

## Summary of Discussion Points

### **Presented by the Business and Industry Advisory Committee (BIAC) to the OECD at the OECD Competition Committee Working Party No. 3 Roundtable on Private Remedies: Discovery and Gathering of Evidence\***

**May 31, 2005**

BIAC is pleased to provide some preliminary comments on private remedies in response to the issues raised by Mr R Hewitt Pate in his letter of 15 April, 2005 for the purposes of the roundtable discussion to be held on 31 May, 2005. Whilst noting that the focus for discussion is to be "Discovery and production of evidence in private litigation", we start with some observations on the subject of private remedies generally in order to provide some context for what we are sure will prove to be an interesting and enlightening discussion.

#### **GENERAL OBSERVATIONS**

1. A threshold question is whether private enforcement actions in the anti-trust field are considered to be a good thing and, if so, whether this extends to all areas of anti-trust including mergers. BIAC crosses that threshold on the basis that everyone should agree that private parties damaged by infringements of anti-trust law should have an adequate opportunity to seek recovery. The more difficult issue is the extent to which such parties should be facilitated or even incentivised under the applicable legal framework to pursue private enforcement actions. This in turn leads to a discussion of how this might be done as a practical matter without triggering what many in business would consider to be the undesirable consequence of opening the flood gates to speculative and even vexatious proceedings with all the wasted cost and disruption to legitimate commercial activities which can result. If the right balance can be found, then the resulting benefits would not be limited to better access to justice for victims of anti-competitive practices, but would also produce the public benefit of some reduction in the enforcement burden currently placed upon national competition authorities. However, there would, of course, be a corresponding additional burden on the court system which may need substantial reinforcement in certain areas. Equally, a degree of caution is required in measuring this possible public benefit. In certain types of hard core anti-competitive practice such as cartels private enforcement even with the benefit of broad discovery rules would be no real substitute for the wide investigative powers of the public authorities.

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2. Any global approach to this issue cannot ignore the problems presented by the existing diversity of legal systems in the various national jurisdictions. In the general absence of specialised competition courts such private remedies have to be pursued before the relevant national civil courts which have jurisdiction to try the issues. This necessarily involves a comparative assessment of civil procedure rules. Whereas the public enforcement of anti-trust rules has been the subject of considerable global efforts to achieve convergence through bodies such as the OECD and the International Competition Network and has made progress based on shared objectives and a wide degree of commonality in terms of the applicable legal and economic theories, the basis for similar convergence of civil procedure and court systems globally simply does not exist. This reflects widely differing legal traditions and cultures across the world notably between the common law and the civil law systems. These are basic building blocks of national judicial structures to which there can be no quick fix solution. Even within these different traditions there are remarkable differences. Whilst the USA and England<sup>1</sup> share the common law tradition and many similarities in civil procedure, it is notable that in the US some 96% of anti-trust enforcement<sup>2</sup> is reportedly effected through private actions whilst in England the percentage is negligible. This high level of private litigation in the US cannot be explained away by the allegedly litigious nature of that society<sup>3</sup>. In reality it probably reflects a different tradition in which the courts have historically played a much greater role in controlling the potential excesses within a market economy rather than the various forms of governmental intervention which are more extensive in many other jurisdictions, particularly in Europe. No doubt, though, the US tradition has been greatly stimulated by the "incentives" to private litigation which exist in the US system such as class actions, treble damages, punitive damages, contingency fees, jury trials in civil cases and that plaintiffs are not liable to pay the costs of the defendant even if a claim is unsuccessful. These factors have in turn fostered the creation of a vigorous plaintiff's bar having the desire and resources to conduct litigation on a massive scale. Some commentators see the signs of similar trends developing in Europe<sup>4</sup> but as things stand this seems a relatively remote prospect. The Ashurst Report<sup>5</sup> trawled the various European jurisdictions thoroughly and only identified one such case in the UK in which damages had been awarded, five in Germany, three in Spain, two in France and three in Italy.
3. The gap between jurisdictions in which private enforcement actions predominate and those jurisdictions (the vast majority) in which it is negligible is thus extreme with neither system providing a model for what is required to achieve a balanced and more convergent framework for private enforcement. The international spread of merger control laws, notwithstanding all its shortcomings, is an example of the level of convergence that can be achieved in the anti-trust field but arguably that was less of a challenge because in most cases it was achieved by introducing entirely new laws rather than changing deeply

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<sup>1</sup> Within the United Kingdom there are significant differences between the legal system applicable in England & Wales and those of Scotland, the Channel Islands, the Isle of Man and (to a lesser extent) Northern Ireland.

<sup>2</sup> See OECD, Rights of Foreign Firms under Competition Laws, COM/DAFFE/CLP/TD(98)23.

<sup>3</sup> It would also be interesting to see data on the percentage of US private actions which have resulted directly or indirectly from public enforcement action by DOJ or the FTC.

<sup>4</sup> "Europe Gets Litigious" by Mark Wegener and Peter Fitzpatrick. Legal Times. 23 May, 2005.

<sup>5</sup> Comparative study undertaken by Ashursts on behalf of the European Commission in 2004.

entrenched and long standing existing laws. In terms of mechanics, short cuts could be considered such as the establishment of specialist competition courts with their own procedures in the various jurisdictions including the European Union – in the latter case possibly as a specialist chamber of the European Court of First Instance pursuant to the provisions of the Nice Treaty<sup>6</sup>. Whatever the mechanics adopted this is clearly the work of years rather than months which will necessarily involve the international political will to carry the necessary legislation forward with vigour. Of course, a more convergent global framework in this area would also be facilitated by certain changes in the existing US system, some of which are likely to be considered by the US Antitrust Modernisation Commission, such as limiting the number and type of cases in which treble or punitive damages are available. A move away from jury trials in such cases might also help to reduce damages awards to more objectively justifiable levels.

## SPECIFIC ISSUES

4. As mentioned in numerous previous papers on this subject any moves towards encouraging private actions in the anti-trust field need to be balanced and mindful of a range of potentially adverse side effects as follows:
  - a. The need for safeguards in any private enforcement network against the cost, business disruption and damage to reputation which can result from private actions brought for strategic or abusive reasons, e.g. by aggressive competitors. One obvious step here is to give the Court or Tribunal the power to award costs against the unsuccessful plaintiff if this is not the generally applicable rule already.
  - b. In order to deal with the forum shopping and "long arm" issues there needs to be clarity as to when a national court or tribunal will accept jurisdiction in a particular case and when it will assist (e.g. by making disclosure orders) with anti-trust proceedings in other jurisdictions. There have been a number of cases in Europe recently which have apparently disregarded even contractual selection of jurisdiction agreements<sup>7</sup> and it has also now been clarified by the European Court of Justice that the 2001 Regulation on Jurisdiction and Enforcement means that the court in which proceedings are first brought has to decide upon its own jurisdiction. The Empagran Case<sup>8</sup> before the US Supreme Court highlights the importance of this issue. However, whilst the Supreme Court in that case gave considerable weight to issues of international comity and anti-trust enforcement cooperation in restricting the reach of US anti-trust law in cases involving conduct taking place outside the US differing considerations appeared to apply in the Intel Case<sup>9</sup> which followed shortly afterwards. In that case the Supreme Court supported an expansion of the role of US courts in the context of foreign anti-trust proceedings. The US legal position on these issues is further confused by the

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<sup>6</sup> See Nice Treaty. Article 225(a).

<sup>7</sup> JP Morgan Europe Ltd v PrimaCom AG [2005] All ER (D) 03 (April).

<sup>8</sup> F Hoffman-La Roche Ltd v Empagran SA. 124 S. Ct. 2359 (2004).

<sup>9</sup> Intel Corp v Advanced Micro Devices, Inc. 124 S. Ct. 2466 (2004).

conflicting District Court decisions in the Methionine Antitrust Litigation<sup>10</sup> (denying an order to produce documents provided to foreign anti-trust authorities) and the Vitamins Antitrust Litigation<sup>11</sup> (compelling defendants in a private action to produce documents provided to foreign anti-trust authorities). On this evidence it would seem necessary to re-visit OECD recommendations<sup>12</sup> concerning cooperation between Member Governments and, if necessary, to beef them up taking into account the importance which leniency programmes now play in the context of enforcement and the desirability of respecting the confidentiality of requests made for leniency in whichever jurisdiction such action is taken.

- c. It is questionable whether private actions should be encouraged in merger cases given that the resulting cost and delay can undermine mergers which are, in actual fact, pro-competitive or efficiency enhancing. The recent trend in the UK is an example of the problems which can arise in this regard<sup>13</sup>.
- d. Sensitive issues can also arise concerning the extent to which competition authorities will grant private claimants access to information gathered in a public investigation which is not otherwise available under "Freedom of Information" legislation, if any, in the relevant jurisdiction.
- e. A further issue concerns whether the relevant regulators should have the right to intervene in support of private actions and, if so, how this can be done.
- f. The risk of multiple parallel proceedings in different jurisdictions is another possible adverse consequence which would need to be managed. Any private action framework would need to take into account prior proceedings and/or action taken or pending by a public authority.
- g. The subject of this roundtable, namely, a degree of commonality on key procedural issues would be another essential ingredient of a viable international framework covering the burden and standard of proof, active case management, the availability of pre-trial disclosure of evidence and the use of expert testimony. Bearing in mind that timing issues can be particularly important in anti-trust issues, the availability of interim relief would be a significant attraction in many cases.
- h. The availability of damages is one of the most critical issues which is also pivotal to the question of incentivisation. The US model with its treble and punitive damages, class actions, contingency fees and general absence of liability for the cost of the defendants offers the greatest incentive to plaintiffs. However, it is unlikely that this model would be adopted by any other jurisdiction given the

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<sup>10</sup> No. C-99-3491 CRB (JCS) MDL No. 1311.

<sup>11</sup> No. 99-197 (TFH) MDL No. 1285 (April 2002).

<sup>12</sup> Recommendation of the Council of the OECD of 28 July, 1995, concerning Cooperation between Member Countries on Anti-Competitive Practices affecting International Trade.

<sup>13</sup> Office of Fair Trading v IBA Health [2004] EWCA Civ 142; Unichem Limited v Office of Fair Trading Case No. 1049/4/1/05. Judgement of 1 April, 2005 as a consequence of which the discretion of the OFT to clear mergers at the first stage has been constrained.

scale of the litigation which it seems to have created in the US which few other countries would be able or willing to cope with. There is also the issue of principle as to whether private parties should be the recipients of windfall gains resulting from successful treble damages claims; the point here is that the function of treble damages is to punish rather than reward and that it is arguably more appropriate that this deterrent effect should be achieved through fines levied by public authorities. Equally, if claimants are limited to simple damages, then there is scope for clarifying the basis upon which such damages can be calculated. Generally, the prospect of recovering substantial damages will be a powerful incentive for private actions and this can probably be largely achieved without adopting all of the more controversial features of the US model. Once the claimants begin to recover significant amounts in private enforcement actions outside the US also, then the number of such cases can be expected to increase rapidly.

5. In seeking to develop a framework for private enforcement which can be widely exported, the essential requirement is for a balanced approach. Most jurisdictions will strive to avoid the cost and disruption that could result from a flood of speculative litigation on competition issues fuelled by the prospects of rich pickings for those without, in reality, legitimate or substantive grievances. Equally, some increase in private enforcement action would help to foster the more widespread development of a competition culture in support of (but not as a substitute for) public enforcement action. A key element in the latter respect is the availability and use of leniency programmes and great care will be needed to ensure that parties are not discouraged from availing themselves of such programmes for fear of the private actions that may result later<sup>14</sup>.

## **PRODUCTION OF EVIDENCE IN PRIVATE LITIGATION**

6. The discussion papers prepared for this meeting by the delegations of the USA, the European Commission and others well illustrate what might be described as the great divide between the "common law" tradition (as followed in the US, Canada, England, Ireland, Australia and other Commonwealth countries) and the "civil law" tradition as followed in most EU Member States. In terms of evidence gathering powers, recent studies show that the claimant is far better placed as a general rule under the common law system with its emphasis on the parties to a dispute being required to put all their cards on the table (whether favourable or unfavourable) prior to trial. Under the civil law system the claimant only has limited power to compel the production of evidence or to elicit testimony from adverse or third parties and must, therefore, rely upon voluntary cooperation or seek intervention by the Court. Whilst judges in civil law procedures may generally play a more significant role in fact finding than under common law, there is also comment that judges are less likely to intervene in purely civil cases<sup>15</sup>. This is, no doubt, why several of the national reporters of the Ashurst Study identified the difficulty of obtaining evidence in civil law jurisdictions as one of the major obstacles to private damages actions. Their suggestion was that solutions should be looked at such as the

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<sup>14</sup> See the paper presented to the ABA Antitrust meeting on 31 March, 2005 on "International Antitrust – Developments after Empagran and Intel – Country Considerations" presented by Cal Goldman QC, Chris Hersh and Crystal Wilterick of Blake, Cassels & Greydon LLP.

<sup>15</sup> See written submission of the delegation of the European Commission to WP3 DAF/COMP/WP3/WD(2005)15.

introduction of discovery rules, giving power to judges to order production of classes of documents, and facilitating access by Courts to documents held by national competition authorities. They also suggested removing restrictions on calling certain witnesses and the introduction of cross-examination where this does not already exist.

7. On the face of it the removal of the restrictions which often apply in civil law jurisdictions in relation to the production of evidence by, *inter alia*, introducing pre-trial discovery would appear to be a strong candidate in terms of encouraging private actions. However, such analysis may be over simplistic in that the existence of such rules (as well as a specialist competition court) has not resulted in an upsurge of private enforcement actions in the United Kingdom and it also fails to take into account the significant downside of discovery systems which have plagued the common law jurisdictions. Full disclosure is inordinately expensive and time consuming; in the current electronic messaging era the complexities of email disclosure are still being explored but if not contained could result in crippling expense and significant disruption to the parties. Full disclosure may represent the gold standard of evidence production but who can afford it? In recent years the Courts in jurisdictions such as the US and England have been seeking ways to contain disclosure through active case management and other techniques but in any civil proceedings in common law jurisdictions it can prove to be a highly contentious issue with one party or the other often seeking to stretch the rules to launch so called "fishing expeditions" to try and bolster claims which otherwise they would have difficulty in substantiating. The prospect of offers of teams of expensive lawyers ploughing through mountains of seemingly inconsequential documents looking for the "smoking gun" which could make their case is hardly attractive or compelling as a model to follow voluntarily. On the whole it seems unlikely that civil law jurisdictions including the European Courts of Justice (which effectively follow the civil law tradition) would be prepared to accept this very different approach to evidence production given its well recognised imperfections. The US delegation<sup>16</sup> argues that the US Federal Discovery Rules "limit the risks" and help to avoid costly and risky trials by promoting settlements prompted by parties discovering the strengths and weaknesses of their respective cases; whilst having some justification this assessment strikes us as being unduly positive.
8. In contemplating how to bridge the great divide the relatively recent example of the Competition Appeals Tribunal in the UK provides some interesting lessons. This specialist competition court has been set up with procedures deliberately modelled on those of the European Court of First Instance (which follows the civil law tradition) but without excluding the best features of the common law adversarial rules of procedure and evidence. The emphasis is on the case of each party being fully set out in writing as early as possible with supporting documents produced at the outset. Active case management techniques are followed to concentrate on the main issues, to avoid undue delay and to ensure that evidence is presented efficiently. In this way the worst potential abuses of discovery rules are contained and managed so that only evidence relevant to the main issues is required. This type of balanced approach could provide a useful model for civil law jurisdictions to follow particularly if a trend towards establishing specialist competition courts develops. Other possible models which would be worth taking further

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<sup>16</sup> See DAF/COMP/WP3/WD (2005) 20 at para 15.

are the ALI/UNIDROIT project on transnational procedure and the model law produced by the Working Group for the Approximation of Civil Procedural Law<sup>17</sup>.

9. In tackling the wider issues of obstacles to the production of evidence there is a pressing need, somewhat in the other direction, to adopt consistent rules and practices in relation to attorney-client privilege. This is a fundamental protection for all parties which is entirely justified by the desirability that all parties to a dispute should be able to obtain appropriate legal advice in complete confidence. This right should apply regardless of the identity of the lawyer giving the advice or whether he or she is employed by the client or is in private practice whether in the country of the dispute or elsewhere, e.g. a US lawyer practising in Paris. The only safeguard required is that the lawyer is a member of a recognised professional body of lawyers and subject to effective disciplinary rules. The current stance of the European Commission in not only refusing to recognise that employed and "foreign" lawyers are entitled to privilege but actually targeting them in their investigations may be justified (as appears to be their principal motivation) in terms of "administrative convenience" but is wrong in principle and disregards the established legal rights of lawyers and their clients in approximately half of the Member States not to mention comity principles in the case of other jurisdictions. Other jurisdictions which have not yet fully accepted the concept of legal privilege should be encouraged to do so in order to help create a level playing field in which private enforcement actions can be encouraged with appropriate safeguards.
10. With regard to witnesses, some key issues are whether cross-examination should be the order of the day, whether expert witnesses should be appointed by the Court rather than by the respective parties and whether the right not to self-incriminate should be tempered by the right of the Court to draw adverse inferences from the refusal to respond to a question which is fairly put. There is scope for endless debate on each of these issues. Cross examination can be an unpleasant ordeal for the witness but it has proved to be an effective means of reaching the truth particularly where there are facts in dispute or an absence of documentation. Its introduction in jurisdictions which do not have it would thus make litigation more effective and thereby more likely to reach the correct result. A less rigorous alternative might be to introduce the US style deposition technique without the right to re-examine the witness in Court. On the topic of expert witnesses generally, the trend has been to try and break through the ritual of expert witnesses giving diametrically conflicting evidence on the same technical issues depending upon their client's standpoint, by making them more directly answerable to the Court. If appointed by the Court in the first place it might also result in cost savings since fewer experts would be required. On self incrimination, it seems reasonable that a Court should be entitled to draw adverse inferences from silence taking into account the factual matrix and dynamics underlying the case.
11. In terms of opening up the files of competition authorities to private litigants the risk is that this would ultimately make it more difficult for public investigations to be conducted effectively; this would be too high a price to pay for the proposed benefit. The better answer would be to encourage greater transparency on the part of regulatory authorities; if their findings and/or decisions are explained and reasoned as fully as possible and

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<sup>17</sup> See references in Section 9 of DAF/COMP/WP3/WD (2005) 15.

made available on their web sites, then it creates within the public domain a data base which can be used to support private actions. Public authorities should, nevertheless, continue to respect business secrets which they have the power to obtain from parties though this should be limited to information which can be reasonably justified as such by the relative party.

## CONCLUSIONS

12. Methods need to be found to encourage private enforcement actions in jurisdictions other than the US but, most importantly, without opening the flood gates to speculative or vexatious claims which disrupt and potentially restrict legitimate commercial activities.
13. In order to narrow the "great divide" further measures should be considered to curb the current high level of private enforcement actions in the US, e.g. by limiting the availability of treble damages remedies and giving the Courts greater powers to make cost orders against "rogue" plaintiffs.
14. Where some encouragement of private actions is required one of the most effective tools is likely to be the introduction of some form of discovery to improve the capability of obtaining the necessary evidence. The fact based model adopted by the UK Competition Appeal Tribunal is worth a second look in this regard provided that it is combined with active case management.
15. Both at the level of the European Court of Justice and at the national court level consideration should be given to the establishment of specialist competition courts as a practical means of accelerating convergence based on a common agreed framework for private anti-trust enforcement actions.
16. Any proposed strengthening of rights to privately enforce anti-trust claims is unlikely to be a panacea as can be seen from the UK experience and cannot be a substitute, in any event, for continuing vigorous public investigation of hard core anti-competitive practices such as cartels.