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Private Enforcement of Competition Law – Note by Consumers International

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More documentation related to this discussion can be found at: oe.cd/peocl.

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Consumers International

1. About Consumers International

1. Consumers International is the membership organisation for consumer rights groups around the world. Founded in 1960, we bring together 200 member organisations in more than 100 countries, with a mission to empower and champion the rights of consumers everywhere and to build a fair, safe and sustainable marketplace.

2. Why private enforcement matters

2. Public enforcement remains central to competition law, but it cannot do everything. Competition authorities have limited resources and must prioritise cases, while public penalties generally do not compensate victims. A successful public prosecution may punish unlawful conduct without restoring the losses suffered by consumers and businesses.

3. Private enforcement complements public enforcement by providing compensation for consumers and businesses harmed by anticompetitive conduct, adding deterrence by increasing the expected cost of infringement, and identifying cases that public authorities do not pursue. The prospect of civil damages may alter the calculation of firms considering unlawful conduct.

4. The key principle is that more private enforcement is not necessarily better enforcement. Public and private enforcement should form an integrated system. The objective is not to maximise the number of claims, but to improve compensation and deterrence without impairing the effectiveness of public enforcement.

5. At the same time, excessive barriers to private enforcement may result in under-enforcement, where harmful conduct remains unchallenged because claims are uneconomic or impractical to pursue. Effective systems should therefore seek an appropriate balance between deterrence, access to justice and safeguards against unmeritorious litigation.

3. Follow-on and stand-alone actions

6. Follow-on actions are private claims brought after a public authority has found an infringement. They can reduce duplication and cost. Final public findings should have substantial evidentiary weight, allowing private proceedings to concentrate on causation and damages rather than requiring an infringement already established in public proceedings to be proved again.

7. Stand-alone actions are those in which the plaintiff independently establishes infringement. They are important because competition authorities cannot investigate every case. Such actions also mobilise information held by customers, competitors and other market participants, some of which may never come to the attention of a public authority.

8. Effective systems should facilitate both forms of action. Follow-on proceedings are especially useful for compensation, while stand-alone proceedings may reveal infringements that public enforcement has not addressed. In Australia, section 82 of the Competition and Consumer Act provides for damages for specified contraventions, and

section 83 gives specified findings or admissions of fact an evidentiary role in subsequent proceedings.

9. The experience of Hong Kong provides an interesting illustration of these issues. Hong Kong permits follow-on actions but not stand-alone competition claims. However, the Hong Kong Consumer Council is not aware of any reported consumer follow-on actions having been brought under the Competition Ordinance. This may reflect the practical challenges consumers face in pursuing competition claims individually, particularly where losses are relatively modest. The example highlights the distinction between legal availability and practical accessibility.

4. Evidence and disclosure

10. A major problem in private competition litigation is that relevant evidence is often controlled by defendants. A consumer may know the price paid but have no access to the communications, pricing records or other evidence needed to establish an infringement or quantify loss.

11. Targeted and proportionate disclosure is therefore necessary. There must be enough access to make legitimate claims possible, while avoiding excessive discovery and fishing expeditions. Courts should be able to require disclosure of relevant categories of documents while taking account of costs and confidentiality.

12. Particular protection is needed for competition-authority files. Leniency statements and settlement materials should generally be protected to avoid weakening cartel detection. Private enforcement should benefit from public investigations without turning cooperation with authorities into a disproportionate source of additional exposure.

5. Collective redress

13. Collective redress is essential where competition infringements cause small losses to many consumers. Without aggregation, individual claims are economically irrational and unlawful gains may remain with infringers. A modest overcharge imposed on a very large number of purchasers can cause a substantial aggregate outcome even though no individual claim is worth bringing.

14. Consumer organisations may be particularly important in this context, serving as an intermediary between individual consumers and the enforcement system by helping identify, aggregate and pursue harms that would otherwise remain unremedied.

15. Opt-out collective actions can be particularly effective because consumers do not have to take affirmative steps to join. The United Kingdom's Competition Appeal Tribunal provides one example of a specialised collective proceedings regime. Collective actions nevertheless require safeguards, including credible common issues and damages methodology, adequate class representation, and appropriate oversight of litigation funding.

16. The objective is to make meritorious collective claims feasible without encouraging speculative litigation. A further practical question is whether compensation actually reaches consumers. Legal and funding costs, distribution arrangements and unclaimed amounts can substantially affect the value of collective redress.

17. Consumer organisations may have a useful representative role where dispersed losses would otherwise go unremedied. Any such role should be accompanied by appropriate safeguards for the interests of the consumers represented.

6. Quantifying damages

18. The central question in quantifying damages is what prices, output or profits would have been but for the infringement. Exact counterfactuals are often impossible. Courts should accept credible economic estimation rather than demand artificial precision.

19. Comparisons across periods, markets or products may help estimate the effects of an infringement. Once infringement and causation are established, uncertainty about the precise competitive outcome should not automatically defeat an otherwise well-founded claim. Rebuttable presumptions may be appropriate, particularly for cartel overcharges, but defendants should retain the opportunity to challenge them.

20. Passing-on rules should permit recovery by indirect purchasers where appropriate while avoiding double compensation. The analysis should recognise that an overcharge may be passed through successive stages of a supply chain and that identifying where the loss ultimately falls can be difficult.

7. Costs and access to justice

21. Competition litigation is expensive and technically complex. Consumers and small and medium-sized enterprises face particular disadvantages because individual claims may be relatively small, evidence is costly to obtain, and the risk of adverse costs may deter litigation even where a claim has merit.

22. Possible responses include class or collective proceedings, appropriate cost protection, and litigation funding subject to safeguards. Funding can make otherwise impossible proceedings feasible, but conflicts between funders, lawyers and claimants need to be addressed. The important question is whether the arrangements support meritorious cases and leave an appropriate share of compensation for victims.

23. Australia's capacity for no-adverse-costs orders in appropriate Part IV damages cases is a potentially useful development. Its practical value should be assessed by whether it improves access to justice for claimants who would otherwise be deterred by the financial risks.

8. Role of competition authorities

24. Competition authorities should produce clear infringement decisions, provide economic guidance, assist courts on important competition-law questions and protect confidential investigative material. Clear findings may make follow-on proceedings more efficient, while specialist assistance may help courts resolve difficult questions of competition law and economics.

25. Authorities should not, however, become lawyers for private claimants or routinely determine private damages. Their primary responsibility remains public enforcement. Private courts must retain responsibility for causation, loss and compensation, while private claimants should remain free to pursue cases outside the authorities' enforcement priorities.

9. Public-private interaction

26. The central tension between public and private enforcement concerns leniency and damages. Leniency programmes can reveal secret cartels, but a participant considering self-reporting may be deterred if confidential admissions can be used directly against it in subsequent damages proceedings.

27. Private enforcement should benefit from public investigations without undermining incentives to self-report cartels. Leniency submissions should therefore receive appropriate protection while victims' substantive compensation rights are preserved. Measures may include protecting leniency statements, managing access to investigative materials and ensuring that rules on contribution do not disproportionately disadvantage the first cooperating firm. But a proper balance is needed here. Defendants may seek to limit disclosure in ways that restrict the practical viability of follow-on damages actions. Courts and policymakers therefore need to strike an appropriate balance between protecting legitimate leniency programmes and preserving meaningful access to evidence for harmed parties seeking compensation.

28. The two systems also need coordination over settlements, limitation periods and overlapping proceedings. A claimant should not lose the opportunity to sue merely because a public investigation is lengthy, and unnecessary duplication or inconsistent findings should be avoided.

10. International models

29. The United States has strong private enforcement, treble damages and extensive litigation. This can produce powerful deterrence, but also creates risks of over-enforcement and strategically motivated proceedings. The European Union has some increasingly developed private enforcement centred on full compensation and coordination with public enforcement, particularly through its Antitrust Damages Directive.

30. Australia has statutory damages and class actions, but private competition enforcement remains comparatively limited. The existence of a formal right to damages does not itself make private enforcement effective if litigation costs, evidence and quantification barriers prevent claims from being brought.

31. These different models invite empirical assessment. It is important to ask whether reforms have actually increased compensation to consumers and smaller businesses, whether recoveries reach victims, and whether deterrence has improved without undermining public cartel detection.

11. Conclusion

32. Two extremes should be avoided. One is a system in which private rights exist only on paper because cost and evidentiary barriers make them practically unusable. The other is excessive litigation that chills legitimate competition or damages public enforcement.

33. The aim should be a complementary system combining public deterrence, private compensation, collective redress and protection of leniency. In particular, private actions should not make vigorous price competition, innovation or other legitimate competitive conduct legally hazardous merely because competitors are disadvantaged.

34. The ultimate test is whether the system deters infringement, compensates victims, encourages detection of secret wrong doing and preserves vigorous legitimate competition. A well-designed system should achieve these objectives together rather than maximise any one of them in isolation.

12. Acknowledgements and Disclaimer

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