, as provided by Section 65 (6) "Civil Actions and jurisdiction" South African Competition Act 1998.

In conclusion, the Chilean damages actions originated in competition infractions are emerging in Chile. Yet, there are some amendments and corrections that are needed for the perfection of the system. Therefore, it is important to stay aware of future case law that will certainly illustrate the development of this matter.


CPI
COMPETITION POLICY
INTERNATIONAL