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## Working Party No. 3 on Co-operation and Enforcement

# SUMMARY OF DISCUSSION OF THE ROUNDTABLE ON THE RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT

**15 June 2015**

*This document prepared by the OECD Secretariat is a detailed summary of the discussion held during Item III of the 121sh meeting of Working Party No. 3 on 15 June 2015.*

*More documents related to this discussion can be found at: www.oecd.org/daf/competition/antitrust-enforcement-in-competition.htm*

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# ROUNDTABLE ON THE RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT

*Summary of Discussion*

The Chair of Working Party No 3 (WP3), Mr. Bill Baer, opened the roundtable on the relationship between public and private antitrust enforcement with a short introduction on the aim of the roundtable: explore the current state of private enforcement in OECD member and participant jurisdictions and review initiatives and tools to make such enforcement more effective.

The Chair noted that there is a broad agreement in the antitrust community that private litigation can improve the functioning of a competition regime and that victims of anti-competitive conduct should be entitled to reasonable compensation. Thus, many jurisdictions have adopted measures to encourage harmed parties to bring private actions and to reduce unnecessary obstacles that such parties might otherwise face in starting litigation. Those measures include, for example, giving plaintiffs easier access to relevant evidence and alleviating the burden of proof on the existence of illegal conduct and the quantification of the damage suffered.

At the same time, the right balance must be struck between public and private enforcement, as private enforcement may in some situations have an adverse effect on enforcement by public authorities. For example, the possibility of discovery of evidence obtained by competition agencies through leniency processes may discourage offenders to ask for leniency in the first place. Antitrust policy and antitrust law enforcement, including private enforcement, should be viewed as an integrated policy in which numerous factors contribute to the complementary goals of correction, deterrence, and compensation.

The Chair suggested that the discussion cover the following issues: instruments to promote private enforcement, means to ensure that public and private antitrust enforcement do not interfere with each other, and ways to strike the right balance between public and private enforcement.

The Chair introduced the three invited speakers: Judge Irène Luc, legal deputy at the Paris Court of Appeal, Honorable Susan Illston, Judge at the United States District Court of the Northern District of California and Dr. Tilman Makatsch, Head of Competition Litigation at Deutsche Bahn AG.

## 1. Introduction

The Chair asked Judge Irène Luc to give an overview of private enforcement in France to set the stage for discussing the interaction between public and private enforcement.

**Judge Luc** started with a presentation of competition law in France. The French Competition Authority (FCA) is the only administrative authority that may punish anti-competitive practices by imposing monetary sanctions. Private enforcement cases are heard by specialised commercial courts which can – like the FCA – declare practices anti-competitive and order that they cease. However, the commercial courts do not have the authority to impose monetary sanctions.

Victims of anti-competitive practices can file either follow-on or stand-alone actions. In follow-on actions they file for damages in the commercial courts after the FCA has found an infringement. In stand-alone actions they file a complaint directly with one of the eight special commercial courts to seek recognition of and compensation for anti-competitive practices. The Court of Appeal of Paris is the specialised appellate court against the decisions of the FCA and of the commercial courts.

Judge Luc explained that the basis for private antitrust enforcement is the general principles of French civil law. For a court to award damages, an infringement of competition law must be established and the causal link between the infringement and the damage demonstrated. The claimant bears the burden of proof. The judge has to establish the loss and order full compensation. A company which has been a victim of a price cartel has to prove that it has not passed on its overcharge to its end clients in order to be compensated.

In 2014, France introduced so-called 'actions de groupe' (class actions) with the Hamon law. Under this law, consumer organisations are allowed to file civil lawsuits to receive compensation for losses suffered by individual consumers (not companies). These class actions are always follow-on actions, i.e. they follow the decision of the FCA or of a commercial court. Up to June 2015, no class action had been launched concerning competition law.

When a case is submitted to the FCA, the parties have access to the file. Also, the judge can ask the FCA to send information in its case files. Leniency applications are protected and may not be disclosed. In practice however, the FCA does not normally give any information during ongoing investigations, in order not to jeopardise the efficiency of public enforcement, thus making it difficult for private parties to collect sufficient evidence to start proceedings. Also, trade secrets are not protected per se under French law. The judge must use his discretion to weigh the conflicting interests involved and decide whether to order access to them. There is no general disclosure right in French law, only specific discovery rules, i.e. requests for specific documents.

Judge Luc mentioned that in France courts can ask the FCA for an opinion on the case. This method has been of good use so far. The opinions of the FCA are not mandatory for the courts but are generally followed. However, there have been cases where the court denied compensation although the FCA had found a violation of competition law. Such cases jeopardise the coherence of French competition law and should decrease and eventually disappear. The FCA and the European Commission can also act as *amicus curiae* before the national courts, offering information on the case.

Judge Luc reported that there is private enforcement in France. Especially the number of stand-alone cases brought directly before the special commercial courts is rising, meaning that more competition cases are investigated. Judge Luc concluded that the French private enforcement system works but should be strengthened.

The Chair thanked Judge Luc for her presentation and asked what weight the commercial courts give to the findings of the FCA. Judge Luc explained that, while judges at the commercial courts are not bound by the decisions of the FCA, they usually follow them.

**Judge Illston** then spoke on her experience as a senior district judge at the United States District Court of the Northern District of California. She presented the flat panel/LCD cartel case in which several individuals and firms were convicted in criminal proceedings for anti-trust violations. At the same time, private actions in damages were lodged. In the US only the direct victims (direct purchasers) of the cartel conduct may file federal law suits. Indirect purchasers, usually consumers, do not have standing in federal courts to lodge anti-trust claims. However, in approximately 23 state jurisdictions, consumers (indirect purchasers) can file law suits. In the flat panel/LCD cartel case there were indirect purchasers' class actions

and class actions in which the states sued on behalf of their consumer residents. These class actions resulted in out of court settlements for approximately 1.08 billion USD. Direct purchaser class actions were also filed and were settled for approximately 470 million USD. In addition there were 27 opt-out cases which involved purchasers with claims sufficiently large to start separate lawsuits.

In terms of co-ordination between public and private enforcement, in flat panel/LCD cases the timing of the litigation was controlled by the court. The public enforcement actions started first, the private enforcement actions were brought soon after. The parties in public enforcement actions filed for a stay of the private enforcement proceedings. The private parties argued against the stay. There was a debate on discovery of information in the course of private actions while criminal proceedings were pending. The court decided that the rights of the criminal defendants should not be impaired by the private enforcement proceedings. So, only documents which the criminal defendants had already provided to the public authorities could be provided to the private plaintiffs. Depositions – oral statements given by individual witnesses and parties – were delayed until after most of the criminal matters had been decided. The court's task was to balance the timing and the needs for the various cases. The court was occasionally asked to order the production of documents from leniency programmes or from prosecution in foreign jurisdictions, but these requests were never granted.

Judge Illston concluded that the US has a robust long history of private litigation. However, it can be improved in some areas. First, while there is no passing-on defence, direct victims often do pass on costs. So if direct and indirect purchasers sue for damages there is a real risk of double recovery. If consumers (indirect purchasers) are allowed to bring private enforcement actions, then the damage analysis needs to be carefully tailored so that the risk of double recovery is lessened. Also, the jurisdictional reach of the courts must be reviewed in the light of the global nature of today's economy.

The Chair thanked Judge Illston for her presentation and pointed out that the next WP3 meeting of October 2015 will cover the topic of cartels in intermediate goods and how to determine antitrust jurisdiction in that situation.

## 2. Instruments to promote private enforcement

The Chair opened the second part of the discussion on the tools that countries use to promote private enforcement and asked the United States for an intervention on punitive damages.

The delegation from the **United States** mentioned that the US has a very active private enforcement system which complements the public enforcement work by the Federal Trade Commission, the Department of Justice and the states. Private litigation is important because on the federal level agencies most often seek only injunctive relief and not redress for affected consumers. Private plaintiffs may be, anyway, in a better position to assert their rights. Private plaintiffs can seek treble damages. This rule was introduced as an incentive to promote private enforcement and also serves as a very powerful deterrent.

The US delegate also emphasised that the US class action system helps private actions, as it allows groups of individuals or small companies to bring damages claims. These individuals or companies might otherwise not bring lawsuits on their own as they do not have the resources or do not suffer harm large enough to motivate them to start proceedings.

The US delegate observed that there is co-ordination between public and private enforcement to organise the discovery process in order to assure efficiency in the production of information, not jeopardise the different enforcement routes and reach coherent outcomes. However, there are situations in which the interests of the private litigants are not in line with the interests of public enforcement agencies. The

complexity of private enforcement can cause delays to public enforcement proceedings and in these cases it may make sense to have separate procedures.

**Israel** took the floor to explain that an amendment to the anti-trust act is pending before the economic affair committee of the Israeli parliament to introduce treble damages. The Israeli delegate reported that the amendment is going to be reviewed in parliament within a few months.

The Chair thanked the US and Israel and turned to the issue of claim aggregation. The Chair invited the French delegate to explain the follow-on class action mechanism by consumers' associations introduced in 2014 with the Hamon law.

**France** explained the French class action which in many respects follows the European model of class actions recommended by the European Commission. This model aims to limit excess litigation by grouping claims together and offer a compensation tool for consumers and SMEs who would not otherwise have the resources or interest to take action on their own. The Hamon law provides for full compensation (but not punitive damages) and opt-in mechanisms which allow consumers to become voluntarily part of the damages proceedings. The judge can order the publication of information concerning the proceeding in order to alert consumers to the class action.

The **Chilean** delegate then reported that in Chile there is a law proposal to introduce class actions pending before the Congress. Currently class actions for breaches of competition law are not possible. The proposal includes a provision to increase the maximal applicable fines from 25 million USD to twice of the benefits of the anti-competitive conduct. The proposal also aims to strengthen the leniency programme, criminalise collusion and make findings of collusion easier by abolishing the need to prove market power in certain cases.

The Chair thanked the Chilean delegate. He observed that criminal sanctions tend to be stronger deterrents and asked Australia to explain the background and the effect of a reform in 2009 regarding disclosure of evidence by the Australian Competition and Consumer Commission (ACCC).

The **Australian** delegate took the floor and explained that in Australia legislation was introduced in 2009 to remedy some shortcomings that became apparent when the ACCC was unsuccessful in defending some claims brought by private claimants in follow-on cartel proceedings. The private plaintiffs wanted access to a number of witness statements that the ACCC had, which included information from immunity applicants. The ACCC argued that the disclosure of the witness statements would have operated as a disincentive for future immunity applicants and would have undermined the ACCC's immunity policy. The Court did not agree with the ACCC. Thus, the ACCC was concerned that the decision would have a detrimental effect on its immunity policy and advocated for statutory protection for information provided in confidence in relation to cartel investigations. This let to statutory protections for what is now known as protected cartel information. The statute gives greater legal certainty to those who provide such information to the ACCC.

Protected cartel information is broadly defined as any information that is related to a possible cartel provided to the ACCC in confidence. The ACCC cannot be required to disclose protected cartel information unless the court orders the ACCC to do so. This information can only be used for the purposes for which disclosure was ordered. The court, when deciding whether to order disclosure of protected cartel information, can only take into account certain factors: whether the information is provided by an informant, that person's safety, whether or not disclosure will discourage future informants, Australian relations which other countries, the need to avoid disruption of national and international law enforcement efforts, and the interests of administration and justice. The court has to balance private and public interests.

The Australian legislation does not establish categories of protected or disclosable information like for example the EU directive 2014/104/EU on antitrust damages actions.

The Chair thanked the Australian delegate and asked Korea to present the Korean 2004 law amendment which makes it easier for victims to prove the amount of damages.

The **Korean** delegate explained that the 2004 amendment to the antimonopoly law and the Fair Trade Act eliminated the three year limitation period for damages claims. It also allows victims of anticompetitive conduct to bring damage claims irrespective of whether they Korean Fair Trade Commission has issued a remedy or not. In view of the difficulties of calculating the amount of damages, in 2010 the Korean Fair Trade Commission implemented a system to predetermine the amount of damages in bid rigging, which requires public procurement contracts to include provisions predetermining the amount of damages (usually 10% of the contract amount).

The Chair thanked the Korean delegate and invited the Japan to explain how Japanese courts can ask the Japan Fair Trade Commission (JFTC) to advise on the amount of damages in follow-on damage actions based on prior JFTC decision.

**Japan** explained that the anti-monopoly act allows the court who hears an action in damages to ask for an opinion by the JFTC regarding the amount of the damages, to help alleviate the burden of proof on the claimant. Seeking the opinion is voluntary and the opinion of the JFTC is not binding. Since the introduction of the system, 84 JFTC opinions have been requested by courts. The JFTC not only provides the sum of damages but also the way of calculating it. The system works very well in promoting private follow-on anti-trust litigation.

The Chair thanked the Japanese delegate. He asked the Finnish delegate to explain whether in Finland the findings of the competition authority are binding for the commercial court.

The **Finnish** delegate explained that in Finland the findings of the competition authority is not binding for the commercial courts *de jure* but are followed *de facto*, like in France. There is no case law in Finland on that. There are only cases in which the civil courts have taken decisions of the High Administrative Court as a precedent in private enforcement proceedings. The delegate noted that Finland is in transition period because it will implement the 2014 EU directive on antitrust damages actions.

The Chair thanked the Finnish delegate and asked Canada to explain mechanisms in the Canadian judicial system that assist private persons injured by anti-competitive conduct to obtain relief.

The delegate from **Canada** explained that the Competition Bureau is the investigative body which takes cases to courts or specialised competition tribunals. It deals with civil cases, mergers, unilateral conduct and deceptive marketing practices. Today all but one Canadian province allow class actions for damages. As a consequence the number of cases for damages has risen. This concerns follow-on proceedings as well as cases concurrent with public enforcement proceedings.

Recent decisions of the Canadian Supreme Court allow indirect purchasers (consumers) standing in private enforcement proceedings for cartel damages. The Competition Bureau was obliged to disclose certain information to the private plaintiffs. However, this obligation meant that the Competition Bureau had to allocate staff to redact protected information in documents to be disclosed.

In Canada civil actions can be lodged before the competition tribunal only in cases concerning vertical restraints, in which the remedy is a cease and desist order, not compensation. However, in Canada six residents can compel the Competition Bureau to start investigations. The Bureau has discretion on how to

proceed with the investigations but it needs to go through a formal process to discontinue the investigation. This is therefore a powerful tool for consumers to compel the Bureau to take action.

The Chair thanked the Canadian delegate for his presentation. He asked why access of private parties to the competition tribunal is limited to vertical restraints and whether in these cases the private party could also seize the courts.

The delegate from Canada explained that the government's approach is incremental, meaning that access to the tribunal can be increased in the future. Private parties can seize the courts, though.

The Chair concluded that the discussion on co-ordinating public and private enforcement showed a clear need to strike the right balance between both enforcement approaches. Interference with or discouragement of private companies to seek leniency should be carefully avoided.

## 3. Striking the right balance between public and private enforcement: disclosure of information

The Chair then asked the European Union to talk about balancing public and private enforcement.

The **European Union** noted that the secretariat's background note gave a good perspective on how the EU directive 2014/104/EU on antitrust damages actions tries to strike the balance between public and private enforcement. Access to evidence which is in the files of the competition authorities is key for any private enforcement case and the Directive contains provisions in this regard.

A majority of the private enforcement cases in Europe are follow-on cases. There are basically three ways for the claimant to get evidence: the first is to ask the competition authority, the second is to ask the information from the other party in a private proceeding and the third is to ask the court to order the competition authority to disclose information.

The Directive clarifies what kind of information held by a competition authority can be requested for private litigation purposes. It provides for three-tier system with black (information is protected and cannot be disclosed), grey (information is protected for a period, and can be disclosed afterwards) and white (information can be disclosed at any time) lists. Leniency statements and settlement submissions are black listed. The black listing of these documents is however limited to self-incriminating statements and not to the pre-existing information which is usually added as an annex to the leniency statement. The reason of black listing the confession is the risk that companies would not come forward of their statements can be disclosed, so this is a way to protect the incentive to file for leniency.

Information that has been exchanged between the competition authority and the parties during the proceedings is grey listed. That information can be available after the authority takes a decision or closes the case. This protects ongoing investigations but also facilitates follow-on actions (though not concurrent ones).

Disclosable information can be disclosed if the civil judge so decides, on the basis of a proportionality test balancing the interests of the claimant with the interest of public enforcement. Competition authorities can give a non-binding view on that balance.

The EU underlined that the treatment of confidential information is an important point for private enforcement. There is a tension between the obligation of the competition authorities to assist national courts and their obligation of professional secrecy as civil servants. In principle the European Commission should give confidential information to national courts. However, EU Member States must ensure that national judges protect confidential information.

The Chair thanked the EU for his presentation. He noted that it would be helpful to have periodic updates on the development of private enforcement. The Chair asked Italy to describe the details of their three-tier system on black, white and grey lists for disclosure.

The **Italian** delegate described the details of their three-tier system, which will be based on the categories of information in the EU Directive on antitrust damages actions. In Italy private enforcement consists mainly of follow-on actions; it is hoped that the transposition of the Directive will boost private enforcement actions.

The Chair thanked the Italian delegate and asked Sweden to explain the conditions under which private parties can access the Swedish agency's files.

The **Swedish** delegate then explained the conditions under which private parties can access the Swedish competition authority's files. Swedish legislation on public access to official documents already provides an extensive right of access to documents. However, that access is not unlimited. There is no right of access to internal memorandums or to information which is secret; however only in the early stages of investigation can the authority keep information secret from parties.

EU law has been invoked in two recent requests for access to documents by complainants who had stated that their intention were to bring actions in damages against undertakings which were under investigation by the authority. The authority had to determine in what circumstances EU law could be invoked and whether EU law implied a right to full access to the authority's file when the undertaking seeking access had the intention of lodging private damages actions against the undertaking subject to investigations. The authority denied access to the documents in both cases. The documents contained profit margins and price strategies of the investigated undertakings, which was considered to be confidential information. The administrative court of appeal shared the authority's opinion in one case but opened the possibility to make an assessment based on EU law if there is enough evidence for the complainant who intends to pursue actions in damages. In the other case the administrative court of appeal found that Art. 102 TFEU is applicable, that the claimant has the intention to pursue actions for damages and that a balancing of interests exercise has to be conducted according to the principles laid down by the CJEU. By doing so the court came to the conclusion that the documents in question should be kept confidential.

The Chair thanked the Swedish delegate and asked Germany to describe a recent case.

The **German** delegate described the *Pfleiderer* case. In 2008 the Bundeskartellamt imposed fines on several European manufacturers of décor paper for fixing prices. *Pfleiderer*, who was a major customer, applied for access to the file – in particular the leniency application – in order to prepare a claim for damages. The Bundeskartellamt denied access because of the potential negative effects on future leniency applications. The customer appealed this decision to the local court in Bonn, which decided to stay the proceedings and refer the question to the Court of Justice of the European Union (CJEU). The CJEU requested national courts to balance the public and the private interest. Applying the decision, the Bonn court refused the disclosure of the files. The German delegate underlined that leniency statements should be subject to very strict confidentiality rules. Since private enforcement largely depends on successful detection of cartel infringement, the protection of leniency programmes also guarantees the possibility to take private legal actions against cartelists.

Regarding other information in the files, natural or legal persons having suffered damages from cartels can be granted access to the cartel files. In almost every cartel case with a final decision there is at least one application for access to the files. In 2014 the Bundeskartellamt received about 150 applications for access on files. The scope for disclosure is limited by the legitimate interest that can be shown. Usually

only access to the final decision is granted by the Bundeskartellamt because this document contains all the information about the acts of individuals and the infringement as such.

The Chair thanked the German delegate and invited Portugal to explain how the Portuguese competition act protects leniency statements.

The **Portuguese** delegate underlined that private enforcement in Portugal is still in its initial stage, but there are already some follow-on cases. Currently the Portuguese Competition Act contains a special provision concerning access to files of leniency documents. It states that parties have access to the documents for the exercise of their rights of defence. However, they cannot take copies of the documents unless authorised by the leniency applicants. The law also adds layers of protection with regard to oral statements in oral leniency applications. These protections apply during the investigations of the competition authority. Once the decision becomes final, restrictions to access leniency documents remain in place because they are considered confidential. Similar protection is in place for settlement documents which may contain self-incriminatory declarations. The Portuguese delegate underlined that Portuguese legislation finds a balance between leniency and civil follow-on actions.

The Chair then asked the Slovak Republic to illustrate their rules to limit the civil liability of successful leniency applicants.

**Slovak Republic** presented their reform of the Competition Act. Main goals are to improve the cartel enforcement and increase the attractiveness of the leniency programme. However, there are no practical cases on the civil liability of successful leniency applicants.

The Chair thanked the Slovak delegate and introduced the final speaker, Dr. Tilman Makatsch of Deutsche Bahn AG and invited him to share his experience on private enforcement as head of the special competition litigation division of Deutsche Bahn AG.

**Dr. Makatsch** clarified that he is only expressing his personal views and shortly introduced Deutsche Bahn, a transport-network and logistics company operating the German rail network, providing public transport and air/land/water freight services. The annual purchase volume of Deutsche Bahn is approximately 25 bn Euros. A lot of cartels affect Deutsche Bahn directly or indirectly. Deutsche Bahn established a special competition litigation unit. Currently 65 cases are on the watch-list and 20 cases are in progress of which 11 are pending before courts in six different countries. The claim volume exceeds one billion Euros.

From Dr. Makatsch's view current challenges are that proceedings are slow and cost intensive. There is also significant legal uncertainty in particular with regard to the burden of proof. Private enforcement is subject to information asymmetries. The Bundeskartellamt does not generally publish decisions and the access to documents and decisions takes time, which could lead to claims being time barred. Settlement decisions contain little information and non-confidential versions of decisions contain only a limited amount of useful information for private plaintiffs.

Dr. Makatsch proposed a two-step procedure to resolve the problems of private enforcement. Compared to the US or the UK settlements are very rare in Germany. Therefore, to encourage more follow-on actions, the public enforcement procedure could be split into two. The first step would be a declaratory decision finding a competition law infringement. This decision would be published by the competition authority early. In a second step the competition authority would give a final decision including a fine, taking into account settlements which had been concluded between the two steps during an interim period. This would create an incentive for cartelists to settle with third party claimants between the two procedural steps.

Dr. Makatsch underlined that such a two-step procedure would be in line with German legislation. Also the EU Directives on antitrust damages actions provides in Section 3 of Art. 18 that a competition authority may consider compensation paid as a result of a consensual settlement and prior to its decision imposing a fine to be a mitigating factor. Such a two-step procedure would create benefits, as cartelists and private litigants would be spared the high costs which court proceedings entail. The two-step procedure would be faster than court proceedings and ease the workload of courts. In addition settlements can give parties a reliable basis for long-term planning.

The Chair thanked Dr. Makatsch for his presentation and invited the UK delegate to describe the new mechanism to certify a voluntary redress scheme offered by a party in relation to a CMA infringement decision.

The delegate from the **United Kingdom** explained that the 2015 Consumer Rights Act introduced a new power for the Competition and Markets Authority (CMA) to certify a voluntary redress scheme following either an infringement decision by the CMA, by the European Union or a sector regulator exercising its competition powers. The new CMA certified redress scheme aims to place a voluntary redress scheme on a formal statutory footing. It is intended to be an alternative to private litigation. The CMA will certify that the scheme has been set up in accordance with the statutory framework but it would not determine the precise levels of compensation to be awarded. Those determinations as to the levels of redress will be carried out by an independent board of experts. The board will be chaired by a senior judge or lawyer and be composed of an economist, an industry representative and a representative of the potential beneficiaries under the scheme. To incentivise companies to offer this scheme the CMA envisages in certain instances to allow for up to 10% reduction in the penalty. The formal redress scheme promotes private enforcement without diverting significant resources of the CMA, thus strikes an appropriate balance between public and private enforcement. The Chair thanked the delegate from the United Kingdom and turned to the United States.

Finally, the delegate from the **United States** shared insights in the role that US agencies play with respect to civil cases filed in parallel with cartel investigations. US agencies try to keep their role in civil litigations as limited as possible to protect the integrity of the government's criminal antitrust investigations.

## 4. Chair's Closing Remarks

The **Chair** thanked all participants in the roundtable and stressed that papers submitted by participants and by the Secretariat for this discussion were very useful to frame the discussion. As this is an evolving issue it should be kept on the agenda of WP3.