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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

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

15 June 2015

This Executive Summary by the OECD Secretariat contains the key findings from the discussion held during Item III of the 121st meeting of Working Party No. 3 held on 15 June 2015. It is circulated to delegates FOR INFORMATION.

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

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EXECUTIVE SUMMARY

*By the Secretariat**

Considering the discussion at the roundtable held by Working Party No.3 on Co-operation and Enforcement on 15 June 2015, the delegates' submissions, the panellists' presentations and the Secretariat's background paper, several points are noted:

(1) *Private and public antitrust enforcement are complementary tools for effective compliance with antitrust laws.*

Public enforcement of antitrust laws is carried out by competition authorities and aims to serve the public interest. Private enforcement is based on claims for damages brought by private entities that have suffered harm from antitrust infringements and aims at compensation. Both public and private enforcement support effective compliance with antitrust laws.

Although the aims of public and private enforcement differ, they are essentially related and mutually reinforcing. Private antitrust damage actions can complement public enforcement by strengthening deterrence, increasing incentives to enter into amnesty/leniency programmes and empowering victims to challenge anti-competitive behaviour directly. Public enforcement facilitates private actions by helping claimants to base so-called follow-on actions (i.e. claims brought after a competition authority has established the infringement) on the findings of the competition authority and rely on evidence that the competition authority collected, which can be essential in showing causation and estimating the harm suffered. Therefore, public and private enforcement are integrated policy tools, which contribute to the complementary goals of deterrence, compliance and compensation.

(2) *OECD member and participant jurisdictions have introduced mechanisms to promote private enforcement. However, the intensity of private enforcement is mixed. Some jurisdictions have a significant experience in damages actions; in others, private claims are not very common.*

The roundtable showed that the experiences with private enforcement within OECD member and participant jurisdictions are uneven. Some jurisdictions, like the United States, have a long-standing tradition of private enforcement, while others have very little experience. In recent years, jurisdictions like Germany, the Netherlands, the United Kingdom and the European Union have adopted measures to promote more vigorous private enforcement; an increasing number of claimants rely on the tools introduced in these jurisdictions with positive results. It emerged from the roundtable discussion that most private actions are follow-on actions.

Civil procedure (tort) rules apply to private enforcement. In general, plaintiffs must provide evidence of the illegal conduct, the harm suffered from such conduct, the amount of the damage and a causal link between the conduct, the harm and the damage. Delegates recognised that OECD member and participant jurisdictions should aim to facilitate private antitrust enforcement and provide incentives to harmed parties to bring private actions, by, for example, easing the

* This Executive Summary does not necessarily represent the consensus view of the Competition Committee. It does, however, encapsulate key points from the discussion at the hearing and the conclusions of the expert papers.

burden of proof for the plaintiff on the existence and quantification of the damage or introducing rebuttable presumptions. Other tools to facilitate private antitrust enforcement are easier access to evidence, giving binding effect to final infringement decisions adopted by competition authorities or establishing clear and sufficient limitation periods. Some OECD countries use punitive damages, which may consist in double or treble damages, and class actions, which allow groups of claimants to request compensation collectively and thus minimise legal costs. Some jurisdictions have established opt-in and opt-out collective redress mechanisms and allow consumers to assign their claims to an association who then files a complaint on their behalf. Delegates agreed that there is no one-size-fit-all private enforcement system.

Private enforcement rules and practice differ between countries. The United States, which is the OECD jurisdiction with the longest and most extensive experience with private enforcement, has a system based on actions for treble damages, opt-out class actions, jury trials, contingency fee agreements, an extensive discovery system and the exclusion of the passing-on defence. In the European Union, in the period 2006-2012 less than 25% of the Commission's infringement decisions were followed by damages actions. Actions in damages are brought in very few EU Member States, mostly in the United Kingdom, Germany and the Netherlands. In the United Kingdom, measures were adopted in 2013 to strengthen the follow-on damages regime. In the European Union, Directive 2014/104/EU on antitrust damages actions sets forth common standards for disclosure of evidence, the effect of national decisions, limitation periods, passing-on defence, standing of indirect purchasers, quantification of harm, joint liability and consensual dispute resolution, and is expected to lead to an increase of damages actions. In Korea, private damage claim are increasing. Private enforcement is not usual in Hungary and Mexico, but there is a trend for more actions in Japan, Brazil and China.

(3) *There are obstacles to private enforcement due to, in particular, the partial unsuitability of general civil procedure rules to private antitrust claims.*

Delegates agreed that there are obstacles to effective private enforcement, related to the complexity of damages claims, as well as to the application of general rules which do not fully take into account the particularities of antitrust claims, and the relation between public and private antitrust enforcement.

General civil procedure rules require the plaintiff to prove the breach of law, the fault of the defendant, the existence of damages, which must then be quantified, and a causal link between the breach and the damages. Competition cases are not only particularly fact-intensive, but also characterised by a structural information asymmetry, where the information required to support a private claim is generally in possession of the defendant, while certain information in the files of the competition authority is protected and cannot be disclosed. It can be extremely complex for potential claimants, especially final consumers, to obtain the factual elements in order to demonstrate that they are entitled to compensation, and this may deter them from claiming damages. Also, as delegates highlighted, private enforcement proceedings can be very long, cost intensive, uncertain and subject to tight limitation periods.

(4) *Jurisdictions should strike a balance between public and private enforcement and avoid that private enforcement has an adverse effect on public enforcement.*

Delegates underlined that focusing only, or primarily, on facilitating compensation for victims of antitrust breaches can undermine the effectiveness of public enforcement, especially if the measures to help private claims diminish the incentives to enter into leniency programmes. Harmed parties want access to information which is in the files of the competition authorities to

use as evidence for their damage claims. However, granting access to all information which the competition authority possesses can jeopardise ongoing investigations, and leniency and settlement programmes. It is therefore necessary to balance the attractiveness and effectiveness of leniency and settlement programmes with private parties' access to information collected by competition authorities. Some delegates pointed out that the provision of information to private parties can also create additional costs for the competition authorities, for example when they have to redact documents to hide confidential information.

Delegates discussed the conditions under which harmed parties should access documents and information contained in the files of the competition authority. They agreed that clear discovery rules help to ensure easier access to evidence and, at the same time, protect confidential information (particular leniency statements) from disclosure.

The final decision on whether and what information should be disclosed is usually up to courts which can decide case-by-case which weighs more, the public or the private interest. Courts can consider whether the information sought was provided by an informant or leniency applicant, whether the disclosure of the information will discourage future informants and the legitimacy of the private plaintiff's interest for disclosure. Delegates agreed that, although the evidence which can be found in leniency statements can be very helpful for cartel victims in follow-on actions, the overall value of leniency programmes for effective enforcement of competition law requires that these documents are kept confidential.

One approach to regulate access to information is to categorise the information which is in the competition authorities' files. Directive 2014/104/EU on Antitrust Damages Actions introduced a system in which leniency statements and settlements submissions are black listed, i.e. cannot be disclosed. Documents prepared for the purposes of the investigation are grey listed, i.e. are temporarily embargoed and can only be made available when the proceedings are closed. Pre-existing materials and all other information are disclosable. The categorisation aims to help the courts to decide whether the information is to be disclosed or not. Delegates underlined that the final decision on the disclosure is on the judge, but that having these categories will create legal certainty which is needed to promote more private enforcement.

(5) ***Jurisdictions should ensure that public and private enforcement are co-ordinated and that the knowledge and resources of the competition authorities feed into private enforcement.***

An instrument which can promote private enforcement are voluntary redress schemes, whereby the infringer agrees out of court with the victims of the infringement on the compensation due. In the United Kingdom, the Competition and Markets Authority can certify such voluntary redress schemes.

In several jurisdictions the competition authority is allowed to give non-binding opinions to the civil courts regarding the amount of damages or act as *amicus curiae* during the court proceedings. Delegates observed that in a number of jurisdictions the findings of authorities in public enforcement cases are not binding *de jure*, but they are followed *de facto*.

Delegates highlighted that co-ordination between public and private enforcement is important. Thus, each individual case of anti-competitive conduct must in principle end with a consistent finding of both the public and the private enforcers. This can be achieved by granting binding effect to competition authority decisions. When public and private enforcement are launched in parallel, court proceedings can be co-ordinated with public investigations; undisturbed, efficient public enforcement may require a stay of private proceedings.