Organisation for Economic Co-operation and Development

DAF/COMP/WP3/WD(2026)26

Unclassified

English - Or. English

25 November 2026

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

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

# Private Enforcement of Competition Law – Note by BIAC

7 December 2026

This document reproduces a written contribution from BIAC submitted for Item 3 of the 144th meeting of Working Party 3 on 7 December 2026.

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

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**JT03599039**

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# *BIAC*

## 1. Introduction

1. *Business at OECD* (BIAC) welcomes the Working Party No. 3 roundtable regarding private enforcement of competition law. The roundtable builds on the OECD's 2015 paper, *Relationship between Public and Private Antitrust Enforcement*, and provides an opportunity to assess how the balance between public and private mechanisms has developed in practice over the past decade.[1]

2. For the purposes of this submission, BIAC uses "private enforcement" in the same broad sense as the 2015 OECD paper: claims of possible infringements of competition law brought by individuals before courts. This is broader than "private damage litigation," which refers more narrowly to compensatory, often follow-on claims after a public infringement decision.

3. Since 2015, the private enforcement landscape has changed materially. The scale and scope of private enforcement have significantly increased as the growth in third-party litigation funding has become a more prominent source of financing for antitrust claims. Certain jurisdictions, such as Canada, have expanded their private enforcement regime. This increase in private exposure has also meant that the debate over whether private exposure has reduced the incentive to seek immunity or leniency has continued.

4. The increase in private antitrust litigation has coincided with the growth of third-party litigation funding. Burford Capital, the world's largest litigation funder, reported in its 2025 annual report that its total group-wide legal finance portfolio had grown to approximately USD $7.5 billion.[2] The EU Antitrust Damages Directive has facilitated the development of private damages actions across Member States since transposition, as reflected in the European Commission's 2020 report on its application.[3] The UK Competition Appeal Tribunal has reported a notable increase in collective proceedings applications following the *Consumer Rights Act* 2015 opt-out regime,[4] and Australia has

[1] OECD, Relationship Between Public and Private Antitrust Enforcement — Note by the Secretariat, DAF/COMP/WP3(2015)14 (June 11, 2015), https://one.oecd.org/document/DAF/COMP/WP3(2015)14/en/pdf.

[2] Burford Cap., Buford Capital 2025 Annual Report 1, https://s206.q4cdn.com/737820215/files/doc_financials/2025/ar/2025-Annual-Report.pdf (reporting a group-wide legal finance portfolio of approximately USD $7.5 billion).

[3] Commission Staff Working Document Accompanying the Report from the Commission to the European Parliament and the Council on the Implementation of 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, at 14, SWD(2020) 338 final (Dec. 14, 2020), https://data.consilium.europa.eu/doc/document/ST-14083-2020-INIT/en/pdf.

[4] Competition Appeal Trib. & Competition Serv., Annual Report and Accounts 2023-2024, at 5 (2025), https://www.catribunal.org.uk/sites/cat/files/2026-03/Competition%20Appeal%20Tribunal%20and%20Competition%20Service%20Annual%20Report%20and%20Accounts%202023-2024.pdf.

seen growth in funded class actions in competition matters.[5] These developments increase access to claims, but also heighten the importance of screening, cost allocation, and controls against duplicative or weak litigation.

5. At the same time, several jurisdictions have experienced a sustained reduction in immunity and leniency applications. Various data sources, including the OECD's 2023 Competition Trends, indicate a general decline in leniency applications around the world, affecting most jurisdictions.[6] More specifically, between 2015 to 2021, the number of leniency applications dropped across most OECD jurisdictions and regions. Looking at specific regions, Europe and the Latin America and Caribbean region experienced an overall 60% and 66% decline, respectively.[7] Commentators have attributed part of this decline to the exposure created by private follow-on damages claims, which can reduce the net benefit of self-reporting.[8] The relationship is not necessarily causal in every case, but it warrants careful calibration of disclosure, damages, and settlement regimes so that private redress does not erode the public detection system.

## 2. Private Enforcement as a Complement to Public Enforcement

6. Private enforcement generally takes two forms: stand-alone claims, in which the claimant must establish the infringement and its consequences, and follow-on damages claims, which rely in whole or in part on a prior public finding. Both forms can serve legitimate purposes. Public enforcement should nevertheless retain primacy for deterrence because public authorities can investigate conduct systematically, impose public remedies, and pursue cases in the broader interest rather than only where a private claimant has sufficient incentive to litigate.

7. Public enforcement is also generally better placed to develop competition law jurisprudence. Agencies can select matters that address recurring or economically important questions, develop a consistent record, and consider effects across markets. Private litigation is usually more specific to the facts, evidence, and incentives of the parties before the court. It can clarify the application of legal principles, but a fragmented body of private judgments may not provide the same coherence or prospective guidance. This is particularly true in the United States, where private claims that go to trial often are decided by lay juries, who do not write judgements explaining their reasoning.

8. Public enforcement may also be more effective in achieving broader societal goals. Agencies can set priorities, allocate resources, coordinate across jurisdictions, and decide whether a matter warrants intervention. Courts have no equivalent control over which cases

[5] Austl. L. Reform Comm'n, Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders, Report No. 134, at 74 (2018), https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_134_webaccess-1.pdf.

[6] OECD, Alternatives to Leniency Programmes — Call for Country Contributions, at 2, DAF/COMP/GF(2023)3 (Sept. 12, 2023), https://one.oecd.org/document/DAF/COMP/GF(2023)3/en/pdf.

[7] OECD, The Future of Effective Leniency Programmes: Advancing Detection and Deterrence of Cartels — Background Note, ¶ 7, DAF/COMP/WP3(2023)1 (Apr. 25, 2023), https://one.oecd.org/document/DAF/COMP/WP3(2023)1/en/pdf.

[8] Id. ¶¶ 44-45, 49; OECD, Summary of Discussion of the Roundtable on The Future of Effective Leniency Programmes: Advancing Detection and Deterrence of Cartels, at 3, DAF/COMP/WP3/M(2023)1/ANN1/FINAL (Mar. 20, 2024), https://one.oecd.org/document/DAF/COMP/WP3/M(2023)1/ANN1/FINAL/en/pdf.

are brought before them. Private enforcement should therefore supplement public priorities and remedies, not displace the authority's judgment about which conduct most warrants investigation and public action.

## 3. Procedural Safeguards for Private Enforcement

9. Care should be taken to ensure that private enforcement is complementary rather than duplicative of public enforcement, does not unnecessarily penalize or dissuade competitive conduct, and discourages frivolous claims. These objectives require a balanced procedural framework: legitimate claimants should have meaningful access to justice, while defendants should not face litigation pressure untethered to a plausible theory or evidence of harm.

10. Canada illustrates how a leave requirement can serve these objectives. Following the significant expansion of the private right of action that came into in force in June 2025, a private applicant must obtain leave from the Competition Tribunal and satisfy statutory tests that differ depending on the provision invoked.[9] The leave stage can screen out unmeritorious claims before the parties, and the Tribunal incurs the full costs of litigation. The interaction with Competition Bureau inquiries also helps avoid parallel proceedings. More specifically, the Tribunal will not hear an application where the Bureau has launched a formal inquiry or where the Bureau discontinued an inquiry because of a settlement.[10] Conversely, a pending private application may prevent a Bureau inquiry into the same matter, although the Bureau may at the outset choose to intervene and take carriage of the matter.[11]

11. Costs awards for unsuccessful private enforcement can provide an additional safeguard against weak or strategic claims, subject to appropriate judicial discretion and access-to-justice considerations. Such measures should not be treated as obstacles to legitimate claims. Their purpose is to ensure that the prospect of private litigation encourages credible enforcement and redress without creating disproportionate settlement pressure or deterring firms from lawful competitive conduct.

## 4. Role of a Public Enforcer in Private Enforcement

12. The role of a public enforcer in private enforcement may range from bystander to participant to source of evidence. The appropriate role depends on the proceeding, the authority's statutory mandate, and the risk that its involvement could distort the balance between public and private litigation. BIAC supports participation that adds expertise and public-interest discipline, while preserving the parties' ability to test the evidence and the authority's accountability for its positions.

[9] Gov't of Canada, Bulletin on Private Access to the Competition Tribunal pt. II.A (Aug. 4, 2026), https://competition-bureau.canada.ca/en/how-we-foster-competition/education-and-outreach/publications/bulletin-private-access-competition-tribunal.

[10] Id. Pt. III.B.

[11] Id.

### 4.1. The Authority as Amicus or Interpretive Participant

13. Amicus participation is generally welcome, because it can import the authority's expertise and public-interest perspective into private litigation. Any intervention should be transparent, on the record, and open to response by the parties. .

### 4.2. Prior Enforcement Decisions

14. For stand-alone claims, consideration should be given to the treatment of a prior public decision to discontinue an investigation because the authority found no sufficient merit. Such a decision should not automatically bar a private claim where the legal standard, evidence, or relief differs, but it should receive appropriate weight. At a minimum, the claimant should explain the basis for proceeding and the court should avoid allowing private litigation, in the absence of a material reason, to relitigate an issue that the public authority has already examined.

## 5. Access to Public Enforcer's Investigatory Evidence

15. Not every private enforcement proceeding raises questions about access to investigatory evidence. Where it does, particularly in follow-on actions, self-incriminating cooperation statements should be protected. This includes leniency statements, settlement submissions, and functional equivalents in oral or recorded form. Disclosure of such material can weaken the incentive to cooperate, expose firms to disproportionate follow-on liability, and undermine the public enforcement system that generated the evidence.

16. Confidentiality protections and treatment of competitively sensitive information may properly differ between public and private proceedings. If investigatory materials are shared, use restrictions should travel with the materials through protective orders and equivalent confidentiality protections. Courts and authorities should address the risk of cross-border leakage of protected materials where possible. Access should also be symmetrical: where claimants obtain the authority's file, defendants should have equivalent access sufficient to identify exculpatory material and answer the case fairly.

## 6. Quantification of Harm

17. Private enforcement should complement, not duplicate, public fines and remedies. The design of damages and other private relief should account for cumulative liability and its effects on deterrence, compliance incentives, and firms' willingness to cooperate with leniency programmes. Consideration should be given to an express set-off or other coordination mechanisms for fines and remedies imposed through public and private enforcement, while preserving full compensation where appropriate.

18. Quantification should be based on clear, transparent criteria that reflects the harm to competition and can be tested by the parties and the court. Economic analysis should distinguish actual loss from speculative effects, address causation and pass-on where relevant, and avoid converting uncertainty into a presumption of overcompensation. A calibrated approach will better reconcile redress with deterrence and preserve incentives for lawful conduct and public cooperation.

## 7. Conclusion

19. BIAC supports private antitrust enforcement as a complement to public enforcement, not as a substitute for it. Public authorities should retain primacy in deterrence, priority-setting, and the development of coherent competition-law principles. Private claims should be supported by procedural safeguards that screen out unmeritorious or duplicative cases without obstructing legitimate redress.

20. The framework should protect leniency and settlement materials, ensure fair and symmetrical access to evidence, permit transparent and disciplined participation by public authorities, and calibrate private relief to demonstrated harm and cumulative public liability. These principles can preserve redress and accountability while maintaining the incentives that make effective public antitrust enforcement possible.