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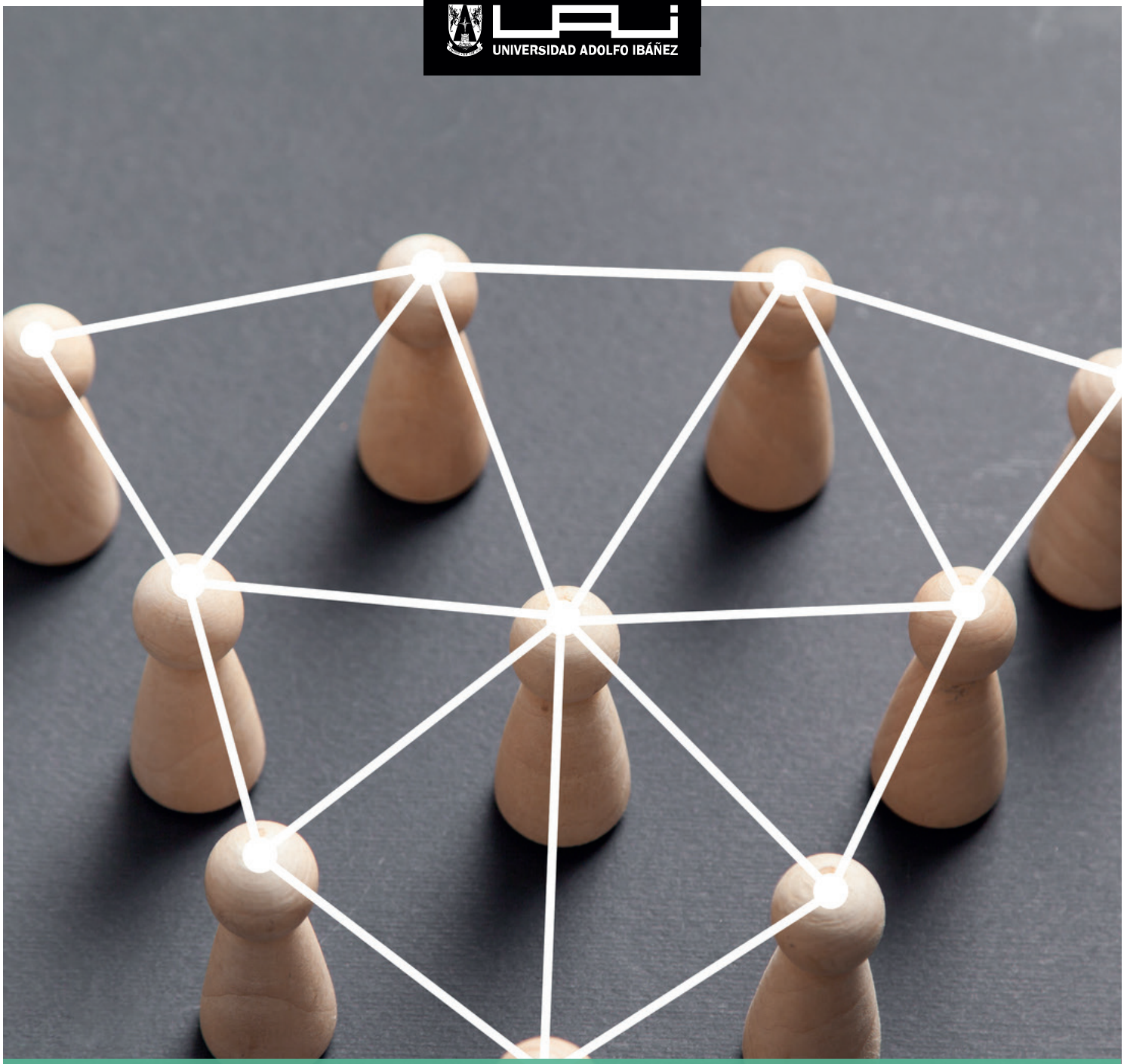

ANTITRUST DAMAGES LITIGATION IN LATIN AMERICA: A COMPARATIVE STUDY

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Antitrust damages litigation in Latin America: A comparative study

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***Discussion draft**: This working paper is being released by CeCo in incomplete, non-final form for discussion purposes. The author will be working throughout 2024 to expand and improve this paper before a final version is released later in the year. In the meantime, comments and feedback are welcome at **mjacobs@cfmlawyers.ca**. We hope for your understanding of the evolving nature of this document and welcome constructive criticism to enhance its quality.*

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PART I

Each nation of course *has unique needs, history, institutions, capabilities and circumstances, and no one should advocate 'one size fits all' competition legislation.* ***Nevertheless, every nation without effective private enforcement of its competition laws should seriously consider reform in this area.***

-Professor Robert H. Lande[1]

I. INTRODUCTION

Anticompetitive conduct imposes substantial costs on individual consumers and businesses throughout Latin America.[2] Chile, a country long celebrated for its market successes, has been rocked over the past fifteen years by major price-fixing scandals across diverse sectors that have directly impacted the country's consumers. Major pharmacy chains colluded to manipulate drug prices, leading to inflated prices, and compromising access to essential medications.[3] Poultry producers and their trade association conspired over many years to restrict output of chicken, affecting prices for a staple of the Chilean diet.[4] Major supermarket chains schemed to head off price wars that would have hurt their bottom lines, but would have delivered lower prices to their customers.[5] And tissue manufacturers collaborated to manipulate the prices of essential paper products, including toilet paper and tissues used by everyone.[6] Market abuses such as these harm consumers directly, of course, through higher prices. But they also undermine confidence in the market if the public comes to believe that major firms can steal with impunity.[7]

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[1] Robert H. Lande, "Benefits of private enforcement: empirical background," in *The International Handbook on Private Enforcement of Competition Law*, A.A. Foer and J.W. Cuneo, eds. (American Antitrust Institute 2010), p 10.

[2] *See* John M. Connor, *Latin America and the Control of International Cartels* (American Antitrust Institute, Working Paper, 2008) (estimating affected sales in Latin America from *known* global cartels between 1990-2007 at between US$150-210 billion).

[3] FNE v. Fasa, Cruz Verde and Salcobrand, Ruling N°119/2012 of the TDLC. See CeCo's case summary.

[4] FNE v. Agrosuper, Ariztía and Don Pollo, Ruling N°139/2014 of the TDLC. See CeCo's case summary.

[5] FNE v. Cencosud, SMU and Walmart, Ruling N°167/2019 of the TDLC. See CeCo's case summary.

[6] FNE v. CMPC and SCA, Ruling N°160/2017 of the TDLC. See CeCo's case summary.

[7] As Chilean economist Sebastian Edwards recently wrote, this "succession of major collusion cases involving firms controlled by some of the wealthiest families in the country added to the notion that the

Competition law agencies now exist throughout Latin America and many rank among the best in the world. These public authorities, however, are generally charged with detecting and sanctioning anticompetitive activities, not seeking redress for those who have been harmed by such conduct. That is left to others, often the affected parties themselves. But while public authorities are gaining experience and becoming more effecting in rooting out violations of their competition laws, private damages actions in the region have been few and far between despite the indisputable harms inflicted on consumers.[8] The reasons identified have been multifold, ranging from a lack of any private right of action whatsoever, to procedural, evidentiary and administrative obstacles.[9] The unfortunate result, however, is that millions of victims of anticompetitive conduct in Latin America have largely gone uncompensated while cartelists have profited from their misconduct.[10]

Private antitrust enforcement historically has been a fundamental part of the decentralized antitrust system in the United States, and for decades consumer class actions have provided a crucial (though not uncontroversial) tool there. Private damages actions in the US not only provide compensation to many of those harmed by violations of the antitrust laws, it also provides an important deterrent effect that supplements public civil and criminal enforcement at the federal and state levels.[11] Since the 1990s, private damages actions have taken off in Canada, particularly after the Supreme Court of Canada recognized indirect purchaser standing – a virtual necessity for consumer relief – in a 2013 trilogy of cases.[12] And more recently, there has been an increase in activity in the United

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'neoliberal model' was at the service of the powerful and ignored 'real' people." Sebastian Edwards, The Chile Project: The Story of the Chicago Boys and the Downfall of Neoliberalism, p.213.

[8] The terms "private enforcement" and "private damages actions" will be used throughout this paper. "Private enforcement" refers generally to claims brought by individuals, firms, or other organizations, including public entities in their capacity as purchasers, asking that a court find a violation of the antitrust/competition laws and to request some form of relief, be it injunctive or monetary. A "private damages actions" refers specifically to a private enforcement action that seeks monetary compensation. *See* OECD, Note by the Secretariat, "Relationship Between Public and Private Antitrust Enforcement," June 15, 2015 ("OECD, Note by the Secretariat"), p. 3.

[9] *See, e.g.*, Daniel A. Crane, "Private Enforcement against International Cartels in Latin America: A US Perspective," *Competition Law and Policy in Latin America*, E.M. Fox and D.D. Sokol, eds. (2009), p. 326.

[10] As will be discussed in section V (Chile), there is little doubt that available fines at the time of the *farmacias*, *pollos* and *supermercados* cases in Chile were not only suboptimal from a deterrence standpoint, they were also far lower than the gains unlawfully obtained by the defendants.

[11] *See* Lande, Robert H. and Davis, Josh Paul, Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws (March 5, 2010). Brigham Young University Law Review, 2011.

[12] Pro-Sys Consultants Ltd. v. Microsoft Corporation, 2013 SCC 57; Sun-Rype Products Limited v. Archer Daniels Midland Company, 2013 SCC 58; and Infineon Technologies AG v. Option consommateurs, 2013 SCC 59 (Infineon). The author worked as a consultant with Canadian counsel in the *Pro-Sys* matter.

Kingdom and certain continental European countries with the implementation of the 2014 Damages Directive.[13] Indeed, the OECD has stated, with respect to private enforcement, that "[t]here is a broad agreement in the literature and in policy documents that individuals and firms who suffer injury from anti-competitive conduct should be entitled to reasonable compensation."[14]

In the wake of the major collusion cases that were prosecuted in Chile, that country took a major step in 2016 aimed at facilitating efforts to seek compensation for harms caused by violations of the competition laws. Modifications enacted that year to the Chilean Competition Act[15], DL211, allowed for damages claims, including consumer collective actions, to be brought before the country's specialized competition court, the *Tribunal de Defensa de la Libre Competencia* (TDLC), once an infringement has been found. In theory, these reforms might have been expected to spark a wave of new consumer damages actions. Some cases have been filed, and indeed even a few settlements have been reached. The reforms seem to be generating more activity. Nevertheless, even seven years later, questions remain about their effectiveness in being able to deliver compensation to victims of anticompetitive conduct.

The Chilean experience is not unique. In recent years, there have been efforts in various Latin American countries to encourage private enforcement of the competition laws. While those initiatives have not been particularly successful to date, perhaps that should not come as a surprise. Even in the United States, where the concept of the "private attorney general" was baked into the Sherman Act from the outset, robust private enforcement took years to develop. Moreover, the US and the countries in Latin America come from differing legal traditions. Indeed, one leading observer has postulated that "cultural challenges" and "the predominant legal culture creates [] different hurdles that challenge the evolution of private antitrust enforcement in Latin America."[16] While

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[13] 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 ("EU Damages Directive").

[14] *See* OECD, Note by the Secretariat, "Relationship Between Public and Private Antitrust Enforcement," June 15, 2015 ("OECD, Note by the Secretariat"), p. 3.

For a critical perspective of private enforcement, *see* Daniel A. Crane, Optimizing Private Antitrust Enforcement, 63 Vand. L. Rev. 675 (2010) (arguing that "efforts to correct the perceived infirmities of the U.S. private enforcement system by tweaking the mechanics of enforcement… are futile. The shortcomings of private enforcement are existential, not technical…. Private antitrust in the United States has rarely advanced the two assumed goals of private enforcement: deterrence and compensation.").

[15] The modification was introduced by Law 20.945, available at: https://www.bcn.cl/leychile/navegar?idNorma=1094093&idParte=9725300&idVersion=2016-08-30

[16] *See* Julián Peña, "Cultural Challenges to Private Antitrust Enforcement in Latin America", in Albert A. Foer: A Consumer Voice in the Antitrust Arena, Concurrences Books, 2020.

undoubtedly there is a significant grain of truth to that explanation, jurisdictions elsewhere, including some civil law jurisdictions that share the same continental legal tradition as Latin America, have seen more success in creating the conditions that promote private enforcement.

This study seeks to identify obstacles to private damages actions in Latin America, with a particular focus on Chile, Colombia, Ecuador and Perú. Beginning with an examination of private enforcement in the United States and Canada, it identifies several factors that have led to robust (and some would say excessive) activity in those jurisdictions. The focus then turns to recent efforts in the United Kingdom and countries in the European Union to promote private damages actions there. Finally, the study examines the Latin American countries mentioned previously in light of experience elsewhere. Chile will receive the most in-depth consideration, partly because of greater familiarity with the system, but also because of its more extensive experience with private enforcement than other countries in the region. Moreover, Chile's experience arguably has more relevance for similarly situated jurisdictions.

The experiences in jurisdictions where private damages actions are most common suggests that certain factors have contributed to that development: Those include, first and foremost, the availability of so-called "opt-out" class or representative proceedings; second, adequate funding mechanisms to allow for those cases to be undertaken by competent counsel on behalf of the represented class; and third, predictable access to the types of evidence that will be required to meet whatever burden of proof is required for a claim. In addition, other factors can also play a role, such as allowing claimants to benefit from liability findings in public enforcement actions and providing plaintiffs with adequate limitations periods in to assert a claim. Beyond the formal rules, however, the institutional capacities of the tribunal that will hear a damages action cannot be overlooked as an important factor. Unless litigants have confidence that the tribunal can effectively manage the litigation and properly decide an antitrust matter, private damages actions that require counsel or some other funder to undertake risk are unlikely to prosper. On that basis, Chile is likely to continue seeing more robust activity than the other jurisdictions under their current rules and institutional designs.

Facilitating private damages actions is not – or at least should not be – an end in itself. Private enforcement of the antitrust laws serves two different roles within a competition system. The first, of course, is compensation. The second is deterrence, and that is true even if one conceives of private actions are being purely compensatory in nature, with deterrence reserved to public enforcers. Which points to a larger issue, namely that private enforcement can have a systemic effect on a competition system, the goal of which is to promote competitive markets and protect consumers, workers and other market participants. That balance undoubtedly will differ from jurisdiction to jurisdiction

based on the local legal tradition and institutional design of the country's competition system. Indeed, it is likely to vary depending on the maturity of that competition system.[17] The goal, in short, is not to recreate the experience of anywhere else, but rather to find an appropriate balance given the realities on the ground in a particular jurisdiction. Hopefully this study will be of some value as stakeholders in the various countries being discussed (and others in the region) seek to find that balance.

II. PRELIMINARY CONSIDERATIONS ON PRIVATE DAMAGES ACTIONS

Before looking more closely at how private damages actions work (or, in some cases, do not work), it is worth pausing to consider a few foundational issues that will help frame the discussions that follow. The first, as just mentioned, relates to the objective of private enforcement and whether it is limited to compensating individuals and firms injured by anticompetitive conduct or if it should also have a role to play in deterring such conduct in the first instance. The answer to that may affect what kinds of actions – "follow-on" and "stand alone"– should be available to private litigants. The next section will examine those types of actions and how the decision to allow one or both can affect the role of private enforcement in the overall system. Finally, the section will discuss factors that have been identified in the literature as affecting the viability of private damages actions. Many of those – including access to evidence, availability of collective proceedings, and the use of decisions by public competition authorities in follow-on damages proceedings – formed the basis for the European Union's 2014 damages directive.[18]

a. The Complementary Roles of Public and Private Enforcement in Competition Law Systems: Compensation and Deterrence

Antitrust or competition laws are crucial for promoting fair market competition, preventing monopolistic practices, and safeguarding interests of consumers, workers, and other market participants. While competition law protects a "public good," namely free

[17] *See* López-Galdos, Marianela & Kovacic, William E., Lifecycles of Competition Systems: Explaining Variation in the Implementation of New Regimes (December 31, 2016). Law and Contemporary Problems, Vol. 79, No. 85-122, 2016, King's College London Law School Research Paper No. 2017-15 (arguing that "[c]ompetition agencies and their external constituencies must approach the establishment of the new regulatory regime with realistic expectations about what it takes to build an effective system in light of what jurisdictions have accomplished to date").

[18] 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. European Commission, "White Paper on Damages Actions for Breach of the EC Antitrust Rules" (April 2, 2008).

competition, violations of those laws also implicate private rights of market participants.[19] One of the easiest ways to see this distinction is in the effect of illegal cartels. Cartels contribute to economic inefficiencies by distorting market mechanisms. When companies collude to control prices and output, the market ceases to function efficiently, leading to misallocations of resources. This inefficiency can manifest itself in various ways, such as excess production capacity or shortages of goods. Moreover, by impeding competition and stifling innovation, cartels can hinder the growth of a vibrant and diverse business ecosystem.[20] This is a public harm. But cartels also have immediate effects on purchasers, direct and indirect, of the price-fixed goods. The result of a cartel is generally artificially elevated prices that consumers must bear. They must either pay higher prices for goods they purchase or forgo purchases that they otherwise might have made in a competitive market.[21]

Public competition law enforcement is generally aimed at protecting the "public good" – the functioning of competition in the market – by detecting and sanctioning violations of the law.[22] Competition authorities in Latin America, like their counterparts elsewhere, are focused on this function, which is aimed at deterring anticompetitive conduct. With some exceptions, they generally cannot seek compensation on behalf of consumers or others that have been harmed by those violations. While other public authorities, like consumer agencies, can sometimes seek damages, but even these might be limited in whose interests they can protect.[23] Furthermore, resource constraints necessarily mean that any public authority will have to pick and choose which cases to pursue. Thus, private enforcement, through use of a private damages action, is often required if victims of anticompetitive conduct are to be provided compensation.

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[19] Hernández Paulsen, G., "Responsabilidad civil por los daños causados a los consumidores por la colusión", CentroCompetencia UAI (2022), p. 10, available at https://centrocompetencia.com/wp-content/uploads/2022/01/Gabriel-Hernandez-Responsabilidad-civil-por-los-danos-causados-a-los-consumidores-por-la-colusion.pdf

[20] Kvirikashvili, T., "Review of Cartel Issues in Plain Sight", CentroCompetencia UAI (2023), available at https://centrocompetencia.com/review-cartel-issues-plain-sight/.

[21] Agostini, C., "Cálculo de daños por conductas anticompetitivas: Consumidores", CentroCompetencia UAI (2022), available at https://centrocompetencia.com/wp-content/uploads/2022/10/Agostini-2022-Calculo-de-danos-por-conductas-anticompetitivas-consumidores.pdf.

[22] Public enforcement is broadly understood as enforcement of the competition laws by a governmental authority like the Antitrust Division of the Department of Justice in the United States or the *Fiscalía Nacional Económica* in Chile. *See* OECD, Note by the Secretariat, "Relationship Between Public and Private Antitrust Enforcement," June 15, 2015 ("OECD, Note by the Secretariat"), p. 3.

[23] Under section 4C of the Clayton Act, for instance, state attorneys general in the United States can seek to recover antitrust damages on behalf of "natural persons" in their states. 15 U.S.C. § 15c.

Even if private activity is viewed as limited to compensatory role, public and private enforcement "are essentially related and mutually reinforcing."[24] Private enforcement can complement public enforcement in several ways:

- First, the threat of private damages actions can help deter anticompetitive behavior, even if their primary purpose is seen as compensatory in nature. The prospect of facing not only government fines, but also substantial monetary judgments in private lawsuits, should act as a powerful deterrent against violating the antitrust laws.[25]

- Second, private enforcement can significantly increase the total amount of resources dedicated to enforcement, again contributing to the overall deterrent effect.[26] Public agencies generally have limited resources, making it impossible to investigate and prosecute every potential antitrust violation comprehensively. Private actors, motivated by their own financial interests, can bring cases that public authorities might not have the capacity to pursue.[27] "[P]rivate enforcement can provide a safety net for when public enforcement fails.[28]

- Third, private enforcement often takes advantage of industry-specific expertise that public authorities lack. This specialized knowledge may contribute to a more nuanced understanding of the competitive landscape, making private enforcement a valuable supplement to public enforcement efforts.[29]

Public enforcement, in turn, can facilitate private enforcement. Some jurisdictions allow private claimants to pursue "follow-on" damages actions after an infringement has been found. In some instances, private litigants are given the benefit of findings and

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[24] OECD, Note by the Secretariat, at 23. Some have questioned how well damages actions, particularly consumer class actions, actually provide compensation. *See, e.g.,* Daniel A. Crane, Daniel A. Crane (2009-). "Toward a Realistic Comparative Assessment of Private Antitrust Enforcement." In Reconciling Efficiency and Equity: A Global Challenge for Competition Policy, edited by Damien Gerard & Ioannis Lianos, 341-54. Cambridge: Cambridge University Press, 2019. (p. 346) (As I have previously submitted antitrust enforcement is incapable of compensating consumers for two out of three major categories of injury – deadweight losses and dynamic injuries. That leaves wealth transfers or overcharges as possibly compensable. Yet, even as to this third category of injury, the prospects for adequate compensation to large percentages of injured consumers are remote.).

[25] *See* Lande & Davis, Comparative Deterrence from Private Enforcement.

[26] *Id*.

[27] OECD, Note by the Secretariat.

[28] Pedro Caro de Sousa, "Identifying the Building Blocks of Private Competition Enforcement," CPI Antitrust Chronicle (Feb. 2019), p.3.

[29] OECD, Note of the Secretariat.

conclusions made during the public enforcement proceeding in order to ease their burden in the follow-on matter.[30] Private claimants might also be able to rely on evidence that the competition authority obtained during its investigation. Particularly in jurisdictions where claimants do not have robust "discovery" available, that information can be essential to a plaintiff's ability to establish its burden of proof against the defendant.[31]

Policymakers must take numerous factors into consideration when trying to strike the desired balance between public and private enforcement. That includes which tools to make available to private claimants in such a way that the integrity of the overall competition system is maintained.[32] Former FTC Chairman William Kovacic, for instance, has suggested that judicial reaction to overzealous private enforcement in the US had led to courts scaling back antitrust liability standards over the past forty years, particularly relating to single-firm conduct, which in turn makes public enforcement that much more difficult.[33] Whether or not that is the case,[34] it points to the need for care when seeking to find an equilibrium. Depending on the circumstances, it might recommend allowing only follow-on cases to that have already been prosecuted by public enforcers, or perhaps limiting private actions to only certain kinds of violations, such as hard-core cartels.

On the other hand, it could be that a system would benefit from even greater private activity. Many of the jurisdictions involved in this study are small, emerging economies, in which competition authorities can face unique enforcement challenges. Because these economies are often highly concentrated and tend to have weaker self-correcting

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[30] OECD, Note of the Secretariat, p. 14. *See also* Kevin J. O'Connor et al, "Interaction of public and private enforcement," in *International Handbook of Private Enforcement*, p.243 ("Follow on private plaintiffs may be able to take advantage of factual developments and legal judgments established in government actions without having to expend resources to duplicate the government's investigative and enforcement efforts.").

[31] OECD, Note of the Secretariat. *See also* EU White Paper.

[32] OECD, Note of the Secretariat ("Obtaining the right balance between these tools and goals is key to ensuring that private enforcement (i) does not adversely affect the effectiveness of public enforcement, and (ii) encourages greater compliance with antitrust rules, while avoiding litigation that is wasteful and could discourage socially beneficial conduct."). *See also* EU White Paper.

[33] Professor Kovacic writes that "judicial fears that the US style of private rights of action – with mandatory treble damages, asymmetric shifting of costs, broad rights of discovery, class actions, and jury trials – excessively deter legitimate conduct have spurred a dramatic retrenchment of antitrust liability standards". *See* William E. Kovacic, Competition Policy in the European Union and the United States: The Treatment of Dominant Firms, Hearing on "A Comparative Look at Competition Law Approaches to Monopoly and Abuse of Dominance in the US and the EU", Senate Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights (December 19, 2018). *See also* William E. Kovacic, The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix, 1 Colum. Bus. L. Rev. 1-80 (2007).

[34] *See infra* § III for further elaboration on this argument.

tendencies than in larger economies, competitive concerns may be heightened.[35] At the same time, the agencies charged with enforcing competition laws are generally underfunded, meaning that resource scarcity makes policing the activities of market participants even more challenging.[36] The additional enforcement resources added by private litigants could therefore enhance the overall efficiency and effectiveness of the antitrust system.

Of course, private enforcement is not a panacea if other institutional conditions are not yet in place. Any court called upon to hear private antitrust actions must be able to understand the evidence and apply the law properly.[37] In the absence of such institutional competence, private enforcement is likely to be ineffectual, and certain kinds of private enforcement could even do more harm than good. Moreover, unless private actors have confidence that the courts can manage the litigation, they are likely to be less likely to take the kinds of risks that private litigation entails.

b. Types of Private Enforcement Mechanisms: Follow-on and Stand-Alone

Private antitrust actions come in various forms. They can be used in a defensive manner, or "shield", in a contractual or other dispute. They can also be used for seeking injunctive relief, to put an end to anticompetitive conduct. And of course, they can be used as the basis for damages claims – the focus of this paper.[38]

Damages claims themselves can come in various forms. They might be brought, for instance, by competitors of a firm engaging in anticompetitive conduct. Competitor claims, which will often seek lost profits, are seen by some as the most prone to abuse. Alternatively, damages actions might be pursued by purchasers of products that were subject to an unlawful price fixing conspiracy. And these be subdivided even further, between purchasers who acquired the product directly from the defendant and those who bought the product from an intermediary. Indeed, because anticompetitive conduct can ripple through the economy, the same conduct can potentially give rise to all of these variations.[39] But one of the decisions a jurisdiction that allows private actions will have to confront is who can bring such an action.[40]

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[35] *See* Michal S. Gal, *Competition Policy for Small Market Economies* (2003).

[36] See Michal S. Gal, "When the Going Gets Tight: Institutional Solutions When Antitrust Enforcement Resources Are Scarce," 41 Loy. U. Chi. L J. 417, 433 (2010).

[37] *Id.* p. 431.

[38] Pedro Caro de Sousa, "Identifying the Building Blocks of Private Competition Enforcement," CPI Antitrust Chronicle (Feb. 2019), p.2; Wouter Wils, "Private Enforcement of EU Antitrust Law and its Relationship with Public Enforcement: Past, Present and Future," (2017) World Competition 40(1) 3, p. 4.

[39] *Id*.

[40] *Id*.

Damages actions can be subdivided further into "follow-on" or "stand-alone" lawsuits. Follow-on proceedings are brought after public enforcement actions or regulatory investigations have established a competition law infringement. These lawsuits are often brought by private parties seeking damages for the same anticompetitive conduct addressed in the prior enforcement action.[41] Stand-alone actions, by contrast, are those initiated independently by a party without prior government enforcement actions. Because there has been no prior finding of an infringement, the plaintiffs in stand-alone must establish the anticompetitive behavior on their own, as well as the resulting damages if any are being sought.[42] In practice, the division between the two categories is not always so clear cut in cases since claimants will sometimes add stand-alone elements to a follow-on case. These stand-alone elements, for instance, might expand the temporal or substantive scope of the action brought by the public authorities.[43]

Follow-on lawsuits allow private parties to recover damages resulting from competition infringements already established by public enforcers.[44] Plaintiffs in follow-on cases typically rely on the findings, evidence, and legal conclusions of prior regulatory

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[41] Boetsch, C., "Indemnización de perjuicios a consumidores por atentados a la Libre Competencia", CentroCompetencia UAI (2021), available at https://centrocompetencia.com/wp-content/uploads/2021/06/Investigacion-Cristian-Boetsch.pdf.

[42] Maturana, J., "La acción de indemnización de perjuicios por ilícitos anticompetitivos desde la perspectiva procesal", CentroCompetencia UAI (2020), available at https://centrocompetencia.com/wp-content/uploads/2020/07/Maturaza-Baeza_La-accion-de-indemnizacion-de-perjuicios-por-ilicitos-ant.pdf.

[43] Csongor István Nagy, 2023. "Collective redress and aggregation of claims," Chapters, in: Barry J. Rodger & Miguel S. Ferro & Francisco Marcos (ed.), Research Handbook on Private Enforcement of Competition Law in the EU, chapter 13, pages 329-356, Edward Elgar Publishing. ("The data shows that it is time to leave behind the myth that antitrust private enforcement (including consumer cases) is limited to follow-on actions.... [I]t is very common for claimants in follow-on consumer cases... to add stand-alone elements, expanding the temporal, material or subjective scope of the infringement identified in the public enforcement decision.").

The *Microsoft* consumer and competitor cases in the US, in the wake of the US Department of Justice's monopolization case in the late-1990's, *United States v. Microsoft*, provide an example of this. Many of the consumer cases filed after the 1998 judgment were follow-on cases in the strictest sense, limited themselves to the market (PC operating systems) and conduct (Microsoft's bundling of its Internet Explorer web browser and certain conduct directed at Sun Microsystem's Java technologies) at issue in the DOJ case. *See, e.g., see, e.g., Complaint, Capp v. Microsoft Corp.*, No. 00-CV-0637 (Wis. Cir. Ct. Dane Co.) (pleading a "Windows 98" class). Others, however, include that conduct but went even further, adding, for instance, (a) allegations regarding conduct in the PC operating systems market that predated or otherwise went beyond the scope of the DOJ case, and (b) allegations relating to office productivity applications markets, such as word processors and spreadsheet software, that were not at issue in the government lawsuit. *See, e.g.,* Plaintiffs' Modified Fourth Amended Petition, *Comes v. Microsoft Corp.*, No. CL82311 (Polk Co. Dist. Ct. Feb. 8, 2006). Some competitor cases also went beyond the scope of the government case. *See, e.g.,* Complaint, *Novell, Inc. v. Microsoft Corp.*, 1:05-cv-01087 (D. Md.). In this way, these lawsuits had elements of being "follow-on", in which they could take advantage of the prior government action, and stand-alone, in which the plaintiffs would need to prove the violation as well.

[44] Boetsch, C., "Indemnización de perjuicios a consumidores por atentados a la Libre Competencia", p. 6.

investigations or court judgments. This can lead to more efficient proceedings, as plaintiffs do not need to reestablish the violation.[45] Nevertheless, these claimants still face challenges related to establishing a direct link between the infringement and the harm suffered, and to the quantification of damages, which can be complicated and fact-intensive undertakings.[46] Moreover, depending on the jurisdiction, the damages claims could be limited to the scope of the case brought by the public enforcers. The enforcement proceeding, however, was likely pursued with the public interest in mind, not the viability of subsequent damages claims.[47] The claimants' success therefore could depend on the thoroughness and effectiveness of the government's action.

Stand-alone lawsuits, by contrast, provide an avenue for private parties to seek redress for antitrust violations independently of government enforcement. Because there is no prior infringement decision to support the case, stand-alone lawsuits are often more complex and require more resources, both in terms of time and costs, as plaintiffs bear the burden of independently establishing their case.[48] However, stand-alone litigation allows claimants to pursue claims for damages or other relief based on conduct that, for whatever reason, was not pursued by public enforcers.

Stand-alone private actions have more potential to affect the overall balance between public and private enforcement within a competition system, particularly with respect to overall deterrence.[49] With stand-alone actions, firms engaging in anticompetitive conduct can be subject to damages actions whether or not they had been caught and pursued by public authorities. And as noted above, a private business or individual who has incurred losses from a violation of the competition laws may be in a better position, and have better information, to enforce those laws than public agencies. Furthermore, claimants in stand-alone lawsuits sometimes uncover evidence that in turn leads to

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[45] Maturana, J., "La acción de indemnización de perjuicios por ilícitos anticompetitivos desde la perspectiva procesal", p. 9-10.

[46] Hernández Paulsen, G., "Responsabilidad civil por los daños causados a los consumidores por la colusión", CentroCompetencia UAI (2022), pp. 19-23.

[47] The Chilean TDLC's recent ruling in *Papelera Cerrillos S.A. contra CMPC Tissue S.A. y SCA Chile S.A.*, Sentencia N° 188/2023, which will be discussed in more detail below, provides an example. The TDLC rejected Papelera Cerrillos' claim for compensation in part because many of the facts alleged to have been the basis for the plaintiff's poor financial results were not, in fact, found to have been infringements in the TDLC's prior judgment on liability, *FNE c. CMPC y SCA*, Sentencia N° 160/2017, and affirmed by the Chilean Supreme Court, Sentencia N° 188/2023, C. 49°.

[48] Andres Stephan, "Does the EU's Drive for Private Enforcement of Competition Law have a Coherent Purpose? p. 2.

[49] Andres Stephan, "Does the EU's Drive for Private Enforcement of Competition Law have a Coherent Purpose? p. 2 ("[I]t is stand-alone actions that have the greater deterrence-enhancing effect. This is because they result in the uncovering of infringements that might otherwise go entirely undetected.").

interest on the part of public authorities in pursuing a matter.[50] Thus, by virtue of allowing private claimants to bring lawsuit that are not based on existing findings of competition infringements, stand-alone claims can add enforcement resources to the system in ways that follow-on litigation does not. As competition agencies focus more recourse on regulatory matters, such as merger review, [51] stand-alone private actions might be used to compensate for the loss of those public enforcement resources.

Stand-alone cases can affect the balance in other ways, too. Without being constrained by the bounds set by public enforcers, claimants in stand-alone cases are free to pursue novel legal theories that contribute to the development of antitrust jurisprudence – for better or worse. Indeed, in the United States, "the private right of action… is being used today to reorganize entire industries," from real estate agents to college athletics to Big Tech.[52] Of course, as already noted, the viability of a private enforcement regime requires a forum capable of grappling with the many complex and fact-intensive issues presented in antitrust cases. Stand-alone private actions require a forum with the capacity to grapple not just with damages issues but with liability questions are well. In some jurisdictions, ordinary civil courts might struggle with stand-alone actions. In fact, many courts might struggle even with the complexity associated with damages in follow-on actions. While procedural solutions have been suggested (and in some places implemented) for some of these problems, not all will necessarily be compatible with legal traditions, existing competition law structures or present institutional capabilities.[53]

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[50] A recent instance in the US involves a DOJ investigation of various poultry producers that became public in June 2019. The DOJ intervened in a class action lawsuit that had been filed in 2016 and was then being actively pursued by individual and class plaintiffs, including direct purchasers, indirect end consumers, and indirect "institutional" purchasers. *See* New York Times, Why Chicken Producers Are Under Investigation for Price Fixing, The New York Times (June 25, 2019) available at https://www.nytimes.com/2019/06/25/business/chicken-price-fixing.html?login=email&auth=login-email.

[51] *See* Spencer Waller, In Praise of Private Antitrust Litigation, CPI Antitrust Chronicle (Feb. 2019), p.8.

[52] Hepner, L & Stoller, M., The Case for Ambulance Chasing Lawyers, BIG Newsletter (November 29, 2023) available at https://www.thebignewsletter.com/p/the-case-for-ambulance-chasing-lawyers. Indeed, as Lee Hepner and Matt Stoller of the American Economic Liberties Project have observed, "[i]n *Epic v. Google*, which has to do with fees charged by Google through its app store, *private litigation might restructure one of the most powerful Big Tech gatekeepers of our time, parallel to what the government is doing with its own cases*." (emphasis added).

Regarding the *Epic v. Google* case, *see also* Jacobs, M., "Google Play y las 'otras autoridades' antitrust de EE.UU." *CentroCompetencia* UAI (January, 2024), available at https://centrocompetencia.com/google-play-otras-autoridades-antitrust-eeuu/.

[53] It is important also not to forget the compensatory role that out-of-court dispute resolution mechanisms can play. Pedro Caro de Sousa, "Identifying the Building Blocks of Private Competition Enforcement," CPI Antitrust Chronicle (Feb. 2019), p.3 ("Out-of-court dispute resolution mechanisms are a second type of tool for dealing with competition claims. Such mechanisms allow victims to settle cases quickly and easily on a voluntary basis. Given the costs and uncertainty of litigation, and the complexity of competition-related

c. Instruments to Facilitate Effective Private Enforcement

With the increased interest in private antitrust enforcement, particularly damages actions, there has been a recognition that effective enforcement faces numerous procedural obstacles. General civil procedure rules in civil law jurisdictions, like those in Latin America, require a claimant to prove (i) an illicit act (i.e., a breach of the law), (ii) fault on the part of the defendant, (iii) a causal link between the illicit act and harm suffered by the claimant, and (iv) damages caused as a result, which must also be quantified.[54] Meeting these burdens can be difficult, even in clearly meritorious cases. And plaintiffs are oftentimes called upon to satisfy these burdens in the face of severe information asymmetries, with the evidence needed to meet those burdens is in the possession of the opposing party. This is particularly true for consumers.[55] These proceedings can be extremely expensive. They can be long. And they can be extremely uncertain.

Private enforcement will only occur when it is economically rational, both for the individual claimant or collective, and for the attorneys working on the case. A rational plaintiff will only proceed with an action if the expected benefit from a case exceeds the expected cost of undertaking a matter.[56] This applies to the attorneys working on the case as well.[57] The riskier the case, and the more uncertain the outcome, the greater the difference will have to be between expected costs and the potential benefits of pursuing a case. In situations involving large individual claims, that might not pose an issue. But sometimes enormous harms caused by anticompetitive conduct are dispersed among hundreds, thousands or even millions of potential claimants.

Private litigation can be facilitated (or dissuaded) by rules that, for instance, reduce the actual or potential costs of litigation, make available potential funding sources, and the like. An extensive literature has developed that has identified obstacles to private enforcement and private damages actions, and proposed means of overcoming those hurdles.[58] And with implementation of measures to comply with the 2014 EU Damages Directive (2014/104), which establishes baseline rules for competition law damages actions in EU member states, we are beginning to see in real time the results of efforts to

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damage claims, most systems try to promote the resolution of claims out of court. Three main mechanisms can be found around the world: (i) voluntary redress schemes; (ii) alternative dispute resolution and settlement schemes; and (iii) arbitration.").

[54] *See* Hernández Paulsen, G. and Tapia Rodríguez, M., *Colusión y daños a los consumidores* (2019), p.10.

[55] OECD, "Relationship Between Public and Private Antitrust Enforcement."

[56] Nagy, 2023. "Collective redress and aggregation of claims."

[57] AAI EU PAPER. *See also* Zingales, L., A Capitalism for the People: Recapturing the Lost Genius of American Prosperity (2014) (discussing contingency fee arrangements).

[58] *See, e.g.,* OECD, Note of the Secretariat; Nagy, 2023. "Collective redress and aggregation of claims."

facilitate damages actions there.[59] That recent experience in Europe, combined with the more extensive history in the United States and Canada, strongly suggest that, for consumer damages actions with small individual claims, the directive does not go far enough.

i. Better and Easier Access to Evidence Needed to Prove a Private Claim

It can be extremely difficult for potential claimants, and especially for end consumers, to obtain the evidence needed to establish that they are entitled to claim antitrust damages. Proving a competition law violation and the resulting injury is a complex, fact-intensive endeavor. This is made is even challenging given the "structural information asymmetry" that often exists in competition cases. Much of the information needed to prove a case is held by the defendant or third parties and is not available to the plaintiff.[60] While, in strictly follow-on cases, the need for establishing the antitrust infringement itself can be eliminated, in the absence of other procedural innovations to ease the burden of proving harm and quantifying damages, these remaining elements will still generally require access to information held by the other party.[61] Indeed, the difficulties that a plaintiff faces in gaining access to that evidence is seen as a major obstacle even to follow on cases that might benefit from prior public enforcement.[62]

There are a few different ways for a plaintiff to gain access to the required evidence. Some jurisdictions, like the United States and Canada, have broad pre-trial discovery that allows a claimant to obtain information held by an opposing party or even third parties. Unlike in civil law jurisdictions, discovery is not the process through which the court discovers the facts; rather, it is a mechanism that allows the litigants themselves, in an adversarial process, to obtain the facts that each then presents to the court. This generally provides plaintiffs an opportunity to obtain the information they require. But such broad discovery rights are not common,[63] and therefore claimants that do not have access to these tools must resort to other means.[64]

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[59] *See* Sousa Ferro, Miguel, Consumer Antitrust Private Enforcement in Europe: As Complete a Survey as Possible (Extended Version) (September 19, 2022). Available at SSRN: https://ssrn.com/abstract=4223770 or http://dx.doi.org/10.2139/ssrn.4223770. *See also* Nagy, 2023. "Collective redress and aggregation of claims."

[60] OECD, Note by the Secretariat.

[61] AAI Handbook.

[62] OECD, Note by the Secretariat.

[63] *See* Stephan N. Subrin, Discovery in Global Perspective: Are We Nuts? 52 DePaul L. Rev. 299 (2002), available at: https://via.library.depaul.edu/law-review/vol52/iss2/4.

[64] One tool that is often used by non-US litigants is a powerful US statute, 28 U.S.C. § 1782 ("Section 1782"), allows US federal district courts to order individuals or firms located in the district to provide testimony or

In the case of follow-on actions, or cases that largely overlap with prior public enforcement proceedings, the file of the competition authority will likely include information that would be extremely valuable to a claimant. That information, which will have formed the basis on which the authority pursued the infringement claim, would not only be useful in establishing a violation (if that needs to be done) but also proving injury and quantifying damages. Allowing plaintiffs access to the authority's file (with some limitation, discussed below), either by requesting that information from the authority, or obtaining it through a court order, is one proposal that has been discussed for facilitating private damages cases.[65]

As will be discussed below, other means are often at litigants' disposal. However, if the goal is to encourage private damages actions, those rules should be clear and predictable, to allow claimants to know, with some level of certainty, the scope of the information that will be made available.

ii. Reducing the Burden of Proof for Establishing Harm and Quantifying Damages

It is not enough for the plaintiff in a private damages action to prove that an antitrust violation has occurred. The claimant must also establish that they were injured by the unlawful conduct and calculate to some degree of certainty the amount of that injury. Proving damages with certainty, however, is not a trivial matter.[66] Conceptually it requires determining what would have happened in a "counterfactual" world in which anticompetitive practices had not occurred (also known as a but-for world). The counterfactual world is then compared to what really happened (the factual world), with the difference being the damages suffered.[67] Although recognized and accepted methodologies exist that permit elements of the counterfactual world to be estimated in a reasonable manner, it is very difficult to calculate the damage with exactitude.[68] It is critical, therefore, that "neither the burden nor the standard of proof required for the

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documents "for use in a proceeding in a foreign or international tribunal." Such orders can be made not only in response to direct requests from a foreign or international tribunal (by means of letters rogatory or letters of request), but also from "any interested person" in the proceeding abroad. The statute enables foreign litigants to make use of broad discovery tools available in the US to obtain evidence that might otherwise not be available in their proceedings. *See In re Pro-Sys Consultants and Neil Godfrey,* No. 16-00457 & No. 16-00459 (W.D. Wash. 2016) (allowing Canadian plaintiffs to depose former Microsoft executives, including Steve Ballmer).

[65] *See* discussion *infra*.

[66] *See* Agostini, C., "Cálculo de daños por conductas anticompetitivas: Consumidores", CentroCompetencia UAI (October, 2022).

[67] *Id*.

[68] *Id*.

quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult."[69]

There are several ways of addressing these difficulties. One is to adjust the burdens of proof in a manner that accounts for uncertainties inherent in the economic modeling.[70] In the US, for instance, courts have recognized that damages calculations in antitrust cases "are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts," and therefore apply a lower standard to quantification of the harm suffered once causation has been established.[71] This lower standard "derives from the principle that a wrongdoer should not profit from the harm occasioned by its act."[72] Still, the economic studies required to satisfy even this lowered burden can be very expensive.

Another approach is to establish rebuttable presumptions of harm. The EU Damages Directive, for example, establishes a rebuttable presumption that cartel infringements cause harm.[73] This presumption only applies to one specific type of anticompetitive conduct, cartels. Furthermore, it does not presume any specific amount of harm, but a presumption could encompass that, too. While a plaintiff would still need to incur costs resisting any effort by a defendant to rebut whatever presumption is applied in a proceeding, this still places the plaintiff in a far better position than otherwise – which is essentially a presumption of no harm that must be overcome.

Yet another possible tool is allowing a civil court hearing a damages action to request assistance from the competition authority in quantifying damages. The EU Damages Directive, for example, allows for this when a national competition authority considers such assistance to be appropriate.[74] While this approach gives courts the benefit of an agency's technical expertise, it might be difficult for resource constrained authorities to provide. A less resource-intensive alternative in which the competition authority can

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[69] EU Damages Directive (Art. 17.1).

[70] Pedro Caro de Sousa, "Identifying the Building Blocks of Private Competition Enforcement," CPI Antitrust Chronicle (Feb. 2019), p.6 ("Private competition enforcement regimes routinely … adopt rules that alleviate the bur- den on claimants to prove fault in antitrust private litigation so as not to make it excessively difficult or practically impossible for them to exercise the right to compensation[.]").

[71] *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 123 (1969).

[72] *National Farmers' Org. v. Associated Milk Producers, Inc.*, 850 F.2d 1286, 1293 (8th Cir. 1988).

[73] EU Damages Directive (Art. 17.2). This is based on conclusions in the economics literature that more than 90% of cartels cause price increases, and the logic is that because a cartel that does not cause harm is a rare exception, a presumption of harm is appropriate.

[74] EU Damages Directive 17.3.

support the judiciary in involves issuing guidelines or other capacitation to assist with quantification of damages in civil proceedings.[75]

iii. Giving Effect to Prior Infringement Decisions

Procedural tools can also be used to ease, or even satisfy, a plaintiff's burden of establishing an infringement in a follow-on damages action. Some jurisdictions allow plaintiffs to use findings from prior public enforcement proceedings in a follow-on action as evidence.

> Decisions of the competition authority usually include extensive and detailed explanations of the infringement of the competition law investigated by the agency. In a cartel case, for example, this will include a description of the companies involved in the cartel, the mechanisms of the cartel arrangement, the duration of the cartel activity, its geographic scope, and so forth.[76]

Allowing a plaintiff to utilize these findings can narrow the issues in the follow-on proceeding and make it easier for plaintiff to focus on injury. The evidentiary value given to these findings can vary, from simply being considered normal evidence, to being treated as being a rebuttal or even non-rebuttal presumption.

Of course, the effect of a prior decision only extends to a follow-on damage action that involved the same defendants and conduct at issue in the prior proceeding as found in the decision. While this might appear simple in principle, there almost inevitably will be disputes about the scope of the prior decision and which findings are to be given effect in the subsequent proceeding.[77] Nevertheless, this can be an extremely effective procedural tool for easing burdens on plaintiffs in follow-on actions and streamlining those proceedings.

iv. Availability of Collective Redress

Oftentimes the harms resulting from anticompetitive conduct are distributed among many different potential claimants. This is particularly the situation when the conduct involves consumer products. The individual damages incurred by each consumer

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[75] DAMAGES DIRECTIVE ¶ 42 ("The Commission should issue clear, simply and comprehensive guidelines for national courts on how to estimate the share of the overcharge passed on to indirect purchasers.").

[76] OECD, Note by the Secretariat.

[77] *See, e.g.,* Jacobs, Michael, Non-Mutual Offensive Collateral Estoppel in Private Antitrust Litigation: Lessons from the Microsoft Cases (October 10, 2012). Available at SSRN: https://ssrn.com/abstract=2160052 or http://dx.doi.org/10.2139/ssrn.2160052.

in these can be low, even when the aggregate harm is substantial. In those cases, the costs of pursuing an individual action to recover those losses will exceed any potential recovery. It would be economically irrational to do so on an individual basis, even in cases where liability is not in dispute.[78]

Many jurisdictions have implemented procedural mechanisms that allow plaintiffs to pursue their claims collectively, including class actions, collective actions, and other forms of aggregating damages claims. These mechanisms are procedural in nature and do not create new causes of action. Rather, the idea is to make it economical for claimants, particularly consumers, to pursue numerous small claims. As the Supreme Court of Canada has observed, "a class procedure has the potential to 'breath[e] new life into substantive rights'".[79]

Collective proceedings take advantage of economies of scale enjoyed when individual claims are pursued jointly and common costs are shared.[80] When individual disputes share common factual and legal issues, one can expect that there is not a direct relation between the costs of litigation and the number of plaintiffs involved since liability only needs to be determined once.[81] This can make the enforcement of small claims economically feasible even when individual losses are small.[82] And they can do so in ways that traditional tools, like joinder of parties, cannot.[83] But collective proceedings do not only lead to economies of scale for the claimants, they also result in judicial economy by joining together in a single proceeding many actions that otherwise might have been brought separately.[84]

Collective proceedings can serve both compensatory and deterrence purposes. As the OECD has noted, "[w]ithout such a system recovery of damages, would be limited to plaintiffs that are wealthy and have sufficiently large claims to justify litigation for

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[78] AAI Handbook.

[79] AIC Limited v. Fischer, 2013 SCC 69, [2013] 3 S.C.R. 949, quoting M. Good, "Access to Justice, Judicial Economy, and Behaviour Modification: Exploring the Goals of Canadian Class Actions" (2009), 47 Alta. L. Rev. 185, p. 188.

[80] Nagy, 2023. "Collective redress and aggregation of claims."

[81] *Id*.

[82] *Id*. "Collective redress and aggregation of claims." However, not all actions become economically viable even under an opt-out model. This can happen when individual claims are very small. It can also be the case that, even with relatively significant individual damages, the number of affected potential claimants is not sufficiently large. *Id*.

[83] *Id*.

[84] *Id*.; AAI Handbook. Of course, as Nagy notes, this might result in more litigation since many of those cases would not have been brought in the absence of a collective proceeding.

damages."[85] Collective proceedings thereby provide a path forward for individuals who otherwise would not have been able to pursue any remedy for their harms. But they also have a deterrent effect as well. "The prospect of class actions removes the 'comfort zone' for those who might assume that minor wrongs would not result in litigation."[86]

Mechanisms for collective redress generally can be divided into one of two categories: an "opt-in" model or an "opt-out" model. The fundamental difference lies in how the collectives are formed. In the "opt-in" model, a claimants need to take an affirmative step to join the proceeding as a member of the collective, and the outcome of the proceeding only affects those individuals who do so. In an "opt-out" model, the collective consists of everyone who falls within the definition of the represented group. An individual must take the affirmative step of opting out of the collective, otherwise they will be bound by the outcome of the proceeding.

With collective redress, there is often a need to impose some kind of initial filter mechanism that can identify non-frivolous claims that can be address in a collective manner.[87] These mechanisms generally seek to identify common legal or factual issue to ensure that members of the proposed group have the same legal relationship toward a defendant.[88] In the US and Canada, for instance, courts must "certify" a class before the before it can proceed in a collective manner. This requires some showing by the plaintiffs that the claims being asserted on behalf of a particular class (or classes) can be addressed on a collective basis.

Collective redress schemes also need to grapple with who can pursue claims and how. In some jurisdictions, like the US and Canada, opt-out class actions can be brought

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[85] OECD, Note by the Secretariat.

[86] Will Branch Treatise.

[87] While there is a need to weed out "abusive" or "frivolous" claims, it is important to distinguish between truly abusive claims and those that are ultimately successful. As the AAI has noted, if "non-frivolous" is limited to meaning "ones that are certain to prevail, then the scope of private actions will be quite narrow indeed, and at most would be limited to follow-on claims where the government has already brought a successful action." On the other hand, if a system wants to allow stand-along litigation or even follow-on cases that exceed the scope of the public enforcement activity, then "certainty" cannot be the standard because such actions are inherently uncertain. If stand-alone actions are to be a realistic possibility, then it is necessarily the case that many will turn out to be unmeritorious, and there will be costs involved in adjudicating such claims. The goal of a system of collective redress should be to minimize such costs while affording sufficient incentives and opportunity to bring uncertain, yet legitimate claims." AAI EU White Paper.

[88] *See* EU Collective Redress in Antitrust (2012), p.21. *See also* Pedro Caro de Sousa, "Identifying the Building Blocks of Private Competition Enforcement," CPI Antitrust Chronicle (Feb. 2019), p.3 *(*"In order to serve the efficiency of justice and protect against frivolous litigation, systems that adopt opt-out class actions insist that the admissibility of the claims should be verified at the earliest possible stage of litigation, and that cases which do not meet the conditions for collective action (as well as manifestly unfounded cases) be dismissed as soon as possible.").

and pursued by members of the class they seek to represent.[89] In other models, actions that seek to represent a defined class of claimants can only be brought by qualified entities, such as consumer or trade associations, public bodies such as an ombudsman, or trade association, on behalf of defined group of injured parties.[90] In some jurisdictions, any affected party, whether a natural person or business, can proceed with a collective claim. In others, collective actions might be restricted to natural persons or perhaps also include small and medium firms but exclude large firms.

Experience strongly suggests that opt-out models are far more effective at providing effective redress than opt-in systems.[91] Participation rates in opt-out classes, for instance, have been far higher than in opt-in collectives.[92] Experience in Europe with opt-in cases has seen average participation rates in large collective proceedings of less than one percent.[93] While data on participation rates in opt-out cases is difficult to come by, one recent study of major US class actions found "compensation rates" (i.e., the percentage of potential class members who ultimately received some form of compensation) ranging from one to 70 percent.[94] In various *Microsoft* consumer class actions in which the author participated, the "claims rates" (a slightly different measure than compensation rate) ranged from approximately 20–37 percent.[95]

While opt-out systems have been subject to criticism that "they can fuel an excessive litigation culture,"[96] they are the model that, to date at least, have proven to be the most effective at facilitating private damages actions in a jurisdiction. It was only after

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[89] AAI Handbook; Branch Treatise.

[90] *Id*.

[91] As the AAI has stated: "We have seen no evidence of effective litigation on behalf of a representative class under an opt-in structure." AAI EU White Paper.

"'Given the expense of litigation, individual antitrust cases challenging cartel behavior are often negative-value cases, i.e., cases "in which the stakes to each member are too slight to repay the cost of the suit.'... The existence of a negative-value suit is often said to be the 'most compelling rationale for finding superiority in a class action.'" AAI EU PAPER, at 13.

[92] Nagy, 2023. "Collective redress and aggregation of claims." Delatre, at 38 ("It is (...) submitted that, in a bundle of similar incentives regarding the cost of the action, damages and legal fees, the opt-out arrangement of a class action invariably includes more participants that the alternate opt-in arrangement, as for equal incentives, the rate of rational apathy of victims will always be higher than the rate of victims who opt-in.").

[93] See Rachael Mulheron, 'Reform of Collective Redress in England and Wales: A Perspective of Need', (2008) 7 Civil Justice Council 1, 147–156.

[94] Brian T. Fitzpatrick & Robert C. Gilbert, "An Empirical Look at Compensation in Consumer Class Actions," 11 N.Y.U. J. L. & Bus. 767, 770 (2015).

[95] *See* discussion *infra*.

[96] OECD, Note by the Secretariat; *see also* EU Collective Redress in Antitrust, p.21.

the introduction of opt-out class actions in the United States in 1966 that saw antitrust damages actions rise significantly.[97] Similarly, in Canada, following the enactment of provincial opt-out class legislation in Québec, Ontario and British Columbia between 1978 and 1995, the country saw a sharp increase in damages actions.[98] Perhaps not surprisingly, then, the European countries that appear to be seeing the most significant activity with consumer damages actions in recent years are those, like the UK and Portugal, where opt-out class action mechanisms, are available.[99]

v. Ability of Indirect Purchasers to Claim Damages

Oftentimes consumers and others who suffer injury as a result of competition law infringements do not transact directly with the firms that caused the harm. For example, in the case of a cartel, when the colluding firms sell their products at above competitive prices, the purchaser of those good from the producer is harmed by the amount of the unlawful overcharge. That "direct purchaser", however, is not always the end consumer of the price-fixed product. The direct purchaser could be a manufacturer which incorporates that item into the products it sells, and "passes on" some portion of the overcharge in the price of its products. Or the direct purchaser could be a distributor or retailer that similarly resells the price-fixed product at a higher price to its customers. By the time the price-fixed goods make their way to the end user consumers, these "indirect purchasers" may have had some or all of the unlawful overcharge passed on to them. In this way, an unlawful cartel is capable of causing harm at multiple levels, not just to direct purchasers.

There is considerable debate about whether, from a deterrence perspective, allowing indirect purchasers to bring a private action makes sense, or if it is preferable to concentrate the cause of action with the direct purchaser.[100] The latter view was what led

[97] Waller, Spencer Weber and Popal, Olivia, The Fall and Rise of the Antitrust Class Action (August 10, 2015). World Competition: Law and Economics Review, 2016, Available at SSRN: https://ssrn.com/abstract=2641867 or http://dx.doi.org/10.2139/ssrn.2641867.

[98] Aaron Levenstadt, Instituting an Indirect Purchaser Checkpoint: A Case for Blocking Illinois Brick at the Canadian Border, Canadian Competition Law Review, Vol. 24, No. 1, p. 1.

[99] Sousa Ferro, Miguel, Consumer Antitrust Private Enforcement in Europe: As Complete a Survey as Possible (Extended Version).

[100] The American Modernization Commission Report provides a useful summary of the debate. "Direct purchasers usually can better perceive the violation and prove overcharges and thus may be more likely to bring an antitrust suit. Some witnesses argued that direct purchasers are more likely than indirect purchasers to bring antitrust lawsuits and thus to contribute more to the deterrence of antitrust violations. A sample of indirect purchaser settlements provided by attorneys for indirect purchasers shows that, in virtually all cases, direct purchasers or other private enforcers also challenged the conduct at issue. Nonetheless, indirect purchasers can bring actions in circumstances in which direct purchasers choose not to sue, for example, to avoid injuring business relationships with suppliers. Taken together, this evidence suggests that direct purchaser litigation is more likely to provide effective deterrence, but indirect purchaser litigation may supplement that deterrence." AMC Report, at p. 265-66.

the US Supreme Court to reject the pass on defense,[101] and ultimately to *Illinois Brick*, which disallowed indirect purchaser claims under US federal antitrust law.[102] More recently, the Supreme Court of Canada came to the opposite conclusion.[103] However, if the overriding objective of allowing antitrust damages actions is to provide compensation to those harmed by anticompetitive conduct, particularly end consumers, allowing suits to brought on their behalf is essential.

Allowing indirect purchaser damages actions admittedly can introduce substantive and procedural complexity into the system. Proving harm, for instance, may be particularly difficult for consumers to prove the extent of the harm.[104] And while the 2014 EU Damages Directive has sought to ease the burden for indirect purchasers by introducing a rebuttable presumption of pass-through in certain circumstances,[105] numerous questions nevertheless remain to be worked out.[106] Moreover, allowing indirect purchaser actions introduces the prospect of multiple simultaneous proceedings by different levels in the distribution chain—by direct purchasers, indirect purchaser consumers, and sometimes even intermediate indirect resellers—which requires effective management by the tribunal overseeing the proceedings.

d. Incentivizing Adequate Representation for Claimants

None of the procedural devices just discussed will lead to effective private enforcement if plaintiffs do not have access to the resources needed to effectively pursue their claims. Antitrust claims tend to be complex, which also means they can be extremely expensive to pursue. Parties need not only experienced counsel with expertise in the subject matter, but they also require economic experts and often more. Plaintiffs generally will be up against some of the best antitrust lawyers in the bar, paid for by defendants with

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[101] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968) (expressing concern that indirect purchasers would have "only a tiny stake in a lawsuit and little interest in attempting a class action.").

[102] *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

[103] *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, [2013] 3 SCR 477. The SCC remarked that "Indirect purchaser actions may, in such circumstances [where direct purchasers have valuable business relationships with the defendant], be the only means by which overcharges are claimed and deterrence is promoted. The rejection of indirect purchaser actions in such cases would increase the possibility that the overcharge would remain in the hands of the wrongdoer."

[104] Damages Directive ¶ 41 ("Consumers or undertakings to whom actual loss has thus been passed or have suffered harm caused by an infringement of Union or national competition law. While such harm should be compensated for by the infringer, it may be particularly difficult for consumers or undertakings that did not themselves make any purchase from the infringer to prove the extent of that harm.").

[105] Damages Directive Art. 14(2).

[106] *See* Hausfeld, New EC guidelines reshuffle the passing-on game - The European angle (September 3, 2019) available at https://www.hausfeld.com/nl-nl/what-we-think/competition-bulletin/new-ec-guidelines-reshuffle-the-passing-on-game-the-european-angle/.

substantial sums of money on the line. For plaintiffs with large claims—for example, competitor firms looking to recover lost profits resulting from alleged anticompetitive conduct, or large institutional purchasers of price-fixed goods—this might not be an issue. The size of the claim makes it economical to pursue with the extremely competent counsel and the necessary expert assistance. With collective claims, however, the situation becomes more complicated.[107]

The challenge in collective cases is attracting legal counsel with the ability to effectively pursue a complex case. The filing of a case itself is not particularly difficult or costly. Seeing the case through to a successful conclusion against a skillful and well-resourced opponent is a far more onerous task. That task requires resources. "A private remedy system that does not motivate specialized attorneys to litigate on behalf of antitrust plaintiffs will simply not be effective."[108] And as much as the legal profession pretends to shy away from being a business, the success of collective redress hinges on being able to fund the litigation, including lawyers needed to vigorously pursue a case.[109] "In simple terms, a judicial collective damages procedure will only be effective if there exist both an aggregating procedure and liberal financial rules, such that parties (or more likely their lawyers) will have sufficient economic incentives to find it attractive."[110]

In the US and Canada, funding of these cases often has been done on a contingency basis. The lawyers themselves would fund the litigation, including out of pocket expenses for experts and other litigation costs, with the hope of being awarded a percentage of any recovery if the case is successful.[111] More recently, third-party litigation funding, in which an independent commercial fund finances all or part of the legal costs of a claim in return for a share of any damages awarded, has become a more commonly used option in some jurisdictions.[112] In fact, the countries in Europe where consumer class proceedings have

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[107] AAI Handbook.

[108] AAI EU White Paper.

[109] Nagy, 2023. "Collective redress and aggregation of claims" (including the question of the allocation of a risk premium).

[110] See Christopher Hodges, 'Collective Redress in Europe: The New Model', (2010) 29(3) Civil Justice Quarterly 370, 373 (Ironically, a collective judicial procedure without attractive financial returns for intermediaries will not deliver the policy objectives, but as the financial returns increase, so does the risk of abuse, and adverse consequences become inevitable.").

[111] Cf. Charlotte Leskinen, 'Collective Actions: Rethinking Funding and National Cost Rules', (2011) 8 Competition Law Review 87, 112 ("[T]he possibility of large contingency fees provides incentives to lawyers to bring damages actions and is an essential prerequisite of the functioning of the class action mechanism, in particular, when the individual claims are small").

[112] CITE. *See also* Pedro Caro de Sousa, "Identifying the Building Blocks of Private Competition Enforcement," CPI Antitrust Chronicle (Feb. 2019), p.3. ("A number of mechanisms that operate to this effect have been adopted, to differing degrees, in various jurisdictions. These include: (i) third-party funding; (ii) success-

become more common in recent years, it is where the combination of opt-out collectives *and* third-party funding is allowed.[113]

Nevertheless, even when these conditions are present, the development of a plaintiffs' bar—lawyers specializing in handling competition matters, or at least with experience on both sides—takes time. In the US, for instance, a sizable plaintiffs' bar exists. In recent decades, an experienced and capable plaintiffs' bar has developed in Canada. The same appears to be happening in various European countries where, prior to the enactment of the Damages Directive, a surge has been seen in the number of experienced lawyers (and economists) handling competition damages actions for claimants.[114] During those growth phases (and even after) there will undoubtedly be variations in quality within the bar. But over time, the right incentive structures can lead to the growth and development of specialists capable of handling private damages actions.

e. Balancing interests between public and private enforcement

Promotion of private enforcement cannot come at the expense of public enforcement. The interests of both public and private enforcement need to be balanced with one another, with the objective of enhancing the overall competition system. One area where this potential tension between public and private enforcement can arise involves the plaintiffs' need for access to evidence to prove their claims. Such information, as discussed above, is often in the possession of public enforcers who have tools available for obtaining evidence from investigated parties that private litigants generally do not. Some have suggested that providing private litigants with unlimited access to that information could undermine the effectiveness of public enforcement tools like leniency programs if, for instance, leniency statements by applicants were subsequently made available to private litigants. Similarly, criminal investigations, where antitrust infringements are criminalized, could potentially be impacted when private actions are proceeding in parallel. These concerns, however, might be overblown, and in some instances the real problem might be overcoming public enforcer resistance to cooperation with private enforcers.[115]

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based billing; and (iii) cost-based billing. All these mechanisms have in common that they transfer the risk of bringing a claim to someone other than the victim of the competition infringement.").

[113] *See* discussion *infra*.

[114] See PORTUGAL & SPAIN (Miguel Sousa Ferro* Francisco Marcos) (Portugal and Spain*), Miguel Sousa Ferro* Francisco Marcos, in B. J. Rodger, F. Marcos & M. S. Ferro (eds) Research Handbook on Competition Law Private Enforcement in the EU (Elgar Publishing, forthcoming 2023)

[115] *See* Spencer Waller, In Praise of Private Antitrust Litigation, CPI Antitrust Chronicle (Feb. 2019), p.13. ("The Justice Department tends to overreact to the very concept of private rights of actions as an existential threat to its leniency program. This reaction is short-sighted at several levels.... The Antitrust Division ... overstates the threat posed to the deterrence and disclosure facilitated by the leniency program, particularly after the

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Having briefly examined several fundamental issues relating to private antitrust enforcement and private damages actions, the paper will now turn to examining these in more detail and in concrete settings in Part II. The discussion will begin with private enforcement, including consumer class actions, in the United States. These two jurisdictions have the most experience, which in the consumer context stems from their use of opt-out class mechanisms. The paper will then turn to Canada, which has also seen significant growth in consumer class actions asserting competition claims, followed by a summary of recent experiences in the UK and continental Europe since the 2014 Damages Directive. Again, the evidence suggests that an opt-out mechanism is key. Part III will examine relevant issues of institutional design and procedure, and experience to date with private actions, in the Latin American jurisdictions that form part of this study. Chile will receive the most extensive treatment given its comparatively robust experience with private enforcement and damages actions, particularly following the reforms implemented since 2016 intended to facilitate such activity.

2004 ACPERA legislation; *see also* Spencer Weber Waller, The Temple of Leniency: Thoughts Inspired by the Work of Laura Guttoso, 37 u. Queensland l. rev. 169 (2018).

PART II: COMPARATIVE EXPERIENCE IN ANTITRUST DAMAGES ACTIONS

I. UNITED STATES

Given its extensive experience with private antitrust enforcement, the United States not surprisingly has served as a reference for other countries that studied. From this experience, important insights are available for other jurisdictions that might want to strengthen private enforcement of their competition laws. Sometimes, however, those lessons seem to be based on preconceived, and often negative, notions about an out-of-control litigation culture driven by voracious trial lawyers who file frivolous class actions that primarily benefit themselves. As Professor Lande has cautioned, however, it is imperative, when studying the US experience, to "understand private enforcement as it actually works [there], not a mere caricature, one too often presented by self-interested parties who oppose antitrust enforcement in general."[116] That is the goal of this section – to provide a look at some key features of the US system that have made it possible for private enforcement to play such an important role. And to do so in a way that looks at the many benefits that private enforcement has brought to the table, but without glossing over ways it sometimes falls short.

Private enforcement was envisioned as serving at least three purposes:

> "First and primarily, it was deemed important to compensate persons who were injured by an antitrust violation, with much the same concern as is given to victims of other unlawful conduct. Second, it was hoped that the imposition of substantial monetary penalties would act as a deterrence to anticompetitive activity. Third, providing for private lawsuits would increase the number of potential plaintiffs, thereby offsetting the limited enforcement resources available to the government and giving the opportunity to attack misconduct to the very persons most likely to have information thereof".[117]

By some measures, private antitrust litigation in US appears to be fulfilling those purposes, as will be discussed further throughout this section. In terms of providing compensation, damages actions have recovered many billions in relief for plaintiffs

[116] See Lande, "Benefits of private enforcement: empirical background," AAI Handbook, p.11.

[117] Earl W. KIntner et. Al., Economic Theory, Common Law, and an Introduction to the Sherman Act § 78.2 (2017) (emphasis added).

affected by anticompetitive conduct.[118] Opt-out class actions involving dispersed consumer classes, while far from perfect, outperform alternative mechanisms. By increasing the likelihood that an offender would have to pay damages, these actions have also increased overall deterrence against engaging in anticompetitive activity. And not just by a little. In fact, some scholars have argued that the overall deterrent effect of private damages litigation in the US exceeded that of the DOJ's anti-cartel enforcement efforts.[119] But even if that conclusion does not hold up, private enforcement at a minimum provides an important complement to public enforcement efforts. Finally, private actors have augmented the limited resources of public enforcers by oftentimes targeting conduct left unaddressed by the agencies.

Private antitrust enforcement in the US is part of a larger tradition in the country of using plaintiff-driven litigation to enforce federal laws and needs to be understood in that context.[120] It is also a product of a civil litigation system with various idiosyncrasies, like a heavy reliance on juries and extraordinarily liberal discovery rules. It is not something that can, or should, be replicated elsewhere. Nevertheless, the US experience helps to illustrate the types of substantive and procedural rules that, at a high level, could help private enforcement develop, particularly if the goal is to provide compensation (however imperfect) to those harmed by anticompetitive conduct.

- First, the US system provides incentives for plaintiffs and their lawyers to pursue antitrust claims.
- Second, it has a powerful tool in the opt-out class action for the collective pursuit of small individual claims with large aggregate effects.
- Third, the system provides ample discovery rights, which allow plaintiffs to overcome the information asymmetries that often characterize antitrust cases, particular consumer damages actions.
- Fourth, it demonstrates how rules can be tweaked to facilitate (or conversely, to dial back on) private enforcement.

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[118] Joshua P. Davis & Robert H. Lande, Towards an Empirical and Theoretical Assessment of Private Antitrust Enforcement ("Assessment of Private Antitrust Enforcement").

[119] *See* Davis & Lande, "Assessment of Private Antitrust Enforcement."

[120] *See* Sean Farhang, The Litigation State: Public Regulation and Private Lawsuits in the U.S. (2010) (noting that of 1.65 million lawsuits enforcing federal laws in the decade before the book was published, 97 percent were brought by private parties).

- Finally, it shows the need for decision-making bodies capable of managing the complexities that can arise in private antitrust litigation, even if those rules are simplified somewhat to promote private enforcement.

But the US system comes with high costs as well. Surprisingly, data on how effectively class actions perform in compensating members of the class are difficult to come by.

a. Private Enforcement in the US Antitrust System

To understand the role of private enforcement in the US, it is necessary to put it in context of the overall antirust system in the country. That system is uniquely fragmented, with a multitude of laws and numerous enforcers, both public and private, at the federal and state levels. It is also a system in which "[t]here is no textual or historical basis to prioritize either public or private enforcement of [federal] antitrust laws. Rather they were intended to work as equal partners."[121] That holds true not just at the federal level but also in the many states that allow private enforcement of their antitrust laws.

The main antitrust statutes at the federal level are the Sherman and Clayton Acts.[122] Section 1 of the Sherman Act prohibits agreements that unreasonably restrain trade, while Section 2 forbids monopolistic behavior. The Clayton Act includes more detailed provisions on issues including price discrimination, exclusive dealings, mergers and acquisitions, and interlocking directorates, among other subjects. The US Department of Justice and the Federal Trade Commission have the authority to enforce the federal antitrust laws. Although both agencies perform many regulatory-type tasks, "the bulk of competition policy in the United States is a combination of public and private antitrust litigation."[123]

Oftentimes states antitrust laws are patterned after the federal laws. While some explicitly provide that they are to be interpreted consistently with the federal laws,[124] others are broader in some respects. State attorneys general (AGs) are charged with civil,

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[121] *See* Spencer Weber Waller, "In Praise of Private Antitrust Litigation," CPI Antitrust Chronicle (Feb. 2019), p.9.

[122] *See* US Department of Justice, "The Antitrust Laws" (discussing Sherman and Clayton Acts), available at https://www.justice.gov/atr/antitrust-laws-and-you. *See also* Federal Trade Commission, "The Antitrust Laws" (same), available at https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws.

[123] Waller, "In Praise of Private Antitrust Litigation"

[124] *See, e.g.*, Iowa Code § 553.2 ("This chapter shall be construed to complement and be harmonized with the applied laws of the United States which have the same or similar purpose as this chapter. This construction shall not be made in such a way as to constitute a delegation of state authority to the federal government, but shall be made to achieve uniform application of the state and federal laws prohibiting restraints of economic activity and monopolistic practices.").

and sometimes criminal, enforcement of their respective state statutes. Section 16 of the Clayton Act gives state AGs to ability to seek injunctive relief under the federal antitrust laws when anticompetitive conduct threatens to harm the state's general economy.[125] Moreover, since the 1970s, state AGs have been able to seek damages on behalf of state residents (so called *parens patriae* lawsuits).[126]

Private litigants can bring antitrust actions under the federal antitrust laws to recover damages, sue for injunctive relief,[127] or both. Section 4 of the Clayton Act is the provision that allows "any person" who has been "injured in his business or property" by an antitrust violation to initiate a damages.[128] The actions can be premised on any violation of the federal antitrust laws.[129] Thus, a private plaintiffs can sue not just for price fixing or other unlawful restraints of trade under section 1 of the Sherman Act, but also for illegal monopolization under section 2 and violations of the Clayton Act.[130]

Section 4 includes two provisions that are key to making private enforcement economically viable. First, the law provides that a successful plaintiff "shall recover threefold the damages by him sustained", the infamous treble damages rule.[131] Treble damages are automatic[132] and nondiscretionary, and they are intended to serve as a deterrent to violating the antitrust laws.[133] (In reality, however, when cases settle, they are more likely to be for single damages or less, not treble damages.[134]) Second, a successful

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[125] 15 U.S.C. §§ 15, 26.

[126] 15 U.S.C. §15c(a)(1).

[127] "Injunctive relief, also known as an injunction, is a remedy which restrains a party from doing certain acts or requires a party to act in a certain way. It is generally only available when there is no other remedy at law and irreparable harm will result if the relief is not granted. The purpose of this form of relief is to prevent future wrong." Legal Law Institute, WEX, available at https://www.law.cornell.edu/wex/injunctive_relief.

[128] 15 U.S.C. § 15(a). The Clayton Act defines "person" to include "corporations and associations" existing under federal, state, territorial or foreign law. 15 U.S.C. § 12. A state is also considered to be a person when suing for damages on its own behalf.

[129] *Id*. ("...by reason of anything forbidden in the antitrust laws...).

[130] 15 U.S.C. § 12.

[131] 15 U.S.C. § 15(a). There are a few exceptions to this automatic trebling of damages, including (as will be discussed below) under the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) for participants in the federal leniency program.

[132] As will be discussed below, there are a few statutory exceptions to the treble-damages rule, including for successful applicants to the DOJ's cartel leniency program.

[133] Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc., 473 US 614, 635 (1985) ("The treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a critical deterrent to potential violators.").

[134] Davis & Lande, "Assessment of Private Antitrust Enforcement."

plaintiff is also entitled to the costs incurred in bring the action, including a reasonable attorney's fee.[135] This is an important exception to the so-called "American rule," under which each party is generally responsible for covering its own litigation expenses regardless of who prevails.[136] It is also a one-way fee to that rule, since it only applies to a successful plaintiff, not a prevailing defendant.[137] Many state antitrust laws similarly allow plaintiffs to sue for damages, including up to treble damages in some instances.[138]

Private antitrust enforcement in the US dates to the enactment of the Sherman Act in 1890. "From the outset, Congress contemplated that private parties would play a central role in enforcement of the Sherman Act. Indeed, Senator Sherman believed that individuals should act as 'private attorneys general,' and that the antitrust laws should encourage such enforcement."[139] Nevertheless, private enforcement got off to a slow start. Between passage of the Sherman Act in 1890 and the Clayton Act in 1914, private litigants filed just 46 antitrust lawsuits. Only four were successful.[140] The first fifty years saw only 175 private actions. And of those, the plaintiffs prevailed in just 13.[141] It was not a particularly encouraging beginning for proponents of private enforcement and the ideal of the private attorney general.

That all changed dramatically starting in the mid-1960's. Inspired by the belief that collective litigation could be used to effect social change, implement institutional reform,

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[135] 15 U.S.C. § 15(a). There are a few exceptions to this automatic trebling of damages, including (as will be discussed below) under the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) for participants in the federal leniency program.

[136] This is in contrast to the "English rule" or "loser pays" system, in which the losing party is typically required to pay the prevailing party's legal costs.

[137] Rule 11 of the Federal Rules of Civil Procedure allows for sanctions in the case of frivolous suits. The rule provides, in relevant part: "By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; [and] (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; …" *See* Fed. R. Civ. P. 11.

[138] *See, e.g.*, Iowa Code § 553.12 (allowing state and persons injured by violations to recover actual damages and attorneys' fees and costs, plus, at court's discretion, additional double damages for "willful or flagrant" conduct); Minn. Stat. § 325D.57 (allowing "[a]ny person, any governmental body, or the state of Minnesota or any of its subdivisions or agencies" to recover treble damages and attorneys' fees and costs for violations).

[139] Antitrust Modernization Commission, Report and Recommendations (2007), p. 243.

[140] Daniel R. Fischel, The Use of Government Judgments in Private Antitrust Litigation: Clayton Act Section 5(a), Collateral Estoppel, and Jury Trial, 43 U. Chi. L. Rev. 338, 341 n.10 (1975).

[141] Kent Roach & Michael J. Trebilcock, Private Enforcement of Competition Laws, 34 OSGOODE HALL L.J. 461, 465 (1996).

and supplement governmental regulatory efforts, opt-out class procedures were introduced in US federal courts in 1966.[142] Private antitrust litigation surged.[143] The rise of the Chicago School and a judicial backlash against private antitrust litigation (and class actions more generally) in the 1980's saw the number of cases drop from the peak the decade before. Nevertheless, the level of private activity has remained significantly higher than it had been before the introduction of the opt-out procedure.[144] Indeed, private antitrust litigation is so common in the US that, in recent years, the number of private lawsuits has usually exceeded activity by the federal enforcers by a ratio of more than a ten-to-one.[145]

The role played by private litigants in the US antitrust system, however, cannot be adequately captured by the number of cases filed. Unlike in some other jurisdictions where private actions, if allowed, might be limited to certain types of infringements, or to follow-on actions after public enforcers have established liability, private litigants in the US can pursue any violation of the antitrust laws. And they have done so in some of the most impactful cases in recent years. One needs to look no further than the impact private litigation has had on "amateur" college sports in the US, brought about by years of litigation against the NCAA.[146] Or the recent victory by Epic Games in its challenge to Google's app

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[142] Nagy, 2023. "Collective redress and aggregation of claims."

[143] Waller, Spencer Weber and Popal, Olivia, The Fall and Rise of the Antitrust Class Action (August 10, 2015). World Competition: Law and Economics Review, 2016. *See also* Daniel A. Crane, Private Enforcement of U.S. Antitrust Law – A Comment on the U.S. Courts Data, CPI Antitrust Chronicle (Feb. 2019), p. 47.

[144] *See* Daniel A. Crane, Private Enforcement of U.S. Antitrust Law — A Comment on the U.S. Courts Data, CPI Antitrust Chronicle (Feb. 2019), p. 48-49.

[145] Spencer Waller, "In Praise of Private Antitrust Litigation," CPI Antitrust Chronicle (Feb. 2019), p.8 (noting that "[i]n 2017, there were a total of 631 antitrust cases filed, of which 603 were private cases, amounting to over 95 percent of total new antitrust claims."). *See also* Hovenkamp, Herbert J., Quantification of Harm in Private Antitrust Actions in the United States (February 9, 2011); University of Iowa Legal Studies Research Paper (noting that "[i]n a typical year more than 90% of antitrust complaints filed in the United States are by private plaintiffs rather than the federal government").

These numbers, however, could overstate the actual number of "distinct" private actions filed, given that the filing of a class action typically triggers a series of similar filings. Because "class action lawsuits concerning the same claim may be reported either separately or collectively, [that] can result in significant swings in the data." *See* Daniel A. Crane, Private Enforcement of U.S. Antitrust Law – A Comment on the U.S. Courts Data, CPI Antitrust Chronicle (Feb. 2019), p. 47 n.4.

The number of annual antitrust case filings from 2018 to 2022 (between 570 and 636) remained around the low end of the 600-900 range that Professor Crane observed from the mid-1980's until 2017. New filings dropped to 366 in 2022. *See* William F. Cavanaugh et al, Trends in Class Certification, Global Competition Review (July 28, 2028) (https://globalcompetitionreview.com/review/us-courts-annual-review/2023/article/trends-in-class-certification#footnote-098).

[146] *National Collegiate Athletic Association. v. Alston*, 141 S. Ct. 2141 (2021).

store policies.[147] Moreover, private cases have driven antitrust jurisprudence in the US over the past several decades, for better or for worse.[148]

Antitrust Standing. Before moving on to discuss some features of the US system that, in addition to treble-damages and fee-shifting, have promoted private enforcement, this is an appropriate place to consider the question of who has standing to being an antitrust claim. A literal reading of the Clayton Act's "any person" language is extremely broad and conceivably could encompass any harm attributably directly or indirectly to an antitrust violation. The US Supreme Court, however, has concluded that "Congress intended the Act to be construed in the light of its common-law background," which includes limitations on recovery for remote injuries.[149] Whether a plaintiff has antitrust standing therefore depends on various factors that take into consideration the nature of the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them.[150]

One important limitation under US federal antitrust law involves "indirect purchaser" standing – the ability of individuals or firms to bring an action if they did not deal directly with the wrongdoers. In *Illinois Brick Co. v. Illinois*, the US Supreme Court held that they do not. In an earlier case, *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,[151] the Court had rejected the defendant's effort to assert a "pass on" defense, i.e., from arguing that a direct purchaser plaintiff was not harmed because it was able to "pass on" the alleged overcharge to subsequent purchasers in the distribution chain. The Court based its decision in part on its belief that direct purchasers would have the greatest interest in pursuing a damages action and therefore concentrating the harm there would best serve

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[147] *See* Jacobs, Michael. *Google Play y las "otras autoridades" antitrust de EE.UU.* CentroCompetencia UAI (2024), available at: https://centrocompetencia.com/google-play-otras-autoridades-antitrust-eeuu/

[148] From 1990 to 2019, of the 36 antitrust cases decided by the US Supreme Court, 30 were private and only six were public. Daniel A. Crane, "Toward a Realistic Comparative Assessment of Private Antitrust Enforcement." In Reconciling Efficiency and Equity: A Global Challenge for Competition Policy, edited by Damien Gerard, p. 343 and Ioannis Lianos, 341-54. Cambridge: Cambridge University Press, 2019.

[149] *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 531 (1983).

[150] *See, id*. at 535.

For instance, the plaintiff must have suffered "antitrust injury." In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) – the case in which this doctrine was first announced – the plaintiffs, who were bowling alley operators, had challenged an acquisition by the defendant, Brunswick, as violations of section 7 of the Clayton Act. The plaintiffs alleged they were injured because, had Brunswick not acquired the rival bowling alleys, those rivals would have gone out of business, and the plaintiffs' profits would have been higher. The Supreme Court noted that the plaintiffs in fact suffered an injury, but that injury came from increased competition. It was not "antitrust injury", the types of harm the antitrust laws are meant to prevent.

[151] 392 U.S. 481 (1968).

the interests of deterrence. In *Illinois Brick*, the Supreme Court viewed its rejection of indirect purchaser standing as a necessary corollary to its holding in *Hanover Show* – namely, neither plaintiffs nor defendants could rely on "passing on" either to bring, or defend against, an antitrust claim under federal law. As in *Hanover Shoe*, the Court reasoned that this restriction would promote private enforcement. It also saw the rule as necessary for avoiding multiple and inconsistent liability for defendants and obviate the need to "trace the complex economic adjustments" through various distribution channels to indirect purchasers.[152] Thus, under federal law, indirect purchasers do not have standing even if the entire overcharge has been passed through. Indirect purchasers do, however, often have standing to pursue claims for injunctive relief.[153]

Following the decision in *Illinois Brick*, several states passed "*Illinois Brick* repealer" statutes that explicitly allow indirect purchasers to assert damages claims under their state antitrust laws.[154] In others, state courts declined to follow the federal doctrine based on existing state law.[155] Currently, more than half of the states, including many populous states like California, permit indirect purchaser lawsuits under state antitrust laws.[156] The result, as will be discussed below, is that antitrust litigation – particularly in cases where consumers have been affected – often involves claims being asserted under both federal

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[152] 431 U.S. 720 (1977). This rule has become known as the "*Illinois Brick* doctrine."

There are several exceptions of the *Illinois Brick* rule that are beyond the scope of this paper. *See* Antitrust Law Developments (Eighth), pp. 749-52.

The rationale underlying Illinois Brick has been, and continues to be, a subject of debate in the United States. The classic articles in this debate include William Landes & Richard A. Posner, Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick, 46 U. CHI. L. REV. 602 (1979); Jeffrey Harris & Lawrence A. Sullivan, Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis, 128 U. PA. L. REV. 269 (1979); William Landes & Richard A. Posner, The Economics of Passing On: A Reply to Harris and Sullivan, 128 U. PA. L. REV. 1274, 1275-1276 (1980); *See also*, Hovenkamp, Quantification of Harm, at 8 ("The Illinois Brick rule was based on two premises, both of which today seem quite questionable.").

[153] Eric L. Cramer & Daniel C. Simons, "Parties entitled to pursue a claim," AAI Handbook, p.99.

[154] *See, e.g.*, Minn. Stat. §325D.57 (allowing anyone "injured directly or indirectly" by a violation of the Minnesota Antitrust Law to recover). The Minnesota statute was amended in 1984, seven years after *Illinois Brick*.

[155] *See, e.g., Comes v. Microsoft Corp.*, 646 N.W. 2d 440 (Iowa 2002); *Bunker's Glass Co. v. Pilkington plc.*, 75 P.3d 99 (Ariz. 2003).

[156] Hovenkamp, Quantification of Harm, at 8. Although Professor Hovenkamp refers to "roughly half" the states, the author believes that indirect purchaser claims under state antitrust and/or consumer protection laws are permitted currently in more than 35 states.

The US Supreme Court has held that states are not precluded from granting indirect purchasers an antitrust remedy not allowed under federal law. *California v. ARC America Corp.*, 490 U.S. 93 (1989).

and state antitrust laws. This is, in essence, the very result the Supreme Court in *Illinois Brick* sought to avoid.[157]

b. Some Features of the US System that Facilitate Private Enforcement

i. Aggregation of Claims: US Opt-Out Class Actions

Class actions, and specifically opt-out class actions, are a critically important tool for private enforcement of U.S. antitrust laws. As noted above, a substantial boom in private enforcement corresponded with the introduction of opt-out proceedings in 1966. Although the Federal Rules of Civil Procedure introduced opt-in class actions almost thirty years before, in 1938, those did not see frequent use.[158]

> Only the move to the opt-out scheme allowed class actions to become effective and commonly utilized. The introduction of opt-out collective actions was inspired by the idea that collective litigation on behalf of large groups of people could effectively supplement the government's regulatory and enforcement efforts, especially with small claims which could not get to court anyway. Furthermore, '[c]ivil rights cases and other suits seeking social change or to implement institutional reform were, in many ways, the quintessential type of class action envisioned at the time of the 1966 amendments.'"[159]

The general rule in US litigation is that parties may litigate only on their own behalf.[160] Class actions provide an exception when a plaintiff is part of a group whose members share the same interests, in which case she might also be able to proceed in a

[157] The US Antitrust Modernization Commission recommended that both *Illinois Brick* and *Hanover Shoe* be legislatively overturned "to the extent necessary to allow both direct and indirect purchasers to sue to recover for actual damages from violations of federal antitrust law." Under the proposal put forward by the Commission, "[d]amages in such actions could not exceed the overcharges (trebled) incurred by direct purchasers. Damages should be apportioned among all purchaser plaintiffs—both direct and indirect—in full satisfaction of their claims in accordance with the evidence as to the extent of the actual damages they suffered."

See also, Hovenkamp, Quantification of Harm, at 9 ("Clearly, however, the system currently in place in the United States, in which direct purchaser claims are lodged mainly in the federal courts under federal law, and indirect purchaser claims are brought under state law, is cumbersome and irrational. A better system would consolidate all purchasers who are injured into a single forum and proceeding for purposes of allocating damages.").

[158] J. Douglas Richards, "Aggregation of claims," AAI Handbook, p. 128-29.

[159] Nagy, 2023. "Collective redress and aggregation of claims."

[160] Califano v. Yamasaki, 442 U.S. 682, 700–701 (1979).

representative role on behalf of others in that group. Because of this, class actions differ procedurally from other civil litigation in the US in some important ways.

Class actions generally follow a series of procedural steps. First, a plaintiff (or multiple plaintiffs) files a complaint on behalf of a proposed (or putative) class. If the case survives a motion to dismiss (which is commonly filed to dispose of the plaintiff's claims entirely, or at least narrow the issues[161]), the court will have to determine whether the case is appropriate for class action treatment. That is not automatic. Instead, the plaintiff has the burden of establishing that requires that a number of prerequisites set out in Rule 23 of the Federal Rules of Civil Procedure, which addresses class actions, are satisfied. If the court agrees, one or more classes will be "certified". It will also appoint class representatives (plaintiffs who will participate in the litigation on behalf of the class) and class counsel (to represent the class). Notice will also be provided to members of the class, who will be given an opportunity to "opt-out" before the class is litigated on the merits. Any class members who do not opt-out will be bound by the final judgment.

***Class Certification Requirements*.** Rule 23(a) states that one or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable (numerosity);
(2) there are questions of law or fact common to the class (commonality);
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality); and
(4) the representative parties will fairly and adequately protect the interests of the class (adequacy).[162]

The first of these prerequisites (numerosity) is aimed at determining whether there are enough members of the class so that a traditional procedural mechanism like joinder[163]is

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[161] Rule 12 allows a court to dismiss a complaint for "failure to state a claim upon which relief can be granted." In other words, if the complaint does not allege facts that, even assumed to be true, would amount to a violation, the court can dismiss the case. It is an initial gatekeeping function of the court in the US system. Fed. R. Civ. P. 12(b)(6). The threshold for what a plaintiff needed to allege for a claim to survive was raised in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) by requiring for plaintiffs to include enough facts in their complaint to make it plausible, not merely possible or conceivable, that they will be able to prove facts to support their claims.

[162] Fed. R. Civ. P. 23(a). These requirements are known as numerosity, commonality, typicality and adequacy. Although not explicitly set forth in the rule, courts have also imposed a requirement of ascertainability, meaning that identification of class membership must be feasible using objective criteria. *See, e.g., Rose v. Saginaw Co.*, 232 F.R.D. 267, 271 (E.D. Mich. 2005).

[163] "Joinder is the process to consolidate claims or parties into one case. In federal civil lawsuits, the procedure for joinder is governed by the Federal Rules of Civil Procedure." Legal Information Institute, Wex, available at https://www.law.cornell.edu/wex/joinder.

not a viable option.[164] The second (commonality) requires that a common questions exists "that is capable of classwide resolution … and will resolve an issue that is central to the validity of each one of the claims in a single stroke."[165] The third (typicality) requires the plaintiff to be a member of the proposed class that is sought to be represented and have no diverging interests that group.[166] And the fourth (adequacy) seeks to ensure that the plaintiff and counsel will vigorously pursue not only her own interests but those of everyone in the class.[167]

In addition, Rule 23(b) requires that one of three additional factors be satisfied. For claims typically at issue in antitrust damages actions, the court must also find that (1) "the questions of law or fact common to class members predominate over any questions affecting only individual members," referred to as the "predominance" requirement, and (2) "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy," the "superiority" requirement.[168] The predominance analysis in antitrust cases generally focuses on whether any injury caused by the alleged anticompetitive conduct is an issue common to the class and subject to generalized proof, and if damages can also be established through common proof.[169]

Certification under this rule results in an "opt-out" class. This class must be defined "with reasonable specificity, using objective criteria,"[170] and plaintiffs whose claims fall within that definition are included unless they take affirmative steps, after reasonable

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[164] In antitrust damages cases involving market-wide impact, numerosity is unlikely to pose an obstacle. J. Douglas Richards, AAI Handbook, 129-30. While there is no minimum threshold, some courts have used 40 or more members as a "rough rule of thumb." *See* Antitrust Law Developments at 822 n. 636 (nothing also that cases with as few as thirteen members have satisfied the numerosity requirement).

[165] *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Again, in antitrust cases involving claims of market-wide impact, commonality is generally satisfied. J. Douglas Richards, AAI Handbook, 130.

[166] This sometimes poses obstacles to certification when members of proposed classes "have been injured under different transactional circumstances, such as purchases under different types of contracts or purchases in materially different markets." J. Douglas Richards, AAI Handbook, 130.

[167] J. Douglas Richards, AAI Handbook, 130. Adequacy of proposed class counsel is also considered under Rule 23(g).

[168] Fed. R. Civ. P. 23(b)(3). Requests for injunctive classes are analyzed under Rule 23(b)(2) which, instead of the predominance and superiority inquiries, asks whether the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate with respect to the class a whole." Fed. R. Civ. P. 23(b)(2). *See* J. Douglas Richards, AAI Handbook, 137.

[169] *See* Antitrust Law Developments pp. 836-841 for a more thorough discussion. As courts have noted, "there are no hard and fast rules… regarding the suitability of a particular type of antitrust case for class action treatment," and that "unique facts of each case will generally be… determin[ative]." *Id*. at 838, quoting *Blue Bird Body*, 573 F.2d. at 316.

[170] Antitrust Law Developments, p. 831.

notice, to exclude themselves. Depending on the definition, classes can consist of individuals, legal persons, or both. There are no restrictions that limit class actions to national persons. A final judgment in a class action is binding on all members of the certified class.[171]

Increasing Role of Courts as Gatekeepers. While courts have always played an important gatekeeping role in class actions, that role has increased in recent years. Plaintiffs in the first few decades after the 1966 introduction of the opt-out mechanism faced relatively low hurdles to certification under Rule 23(b)(3). In a 1974 case, the US Supreme Court stated that "nothing in either the language or history of Rule 23... gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."[172] District courts commonly refused to resolve "battles of the experts" in deciding whether to certify a class. Even after the Supreme Court held in 1982 that district courts must conduct a "rigorous analysis" of the requirements under Rule 23 before certifying a class, and that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question,"[173] there remained considerable uncertainty regarding the propriety of inquiring into the merits of a plaintiff's claim.[174] In 2011, in *Wal-Mart Stores v. Dukes*, the Supreme Court clarified that Rule 23 "does not set forth a mere pleading standard, and therefore the "rigorous analysis" required for certification would often overlap with the merits of the plaintiffs' claims.[175]

While the contours of this standard are still being clarified, it does not mean that the plaintiffs must prevail on the merits at the certification stage. The plaintiffs must show that the evidence is capable of showing class wide impact. [176] As a practical matter, however, class certification in recent years has become a far more burdensome process. While obviously this increases costs on defendants, it substantially increases the risk for

[171] Fed. R. Civ. P. 23(c).

[172] *Eisen v Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).

[173] *General Telephone Co. v. Falcon*, 457 U.S. 147, 156 (1982)

[174] *See* Antitrust Law Developments, p. 821 n.632 (citing examples in which courts, following *Falcon*, applied a "rigorous analysis" that overlapped with merits issues).

[175] *Dukes*, 131 S. Ct. at 2551.

[176] *See, e.g.*, Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC31 F.4th 651, 665 (9th Cir. 2022) (en banc); In re Lamictal Dir. Purchaser Antitrust Litig., 957 F.3d 184, 191 (3d Cir. 2020); In re Nexium Antitrust Litig., 777 F.3d 9, 27 (1st Cir. 2015).

plaintiffs and their counsel.[177] But once a class is certified, a case is far more likely to settle.[178] Therefore, the certification oftentimes is crucial.

Multidistrict Litigation (MDLs). Reports of a government antitrust investigation being conducted, or news of a guilty plea in a criminal matter, often leads to the filing of multiple "follow on" class actions based on the subject matter of the government proceeding.[179] Antitrust cases can be filed in any court that has jurisdiction over the parties and is a proper venue. That means that these cases are frequently filed in different courts around the country. Some might assert claims under federal law on behalf of direct purchasers. Others might assert state law claims on behalf of indirect purchasers.[180] The result can be a multitude of lawsuits involving the same conduct being filed in different courts by dozens or more individual claimants, sometimes proposing overlapping or perhaps even inconsistent classes.

In these situations, another aggregation tool is commonly used. Under federal law, when civil actions involving one or more common questions of fact are pending in different districts, the Judicial Panel on Multidistrict Litigation (JPML) can transfer those actions to a single district for coordinated or consolidated pretrial proceedings.[181] This results in the creation of a multi-district litigation (MDL) proceeding. Once cases have been transferred, the judge overseeing the MDL will appoint lead counsel or a steering committee to manage the case on behalf of the plaintiffs (and sometimes one for the defendants). During the MDL, discovery and pre-trial motions are handled in a consolidated manner for all the cases.

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[177] See, e.g., Meriwether, Ellen, "Rigorous Analysis in Certification of Antitrust Class Actions: A Plaintiff's Perspective," Antitrust, Vol. 21, No. 3, Summer 2007.

[178] Thomas E. Willging & Emery G. Lee III, Class Certification and Class Settlement: Findings from Federal Question Cases, 2003-2007, 80 U. Cin. L. Rev. 315, 341-42 (2011).

[179] As has been noted by critics of the US plaintiffs' bar, it can seem like news of this sort can lead to a proverbial "race to the courthouse" by lawyers looking to get a "follow on" action filed as quickly as possible in the apparent hope that it will better position them to serve as lead counsel.

[180] Because of the bar on indirect purchaser actions under federal law, state law indirect purchaser class actions increased in frequency in the 1990's. Defendants often faced direct purchaser actions in federal court and indirect purchaser class actions (oftentimes many) in state courts across the country.

Following the enactment of the Class Action Fairness Act of 2005 (CAFA), most large antitrust class actions in the US are now heard in federal court, whether or not they assert claims under federal law *See* AAI Handbook, p.126. Before CAFA, it was common for antitrust cases on behalf of direct purchasers to proceed in federal court and for cases on behalf of indirect purchasers involving the same conduct to be proceeding simultaneously in multiple state courts.

[181] 28 U.S.C. § 1407.

In an effort to streamline the proceeding to the extent possible, the court will generally order the plaintiffs to file one or more consolidated amended complaints, depending on the circumstances. A not uncommon scenario is that a complaint is filed on behalf of a direct purchaser class brought under federal law, and another complaint is filed on behalf of indirect purchaser classes from states that allow such actions under their state antitrust or unfair trade practices laws.[182] Complicating matters further, sometimes large-scale purchasers will file their own individual "direct action" complaints, excluding themselves from the putative classes they otherwise would have been part of.[183]

The statute contemplates that cases transferred to the MDL for will be sent back to the courts in which they were originally filed.[184] are to be transferred back for trial to the federal courts in which they were originally filed. The parties can, and sometime do, agreed to try their cases in the MDL court.[185] In reality, however, most cases never reach that point.

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[182] The pending broiler chicken MDL, *In re Broiler Chicken Antitrust Litigation,* Case No. 1:16-cv-08637*,* for instance, includes three separate classes at different levels of the distribution chain: (1) direct purchasers of certain types of chicken; (2) commercial and institutional indirect purchaser who bought certain types of chicken for use or resale in the business or organization, and (3) end users who indirectly purchased certain types of chicken for personal consumption.

Federal courts in these scenarios are thus called upon to do precisely what the Supreme Court sought to avoid in *Illinois Brick*, namely tracing overcharges through distribution channels to various levels of indirect purchasers. That was one of the reasons the Antitrust Modernization Commission called for the legislative repeal of *Illinois Brick* and *Hanover Shoe* be legislatively overturned.

[183] In the *Broiler Chicken* MDL, many large scale purchasers, such as major restaurant chains, filed individual "direct action" complaints, excluding themselves from the putative classes they otherwise would have been part of. *See In re Broiler Chicken Antitrust Litigation,* Case No. 1:16-cv-08637

[184] The statute provides in part:

> "When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated."

28 U.S.C 1407.

[185] In the *In re Microsoft Antitrust Litigation* MDL, the trial in the case against Microsoft by Novell, a developer of competing office productivity applications, was returned to the District of Utah, where the case was originally filed, but overseen by Judge Fredrick Motz, from the District of Maryland, who had overseen the MDL.

They are either dismissed on the pleadings shortly after a complaint is filed, disposed of on a motion for summary judgment,[186] or settle.

Appointment of Class Counsel. Unlike typical civil litigation, class actions often do not involve a client selecting her lawyer of choice. That falls on the court, which must, when certifying a class, appoint counsel that it believes can fulfill the responsibility of fairly and adequately represent the interests of the class.[187] In making that selection, the rules call on the court to consider several factors when appointing class counsel including the work they have done in identifying or investigating potential claims in the action; their experience in handling class actions, other complex litigation, and the types of claims asserted in the action; their knowledge of the applicable law; and the resources that they will commit to representing the class.[188]

Several methods exist for selecting among competing lawyers, or groups of lawyers, seeking appointment as class counsel. The method most often used is the "private ordering" approach in which the lawyers agree among themselves who act as lead class counsel, sometimes in exchange for commitments about how the legal work and any fees at the end are shared.[189] Of course, the court must still approve any private arrangement to ensure that the counsel selected can fulfill its role. A second is to select from competing counsel when the lawyers are unable to agree on a lead class counsel.[190] In this case, the court, per the rule, must appoint the applicant it believes is best qualified.[191] Sometimes these first two approaches blend together with the court being ask to select between competing groups.[192] A third approach is for the court to select counsel through a competitive bidding process, with fees as one factor to be considered in the selection.[193] The Manual for Complex Litigation suggests that "[c]ases in which liability is relatively clear

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[186] Rule 56 allows a court to grant summary judgment in favor of one party of another without a full trial when the judge finds there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." In other words, when the evidence likely to be introduced at trial makes it obvious that one side wins as a matter of law, summary judgment is appropriate. This is another tool for courts to dispose of cases in certain circumstance.

[187] Fed. R. Civ. P. 23(g)(1) (4).

[188] Fed. R. Civ. P. 23(g)(1) (A).

[189] Manual for Complex Litigation (4th), § 21.272 (Approaches to Selecting Counsel).

Because lead counsel often is able to decide how any aggregate fee award is divided between lawyers at the end of a case, appointment as lead counsel can affect the profitability of a case for the lawyers. *See* AAI Handbook, p. 128.

[190] Manual for Complex Litigation (4th), § 21.272.

[191] Fed. R. Civ. P. 23(g)(2).

[192] AAI Handbook, p.128.

[193] Manual for Complex Litigation (4th), § 21.272.

and the amount of damages relatively predictable may be particularly good candidates for *ex ante* fee setting."[194]

Regardless of approach, organizing the proceeding and selecting counsel to litigate on behalf of the class is essential to protecting the integrity of the process. Multiple competing class actions and counsel groups can lead to "reverse auction" situations in which the defendant can get class counsel to bid against one another in an effort to find out which is willing to settle a matter most cheaply. [195]

Compensation for Class Counsel. A critical issue for the proper functioning of class litigation involves compensation for class counsel. The Clayton Act, as noted above, provides for recovery of attorneys' fees and costs.[196] However, in most class actions, class counsel are working on a contingency fee basis, meaning that unless they obtain a recovery on behalf of the class, either through a judgment after trial or a settlement, they will not be paid for their time.[197] Moreover, antitrust litigation can require large expenditures for expert fees and travel. These "out of pocket" expenses are also generally paid by class counsel and will only be recovered if a recovery is obtained.[198] Indeed, rule 23 expects class counsel to be willing to commit resources to representing the class.[199] Unless class counsel can be reasonably confident that they will be adequately compensated for assuming the risks involved, they will be unwilling to take on a matter, and class litigation will be undersupplied.[200] Of course, the opposite also holds true. If compensation is too high, plaintiffs' lawyers could bring too many class actions while also depriving the class of an excessive share of any recovery.[201]

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[194] Manual for Complex Litigation (4th), § 21.272.

[195] A "reverse auction" is a situation "in which a defendant selects among attorneys for competing classes and negotiates an agreement with the attorneys who are willing to accept the lowest class recovery (typically in exchange for generous attorney fees)." Manual for Complex Litigation (Fourth) § 21.6.

[196] Another doctrine that allows for recovery of attorneys' fees and costs in class actions is the so-called "common fund" doctrine, which "allows a court to distribute attorneys' fees from the common fund that is created for the satisfaction of class members' claims when a class action reaches settlement or judgment." *See* Martha Pacold, Attorneys' Fees in Class Actions Governed by Fee-Shifting Statutes, 68 U. Chi. L. Rev. 1007, 1014 (2001).

[197] *See* K. Craig Wildfang & Stacey P. Slaughter, Funding litigation, AAI Handbook, p. 223.

[198] *Id*.

[199] Fed. R. Civ. P. 23(g)(1)(A)(iv).

[200] Theodore Eisenberg & Geoffrey P. Miller, Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008 available at https://www.uscourts.gov/sites/default/files/theodore_eisenberg_geoffrey_miller_attorneys_fees_in_class_actions_0.pdf.

[201] *Id*.

In a typical case, attorney compensation would be subject to private agreement (constrained by professional ethical rules) between a client and lawyer. But that generally does not work in the class context, particularly in consumer cases.[202] Thus, the court is called upon to independently assess the reasonableness of any fee award.[203] There are several approaches courts in the US have utilized, including one referred to as the "lodestar" method which takes into account the reasonable value of the time worked, the nature of the services, and the experience of counsel, to arrive at an "objective" amount that can then be adjusted upwards or downwards subjectively to account for the risk undertaken and the outcome achieved.[204] Another approach is for counsel to receive a percentage of the recovery obtained, which might be "cross-checked" with the lodestar method to assess the reasonableness of the fee.[205]

Regardless of the methodology, the size of a contingency fee award in an antitrust class action is generally associated with the size of the class recovery and the risk undertaken.[206] One study of fee awards in antitrust cases found fees ranging from just over five percent up to one-third of the recovery.[207] (As will be discussed below, however, "recovery" is not necessarily synonymous with direct compensation to class members.) These contingency awards are not without their critics, and the conventional wisdom seems to be that they drive abusive litigation.[208] Nevertheless, they have made it possible to pursue damages actions on behalf of consumers and others with relatively small claims that otherwise might not occur.

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[202] *Id*.

[203] Fed. R. Civ. P. 23(e)(2)(C)(iii) (requiring the court to scrutinize the terms of any proposed award of attorney's fees).

[204] AAI Handbook at 233.

[205] AAI Handbook at 234.

[206] Theodore Eisenberg & Geoffrey P. Miller, Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008 , available at https://www.uscourts.gov/sites/default/files/theodore_eisenberg_geoffrey_miller_attorneys_fees_in_class_actions_0.pdf.

[207] Robert H. Lande & Joshua P. Davis, Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases (2007), at Table 1.

[208] *See* European Commission, Frequently Asked Questions: European Commission recommends collective redress principles to Member States (June 11, 2013) (recommending against contingency fee awards "[t]o counter possible abuses of collective redress."), available at https://ec.europa.eu/commission/presscorner/detail/fr/MEMO_13_530.

Class action settlements and judicial oversight. Most cases that are certified as class actions end in a negotiated settlement.[209] Broadly speaking, settlements generally fall into three basic categories[210]:

- *Automatic distribution settlements*. In this model, class members who did not opt-out automatically receive payment under the terms of the settlement. Class members do not have to take any affirmative steps. This approach is generally feasible only when records allow for easy identification of the entire class.[211]

- *Claims-made settlements*. In this model, class members need to make a claim, usually through a third-party settlement administrator, in order to receive payment. This approach is used when records do not allow the universe of class members to be readily identified. Claimants may be asked as part of the claims process to provide proof of purchases or other information to verify membership in the class or the amount to which they are entitled.[212]

- *Cy pres settlements*. In this model, class members do not receive any direct compensation themselves. Rather, a charitable or public interest organization whose work serves the interests of the class "as nearly as possible," is generally selected as a recipient. Pure *cy pres* settlements can be problematic and have come under criticism.[213] Oftentimes, however, *cy pres* is simply a component to ensure that any funds remaining in one of the two other types of settlement structures does not revert to the defendant.[214]

The court plays a critical role in approving any settlement that would bind a class in order to ensure that it is in their best interests. This can be done only after a hearing and a finding by the court that a proposal is "fair, reasonable, and adequate."[215] The court must be

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[209] Thomas E. Willging & Emery G. Lee III, Class Certification and Class Settlement: Findings from Federal Question Cases, 2003-2007, 80 U. Cin. L. Rev. 315, 341-42 (2011).

[210] Žygimantas Juška, The Effectiveness of Private Enforcement and Class Actions to Secure Antitrust Enforcement, The Antitrust Bulletin (Volume 62, Issue 3).

[211] *Id*.

[212] *Id*.

[213] Rhonda Wasserman, Cy Pres in Class Action Settlements, 88 Southern California Law Review 97 (2014). Available at: https://scholarship.law.pitt.edu/fac_articles/172.

[214] The author recently found a decent sized check from the *In re CRT Antitrust Litigation* (MDL 1917) in a pile of unopened mail. By the time the envelope was opened the check had already expired.

[215] Fed. R. Civ. P. 23(e)(2).

confident that the class representatives and class counsel adequately represented the class; that the proposal is the result of at arm's length negotiation; and that the relief provided for the class is adequate and treats different class members equitably.[216] Of course, in so doing, the court has to weight the relief provided in the proposal against the real risks, costs and delay associated with continued litigation. While the court's review must be "exacting and thorough [, that] task is demanding because the adversariness of litigation is often lost after the agreement to settle.[217]

Despite sometimes negative popular perceptions, the vast majority of plaintiffs' lawyers, and particularly those typically involved in complex antitrust matters, are vigorous advocates for their clients. Nevertheless, the nature and incentive structure in class litigation sometimes leads to situations in which class counsel agree to release claims for insufficient compensation and in turn receive generous attorneys' fees.[218] One scenario, mentioned above, settlements that were products of "reverse auctions." While not common, examples of abuses that occurred highlight the importance of judicial oversight in class cases.

ii. Access to Evidence: Discovery

As noted in earlier, providing plaintiffs predictable access to the evidence needed to prove their claims is critical to the success of private enforcement. Oftentimes anticompetitive activity, for example, in cartels, the conduct is covert. Evidence of the unlawful conduct is in the sole possession of the participants, making access essential for liability to be shown. Similarly, proving injury and quantifying the extent of the harm in an antitrust case often requires expert economic and statistical testimony that often relies on

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[216] Fed. R. Civ. P. 23(e)(2)(A)-(D).

[217] Manual for Complex Litigation (Fourth) § 21.61 (Judicial Role in Reviewing a Proposed Class Action Settlement). As the Manual notes about the realities of the situation post-settlement:

> The settling parties frequently make a joint presentation of the benefits of the settlement without significant information about any drawbacks. If objectors do not emerge, there may be no lawyers or litigants criticizing the settlement or seeking to expose flaws or abuses. Even if objectors are present, they might simply seek to be treated differently than the class as a whole, rather than advocating for class-wide interests. The lack of significant opposition may mean that the settlement meets the requirements of fairness, reasonableness, and adequacy. On the other hand, it might signify no more than inertia by class members or it may indicate success on counsel's part in obtaining, from likely opponents and critics, agreements not to object. Whether or not there are objectors or opponents to the proposed settlement, the court must make an independent analysis of the settlement terms.

[218] *See* Manual for Complex Litigation (Fourth) § 21.61 ("There are a number of recurring potential abuses in class action litigation that judges should be wary of as they review proposed settlements"), p. 310-312.

information in the possession of the defendant or third parties. This is particularly true in consumer cases. Because of this information asymmetry, private enforcement in the US is reliant on disclose of evidence.

First, a brief diversion for civil law practitioners. "Discovery" in the US systems refers to the process by which the parties to a lawsuit obtain access to the evidence that directly or indirectly might support their claims or defenses. Unlike in civil law systems, the court is not actively engaged in discovering the facts. Instead, the parties themselves engage in that process using several available tools.[219] These include: (1) depositions of witnesses, in which out-of-court testimony is taken under oath[220]; (2) interrogatories, which are questions posed that require answers under oath[221]; (3) requests for production of documents (or permission to inspect those documents)[222]; and (4) requests for admissions.[223] Other tools for evidence collection are also available, including from third parties.[224] The facts "discovered" during this process – which, again, is conducted by the parties themselves, with the court being called upon from time to time to resolve any disputes about compliance with obligations under the discovery rules – are then available to all parties for use in building their cases and defenses, which they will then present to the court as part of an adversarial proceeding.

The scope of permissible discovery in US civil litigation is quite broad. Parties can obtain discovery on "any nonprivileged matter that is relevant to any party's claim or defense[.]"[225] Discoverable information is not limited to evidence that would be admissible at trial, but is even broader in scope.[226] That breadth is what has led to criticisms about the

[219] This is not to say that the court has no role in the discovery process. In complex matters, like an antitrust action, the parties will be directed to present a discovery plan, which the court, after approving the plan as proposed or with modifications, will oversee. *See* Manual for Complex Litigation, Fourth § 11.42. Some judges are more active than others. In some cases, magistrate judges or special masters are enlisted to resolve disputes and to makes certain that discovery is proceeding as efficiently and effectively as possible.

[220] Fed. R. Civ. P. 30.

[221] Fed. R. Civ. P. 33.

[222] Fed. R. Civ. P. 34.

[223] Fed. R. Civ. P. 36.

In addition, at the outset of a case, the parties are required to make initial disclosures that include, among other things, "the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, [... and] a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses[.]" Fed. R. Civ. P. 26(a)(1)(A).

[224] *See* "Obtaining evidence," AAI Handbook.

[225] Fed. R. Civ. P. 26(b)(1).

[226] *Id*.

scope of discovery in United States and has led to some tweaking around the edges. For instance, the December 2015 amendments to Rule 26 added an explicit "proportionality" requirement, meaning that the requested need not only be relevant but also "proportional to the needs of the case," taking into account various factors.[227] Nevertheless, it still holds true that discovery requests for arguably relevant (and non-privileged) information generally will be denied only when they are unduly burdensome. And the trial court has a lot of discretion to make that determination.

Given the asymmetric nature of access to information discussed above, costs of discovery are likely to fall most heavily on the defendant. Generally, class plaintiffs, at least in the case of individual consumers, will have little relevant material to produce. Often that will be limited to documents or other evidence verifying that they purchased the products at issue, and the prices paid. That does not mean, however, that discovery is not also expensive for class plaintiffs. They will need to review materials produced by a defendant as part of the litigation, both to ascertain what has been produced and its value to their case, but also to figure out what might be missing and in need of follow up during the discovery process.

Discovery in the US involves the actual exchange of documents and other information with the opposing party. In antitrust actions, this commonly means litigants will be asked to turn over sensitive business information that it will not want to be disclosed to commercial rivals (who may also be parties in action) or to the public. Under the rules, a party can ask the court to disallow the requested discovery, or to allow the discovery to proceed in a manner that protects confidential information from being disclosed.[228] While addressing the treatment of confidential information on a case-by-case basis is an option, oftentimes the parties will negotiate "umbrella" confidentiality or protective orders for a case.[229] These orders will generally specify (1) the categories of information that can be protected, (2) procedures for a party to designate information being disclosed as subject to one of those protected categories, (3) to whom that information can be disclosed, and (4) procedures for maintaining the security of that information.[230] In

[227] *Id.*

[228] *See* Fed. R. Civ. P. 26

[229] As the Manual for Complex Litigation notes: "There are two approaches to seeking protection for such material: (1) one or more parties may seek 'umbrella' protective orders, usually by stipulation, or (2) the claim to protection may be litigated document by document. ... When the volume of potentially protected materials is large, an umbrella order will expedite production, reduce costs, and avoid the burden on the court of document-by-document adjudication." Manual for Complex Litigation, Fourth § 11.432 (Limited Disclosure/Protective Orders). *See also* AAI Handbook, p. 196.

[230] Manual for Complex Litigation, Fourth § 11.432 These orders usually provide that" all assertedly confidential material disclosed (and appropriately identified, usually by stamp) is presumptively protected unless challenged. Such orders typically are made without a particularized showing to support the claim for protection, but such a showing must be made whenever a claim under an order is challenged." *Id.*

this way, confidential information can be disclosed to opposing parties with reasonable assurance that it will be protected.[231]

While this section has only scratched the surface about discovery in US civil litigation, the important point is that the availability of broad discovery rights is one of the reasons that private antitrust enforcement has flourished there. Potential plaintiffs with meritorious cases can be reasonably confident that they will have access to the information they need to prove their case if such information exists. This applies not only to cases in which the public enforcers have already obtained guilty pleas or liability judgments. It also applies in stand-alone cases that plaintiffs need to pursue without government assistance. There will always be disputes around the edges of what information is relevant and proportional to a case. Concern that the discovery rules are not broad enough, however, is unlikely to be a deterrent for a plaintiff to pursue a meritorious case.

iii. Relaxed Standard for Quantifying Damages

An antitrust plaintiff in a civil proceeding is required to prove all of the elements of a cause of action by a "preponderance of the evidence," which mean by showing that a fact in dispute is more likely than not true. For a private plaintiff in an antitrust damages action, it not sufficient simply to prove that a defendant the law; the plaintiff must also prove that she was harmed ("fact of damage") by that conduct.[232] This can be a challenge. Recognizing this, the US Supreme Court has said that "[t}rial and appellate courts alike must… observe the practical limits of the burden of proof which may be demanded of a treble damage plaintiff." [233] An over the years, courts have set out standards that accept inherent limitations of proof in antitrust cases and make it possible for plaintiffs to meet those burdens. For instance, the causal connection between the conduct and the harm must be established with "a reasonable degree of certainty."[234] Moreover, it is not necessary for the unlawful conduct to have been the only cause of the injury, it is enough

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[231] Obtaining evidence, AAI Handbook, p.196.

[232] *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 123 (1969).

An antitrust plaintiff seeking injunctive relief under § 16 of the Clayton Act does not have to prove actual injury so long as a significant threat of injury from an impending antitrust violation or from a contemporary violation likely to continue or recur can be shown. *Id*., 129-132.

[233] *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 123 (1969).

[234] *See* Antitrust Law Developments (Eighth) at 735 n.48 (collecting cases).

that it was a "material cause." [235] These can be proven not only with direct evidence, but also circumstantial evidence or inference.[236]

Once injury and causation have been proven, courts apply a relaxed standard regarding quantification or measurement of the harm. One motivation for this was concern over allowing a defendant to benefit from the uncertainty that its own unlawful activity causes:

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.... The wrongdoer is not entitled to complain that [damages] cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise. [237]

Accordingly, under this relaxed standard, "the antitrust plaintiff need only present evidence from which the factfinder may make a just and reasonable estimate of the damages that is not based on speculation or guesswork."[238]

Antitrust plaintiffs have used various economic methodologies to provide such "just and reasonable estimates," and these have come to be accepted by US courts as capable of meeting that burden. The most common methods of measurement seek to compare the market in which the violation occurred with some alternative market (in space, time, or product) that was free of the antitrust violation."[239] While a comprehensive discussion of these methods is beyond the scope of this paper,[240] it is worth mentioning them briefly here:

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[235] *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 125 (1969). *See also* Antitrust Law Developments (Eighth) at 735 n.49 (collecting cases).

[236] Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 125 (1969). *See also* In re Cardizem CD Antitrust Litig., 200 F.R.D. 326, 339 (E.D. Mich. 2001).

[237] Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931)

[238] *Id*. One U.S. federal district court has stated that "[g]iven proof of [impact]... proof of losses *which border on the speculative* is allowed in order to facilitate the policy of the antitrust laws." *In re Bulk Popcorn Antitrust Litig.*, 792 F. Supp. 650, 653 (D. Minn. 1992) (emphasis added).

[239] Hovenkamp, Quantification of Harm, p. 6.

[240] For a more thorough discussion of antitrust damages methodologies, see Agostini, C., "Cálculo de daños por conductas anticompetitivas: Consumidores", CentroCompetencia UAI (2022), available at

- *"Yardstick" method*. The yardstick method involves comparing the performance of the affected market with a similar, unaffected market (the "yardstick"). Economists identify a comparable market that did not experience the alleged antitrust violation, and use that as a benchmark to estimate what the affected market would have looked like in the absence of any unlawful anticompetitive conduct. This method helps to isolate the impact of the violation by controlling for external factors that may affect both markets;[241]

- *"Before and after" method*. This approach compares the economic performance of the affected market before and after the alleged antitrust violation. By analyzing relevant economic indicators such as prices, output, and market share, economists can estimate the impact of anti-competitive conduct on market conditions. The key challenge is isolating the effects of the alleged violation from other factors influencing the market.[242]

- *Econometric/statistical methods*. Econometric and statistical techniques involve the use of advanced statistical models to analyze data and estimate damages. Regression analysis, demand modeling, and other quantitative methods are employed to measure the impact of anti-competitive behavior on relevant market variables. These methods are particularly useful when dealing with complex markets and large datasets. However, they require robust data and assumptions to produce reliable results.[243]

Antitrust plaintiffs often employ a combination of these methodologies to strengthen the overall assessment of damages. Economists may use multiple approaches to cross-verify results and enhance the reliability of their findings. The selection of the most appropriate methodology depends on the specifics of the case, available data, and the nature of the alleged anticompetitive behavior.[244] While much of the necessary data to undertake these analyses, the broad discovery available to antitrust plaintiffs makes that feasible. And class counsel in class actions is able to provide the funding for what are generally resource intensive and expensive undertakings.

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https://centrocompetencia.com/wp-content/uploads/2022/10/Agostini-2022-Calculo-de-danos-por-conductas-anticompetitivas-consumidores.pdf

[241] *See* Hovenkamp, Quantification of Harm, at 6. *See also* AAI Handbook at 204 (discussing yardstick lost-profits method).

[242] *See* Hovenkamp, Quantification of Harm, at 6. *See also* AAI Handbook at 205 (discussing before-and-after method).

[243] AAI Handbook at 204-05 (discussing regression analysis).

[244] *Id*. p. 6-8.

iv. Adequate Limitations Period

The limitations period in US generally provides private litigants with ample time to assert an antitrust claim. Section 4B of the Clayton Act requires a claim to be brought within four years from the accrual of the cause of action.[245] Because a cause of action does not accrue until damages are ascertainable, the four-year period is not necessarily measured from when the unlawful conduct began.[246] Rather, it runs from the time when the plaintiff suffers an injury, for example, by purchasing a price-fixed product.[247] New independent acts in furtherance of the violation can restart the four-year limitations period.[248]

The limitations period can be suspended for a variety of reasons. For instance, it does not begin to run if the defendant's efforts at concealing the violation prevented the victim of actually knowing or, through the exercise of due diligence, being able to know of the offense.[249] The filing of a class action also suspends the individual claims of absent class members.[250] Finally, the limitations period is also suspended by government antitrust actions. Private actions "based in whole or in part on any matter complained of" in the government proceeding must be then brought within one year of end of the government action.[251] This allows a private plaintiff to reach back and seek recovery of any damages that accrued in the four years before the government action was filed.[252]

c. Relationship Between Private and Public Enforcement

Given the uniquely important role private enforcement plays in the US system, it comes as no surprise that these efforts often interact with public enforcement efforts. The federal antitrust agencies most often seek only injunctive relief for anticompetitive conduct. Redress for those affected by the unlawful behavior is left to private plaintiffs. Thus, as noted above, federal enforcement activity will often trigger the filing of (sometimes many) follow-on private lawsuits. It is not uncommon for these follow-on cases to be filed

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[245] 15 U.S.C. § 15b ("Any action to enforce any cause of action under section 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued.").

[246] Antitrust Law Developments, p. 786 n.388 (collecting cases).

[247] See, e.g., *In re Aspartame Antitrust Litig.*, 416. F.App'x 208, 211 (3d Cir. 2011).

[248] Antitrust Law Developments.

[249] *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 195 (1997). For a more thorough discussion of fraudulent concealment tolling the statute of limitations, *see* Antitrust Law Developments, p. 798.

[250] *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983). "Absent class members" are those whose claims fall within a class definition asserted in a proposed class action but who are not named as plaintiffs in the action.

[251] 15 U.S.C. § 16(i).

[252] *See* Antitrust Law Developments, p. 789 n.402 (collecting cases).

while public enforcement efforts relating to the same activity are still ongoing.[253] On occasion, private litigation leads the way, spurring government action later.[254] This overlap raises questions about how public and private enforcement can benefit from the other, and how the needs of both – which do not always coincide – can be balanced. (There is also a question of systemic balance that will be saved for the next section, but that should not be ignored.) Some notable examples of how public and private enforcement can coexist include (i) the ability of private litigants in follow-on actions to take advantage of successful public enforcement efforts, and (ii) provisions to allow the DOJ's leniency program can operate in an environment in which an applicant would undoubtedly subject itself to a follow-on damages action by coming forward.

i. Allowing Private Plaintiffs to Benefit from Public Enforcement

First, when government enforcement efforts are followed up by private damages actions, the private litigants are able to take advantage of those prior efforts. Section 5(a) of the Clayton Act, enacted in 1914, allows final judgments or decrees obtained by the federal government to be used in subsequent private litigation against the same defendant on matters decided in the prior proceeding.[255] Under this provision, the plaintiff can use the prior judgment or decree as *prima facie* evidence (which essentially them rebuttable presumptions[256]) on any matter that was "distinctly put at issue and directly determined" and "necessarily decided) in the prior action.[257] The statute does not give effect to consent

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[253] A current, ongoing example involves Google. In late 2020, the State of Texas and several other states filed a lawsuit against Google for alleged anticompetitive conduct relating to technology used for "display advertising" on the internet. Around the same time, numerous private lawsuits were also filed, which, together with the State of Texas case (over the objection of the state plaintiffs), were coordinated in an MDL in New York. Following passage of a law that prohibits state AG actions from being included in MDLs, the State of Texas case has since been returned to a federal court in Texas. Meanwhile, the US DOJ and other states have filed a similar case pending in yet another federal district court in Virginia.

[254] *See* K. O'Connor et al., Interaction of public and private enforcement, AAI Handbook, at 256-57 (discussing In re NASDAQ Market-Makers Antitrust Litigation). *See also* Arthur M. Kaplan, Antitrust as a PublicPrivate Partnership: A Case Study of the NASDAQ Litigation," Case Western Reserve Law Review, 21(1), 111-32.

[255] Section 5(a) provides, in relevant part: "A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto[.]" 15 U.S.C. § 16(a).

Similar provisions can be found in state antitrust laws. See, e.g., Minn. Stat. § 325D.62; Iowa Code § 553.17.

[256] "A particular rule of law that may be inferred from the existence of a given set of facts and that is conclusive absent contrary evidence." Legal Information Institute, Wex, available at https://www.law.cornell.edu/wex/rebuttable_presumption.

[257] Emich Motors, Inc. v. General Motors, Inc, 340 U.S. 558, 569 (1951).

judgments or decrees entered before testimony is taken.[258] Nevertheless, section 5(a) conferred on private plaintiffs an advantage that, at the time, was otherwise unavailable at common law.[259] This was done "encourage treble damage suits by lessening the plaintiff's required proof and litigation expenses in the usually complex, time consuming and expensive area of antitrust litigation."[260]

In the years since the enactment of section 5(a), another potential tool for taking advantage of prior enforcement proceedings has also become available by way of the common law doctrine of non-mutual offensive collateral estoppel. Under this doctrine, which the US Supreme Court approved in 1979, a court has broad discretion to prevent a defendant from relitigating issues of fact or law that had been adversely decided against it in a prior proceeding.[261] An important difference between this and section 5(a) is that under collateral estoppel, issues that were "necessary and essential" to the prior judgment can be given *conclusive*, not just *prima facie*, effect in the subsequent litigation. The question of which findings from a prior proceeding are appropriately subject to collateral estoppel can be a thorny one, as is amply illustrated by the experience in numerous *Microsoft* cases.[262] Nevertheless, private plaintiffs can sometimes use this doctrine to establish critical issues like market definition, market power, and whether certain conduct that a defendant had engaged in was anticompetitive.[263]

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[258] 15 U.S.C. § 16(a).

[259] John A. Doninger & Robert F. Frandeen, Section 5(a) of The Clayton Act and the Use of Collateral Estoppel by a Private Plaintiff in a Treble Damage Action, 8 U.S.F.L. Rev. 74, 75 (1973) (idea underlying section 5(a) was that the "private plaintiff should be given as large an advantage as possible if he is to be at all encouraged to bring antitrust actions.").

[260] International Shoe Mach. Corp v. United States Mach. Corp., 315 F.2d 449, 453 (1st Cir. 1963). *See also* Daniel R. Fischel, The Use of Government Judgments in Private Antitrust Litigation: Clayton Act Section 5(a), Collateral Estoppel, and Jury Trial, 43 U. Chi. L. Rev. 338, 341 (1975).

[261] *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). The doctrine of non-mutual offensive collateral estoppel has also allowed private litigants to benefit from the results of prior judgments in state antitrust actions. *See Comes v. Microsoft Corp.*, 709 N.W.2d 114 (Iowa 2006) (recognizing applicability of doctrine to prior judgment from the DOJ action but remanding for further proceedings on preclusive effect to be given to individual findings).

[262] *See* Jacobs, Michael, Non-Mutual Offensive Collateral Estoppel in Private Antitrust Litigation: Lessons from the Microsoft Cases (October 10, 2012). Available at SSRN: https://ssrn.com/abstract=2160052 or http://dx.doi.org/10.2139/ssrn.2160052.

It has been suggested that the government make a more "detailed factual record as to market impact in plea agreements and sentencing proceedings to ensure the maximum claim and issue preclusion in any follow-on private or public treble damage litigation." Spencer Waller, In Praise of Private Antitrust Litigation, CPI Antitrust Chronicle (Feb. 2019), p.12.

[263] *Id*. *See also Discover Financial Services v. Visa U.S.A., Inc.*, 598 F. Supp. 2d 394 (S.D.N.Y. 2008).

ii. Interaction with the DOJ's Leniency Program

A second issue relating to the interaction between public and private enforcement involves the DOJ's leniency policy and how the likelihood of facing a follow-on damages action might affect an individual's or firm's willingness to participate in the program. The DOJ's leniency policy "allows the first individual or company to self-report its involvement in an antitrust cartel to avoid prosecution if it cooperates with the Division's investigation and prosecutions and meets other conditions." [264] However, the efficacy of leniency programs faced a significant hurdle – the fear of subsequent private antitrust damages lawsuits. Corporations were hesitant to expose themselves to treble damages, which could overshadow the benefits of cooperation. In 2004, the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) was introduced to address this issue and strike a balance between encouraging self-reporting and compensating victims. Under ACPERA, leniency applicants are exempted under from treble damages and from joint and several liability in subsequent private litigation.[265] However, to qualify for those limitations, the applicant must fully cooperate with any civil plaintiffs in private litigation arising from the conduct. This includes providing relevant information, documents, and witnesses.[266] The cooperation requirement ensures that the benefits of leniency are contingent upon sustained collaboration with all parties involved.[267]

ACPERA's cooperation requirement appears to have yielded mixed results. While the provision may have positively impacted private antitrust litigation by providing plaintiffs with valuable evidence, the extent to which leniency applicants cooperate with civil litigants varies. There have been calls for greater insistence on the part of the DOJ for meaningful restitution and revocation of leniency benefits status for failure to cooperate adequately with private plaintiffs in subsequent litigation.[268] Indeed, it has been suggested that the agencies should develop model cooperation agreements with private plaintiffs and "model restitution plans that would satisfy the requirements of ACPERA and provide meaningful single damage restitution to injured plaintiffs and class members who do not opt out of the follow-on class actions."[269] Although there is undoubtedly room for

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[264] *Id*. p.13 (discussing restitution).

[265] ACPERA § 213(a).

[266] ACPERA §213(b).

[267] *See* In re Aftermarket Auto. Lighting Prods. Antitrust Litig., 2013 U.S. Dist. LEXIS 126308, at *5-17 (defendants not entitled to ACPERA's liability limitations when "cooperation" with private plaintiffs "amounted to little more than compliance with their discovery obligations under the federal rules.").

[268] Spencer Waller, In Praise of Private Antitrust Litigation, CPI Antitrust Chronicle (Feb. 2019), p.13; Spencer Weber Waller, Towards a Constructive Public-Private Partnership to Enforce Competition Law, 29 World Comp. L. & Econ. Rev. 367 (2006).

[269] *Id*.

improvement, ACPERA illustrates how interests of public and private enforcement can be balanced.

iii. Systemic Effects on Public Enforcement

A more subtle observation about US private enforcement, and the overall effects on the system as a whole, is one made by former FTC Chair William Kovacic. Professor Kovacic has argued that private enforcement has had spillover effects on public enforcement. Judicial concerns about overdeterrence "have spurred a dramatic retrenchment of antitrust liability standards".[270] Professor Daniel Crane has raised similar concerns, namely that "a swell of private enforcement can subtly undermine public enforcement, or even choke it off altogether."[271] Public enforcement, he argues, "can become laden with the baggage of private litigation to the point if [sic] ineffectiveness or practical disappearance." [272] And to illustrate this, he points to public enforcement in the US against monopolies and how the bar has been raised due to restrictions that courts placed on various exclusion theories in cases that been brought by private litigants during a surge of monopolization activity in the mid-1970s to the early-1990s.[273]

While concerns about systemic balance should not be ignored, private enforcement may provide stability for the US system over time. Before a resurgence of activity in recent years, US federal agencies had scaled back or even abandoned enforcement in numerous areas of antitrust law.[274] The laws did not change, enforcement priorities did. "Without private enforcement," Professor Spencer Waller has argued, "many market practices would become effectively *per se* legal without any intervening legislative or judicial decision."[275] Moreover, enforcement of the same antitrust laws by a variety of enforcers with different

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[270] See William E. Kovacic, The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix, 2007 Colum. Bus. L. Rev. 1-80 (2007). *See also* Daniel A. Crane, The Institutional Structure of Antitrust Enforcement.

Professor Kovacic observes, however, that the fact "that judges perceive the U.S. system of private rights to be excessive does not mean that their perceptions are invariably correct or enjoy convincing empirical support," and notes that "assumptions about the asserted dangers of overdeterrence from private enforcement in the United States ought not be accepted as a matter of faith and ought to be tested vigorously in light of modern experience and empirical study."

William E. Kovacic, The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix, 2007 Colum Bus. L. Rev. 1, 74-75 (2007) (emphasis added).

[271] Daniel A. Crane (2009-). "Toward a Realistic Comparative Assessment of Private Antitrust Enforcement." In Reconciling Efficiency and Equity: A Global Challenge for Competition Policy, p. 347-48.

[272] *Id*.

[273] *Id*.

[274] Spencer Waller, In Praise of Private Antitrust Litigation, CPI Antitrust Chronicle (Feb. 2019), p.10.

[275] *Id*.

priorities, including state AGs and private plaintiffs, allows the development of a richer body of case law. To the extent the cases decided during the retrenchment of antitrust in the US reflected new economic theory at the time, more activity could be more effective in continuing to incorporate new economic insights into the jurisprudence. That is not to say that there are not certain roles better suited to public enforcement than being left to private litigants.[276] But these observations highlight the need to look at the overall systemic effects of private enforcement – an issue that will be looked at in later sections.

d. Effectiveness of US Private Enforcement in Achieving Compensatory and Deterrence Objectives

No one can dispute that the substantive and procedural rules discussed above have fostered the development of a lot of private litigation. But the quantity of litigation says little about how effective it is at achieving the three objectives of compensation, deterrence, and enhancing the limited enforcement resources of the public sector. Do private damages actions, particularly class actions, actually deliver compensation to those affected by anticompetitive conduct? Does private enforcement add anything to the deterrence provided by public enforcement? Or does it perhaps add too much? And does it really add much value to the work being done by public enforcers? These are hotly debated questions with no clear answers.

In terms of providing compensation, critics argue that private litigation in the US does a poor job of accomplishing its goals. Because class actions are expensive and impose substantial costs on defendants, they contend, plaintiffs' lawyers are incentivized to file meritless claims in order to force settlements. These settlements, they further assert, provide lucrative attorneys' fees for the lawyers but deliver scant benefits for consumers. In a scathing assessment, former FTC Commissioner Thomas Rosch asserted that US class actions are "almost as scandalous as the price-fixing cartels that are generally at issue.... [T]he plaintiff's lawyers... stand to win almost regardless of the merits of the case."[277] Of course, given the significant percentage (74 percent) of cases that are involuntarily dismissed,[278] and the heightened gatekeeping role courts are playing at the pleading and certification stages, the notion that plaintiffs' lawyer can simply file a Moreover, there do not appear to be any reasons to believe that plaintiffs can threaten

[276] Spencer Waller, In Praise of Private Antitrust Litigation, CPI Antitrust Chronicle (Feb. 2019), p.11 ("Major structural relief will probably remain the province of public, rather than private, litigation.... It would be similarly rare that a purely private injunctive case under Section 2 would (or should) result in the divestiture or restructuring of a firm or industry.... While there is no legal reason why such relief could not be sought or granted in a purely private case, it would bear a very high burden of satisfying the balance of equities and public interests tests of all injunctive relief.").

[277] J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Antitrust Modernization Commission Remarks at the ABA Antitrust Modernization Commission Conference, p. 9–10 (June 8, 2006).

[278] *See* Daniel Crane, CPI Antitrust Chronicle, p. 49.

defendants with litigation expenses, and not the other way around.[279] Given these risks, plaintiffs' counsel have little incentive to initiate and pursue weak cases.[280] If anything, the real danger might be the possibility that plaintiffs' lawyers could resolve meritorious cases for less than they should.[281]

Compensation. As defenders of the US system point out, charges that private antitrust litigation benefit only the lawyers, not the victims of anticompetitive conduct, are seldom backed up with any empirical support for the position.[282] Moreover, empirical work that has been done into benefits provided through private litigation in the US provide impressive aggregate numbers. A 2008 study by Professors Robert Lande and Joshua Davis, which analyzed 40 successful private federal antitrust lawsuits since 1990, found that between US$18.0 – 19.6 billion the plaintiffs recovered more than in those cases. Nearly half of the total recovered came from fifteen cases that did not follow government actions, while others had "mixed" public/private origins or were significantly broader than the government enforcement action.[283] In other words, many of these lawsuits were not simply "follow on" lawsuits to enforcement actions by the DOJ or FTC. A follow-on study of 20 additional cases raised that number to at least USD$33.8 – 35.8 billion.[284]

Critics have responded with numerous arguments about these studies. Professor Crane, for instance, has questioned how much of this relief actually compensated the real victims. For instance, he has pointed out, only $2 billion was awarded to indirect purchasers whereas $15 billion went to direct purchasers who may have passed those

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[279] *See* Steven C. Salop & Lawrence J. White, Private Antitrust Litigation: An Introduction and Framework, in Private Antitrust Litigation 28 (Lawrence J. White ed., 1988) ("Both the defendant and the plaintiff can threaten the other side with increased litigation expenses … so as to force a more favorable settlement…. It is not entirely obvious which side has the overall advantage.").

[280] Moreover, as the AAI has noted, "rational defendants have strong incentives to resist settling frivolous claims, even if it would be cheaper in the short run to settle." AAI Comments at p.15. *See also* Robert G. Bone, Modeling Frivolous Suits, 145 U. Pa. L. Rev. 519, 540 (1997) ("By litigating instead of settling the first few frivolous suits, a repeat-player defendant can build a reputation for fighting. Once established, this reputation will signal other frivolous plaintiffs not to expect a settlement, so they will not sue.").

[281] American Antitrust Institute, "Comments in response to the [EU] Public Consultation: Towards a Coherent Approach to Collective Redress" (April 2011).

[282] American Antitrust Institute, "Comments in response to the [EU] Public Consultation: Towards a Coherent Approach to Collective Redress" (April 2011), at 13. Indeed, as the AAI observes, "[t]raditionally, concerns about abusive antitrust litigation focused on suits by competitors, as noted by Edward A. Snyder & Thomas E. Kauper, Misuses of the Antitrust Laws: The Competitor Plaintiff, 90 MICH. L. REV. 551 (1991), not cases filed by customers or consumers, which are 'likely to be the most meritorious.'"

[283] Lande and Davis, Benefits from Private Antitrust Enforcement, p. 897.

[284] See Joshua P. Davis & Robert H. Lande, Summaries of Twenty Cases of Successful Private Antitrust Enforcement, (Univ. of S.F. Law Research Paper No. 2013-01, 2011) [hereinafter Twenty Case Studies], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1961669.

overcharges on. Moreover, attorneys' fees accounted for between 9 and 27 percent of the awards, and claims administration another 4 percent.[285] None of those is fatal their argument.[286] Perhaps they suggest the numbers should be revised downward some to account for fees and administrative expenses. Or that *Hanover Shoe* and *Illinois Brick* ought to be repealed. However, there is one point that Professor Crane has raised that is not so easily, named the amount of a settlement that actually reaches the class member.

As noted above, many settlements require class members to affirmatively make claims in order to receive any benefits, and those numbers can be less than stellar. For the indirect purchases in the Lande and Davis study for which information was available, Professor Crane calculated the average claims rate (measured as a percentage of all class member who went through the claims process), the average rate was 12 percent.[287] To further emphasize the point, he notes that this means 88 percent of the injured class members did not receive any compensation. While some or all of those unclaimed funds might have been distributed to a *cy pres* recipient instead of reverting back to the defendants, this suggests a hurdle to delivering compensation in the class context.

Data on claims rates in class actions is surprising scarce. A September 2019 study undertaken by the FTC of 149 consumer class actions found that the overall claims rate of the cases in the sample was just under 10 percent, which is consistent with the sampling done by Professor Crane. Another recent study of major US class actions found rates ranging from one to 70 percent.[288] In the US *Microsoft* consumer class actions in which the author participated, the "claims rates" (a slightly different measure than compensation rate) ranged from approximately 28–37 percent.[289] Looking at the *Microsoft* indirect purchaser cases as a whole, however, claims rates were as low as 0.71 percent in one case, but with an overall average of around 25 percent.[290] These numbers suggest some barriers to compensating class members in consumers (though again, the data is scarce). Nevertheless, they are significantly higher than could be expected in an opt-in scenario.

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[285] *See* Daniel A. Crane, "Toward a Realistic Comparative Assessment of Private Antitrust Enforcement." In Reconciling Efficiency and Equity: A Global Challenge for Competition Policy, p. 347-348.

[286] *See* Joshua P. Davis and Robert H. Lande, Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement, 36 SEATTLE U. L. REV. 1269 (2013).

[287] *See* Daniel A. Crane, "Toward a Realistic Comparative Assessment of Private Antitrust Enforcement." In Reconciling Efficiency and Equity: A Global Challenge for Competition Policy, p. 346.

[288] Brian T. Fitzpatrick & Robert C. Gilbert, "An Empirical Look at Compensation in Consumer Class Actions," 11 N.Y.U. J. L. & Bus. 767, 770 (2015).

[289] Author's records.

[290] For a more comprehensive summary of claims rates studies, *see* Žygimantas Juška, The Effectiveness of Private Enforcement and Class Actions to Secure Antitrust Enforcement, The Antitrust Bulletin (Volume 62, Issue 3).

Deterrence. Even if damages actions might fall short in their compensatory role, they can still have a deterrent effect. For instance, in the *Microsoft* cases, there were still *cy pres* components to those settlements so unclaimed funds did not revert back entirely to the defendant. Those are real costs that the defendant must internalize. Indeed, Professors Lande and Davis have argued that the deterrent effect of the private cases they studied "probably deters more anticompetitive behavior than even the appropriately acclaimed anti-cartel program of the DOJ Antitrust Division."[291] While this claim has also come under attack,[292] private enforcement undoubtedly raises the expected costs for engaging in anticompetitive conduct and is an important contributor to deterring such conduct.

Indeed, some critics suggest that the prospect of treble damages in private damages actions, when combined with possible fines and other penalties in public enforcement proceedings, result in *excessive* deterrence.[293] And others have argued that private firms may have an incentive to use the antitrust laws strategically, to block competitors or extort settlements from successful competitors, thereby harming rather than promoting competition.[294] The Antitrust Modernization Commission concluded in 2004, however, that while "some have argued that treble damages, along with other remedies, can over-deter some conduct that may not be anticompetitive and result in duplicative recovery[, n]o actual cases or evidence or systematic overdeterrence were presented to the Commission[.]"[295] Moreover, that judicial tools are already available to address meritless lawsuits,[296] and federal courts have not been hesitant to use them.

Perhaps what can be said about private enforcement in the US is this: It imperfectly compensates those harmed by antitrust competitive conduct, but it does a better job at providing compensation than any alternatives so far. And whether or not it provides more deterrence than public enforcement, it augments that deterrence with no real evidence of overdeterrence. Finally, even if many cases are simply follow-on actions, stand-alone litigation has played an important role in many instances of pursuing matters left

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[291] See Joshua P. Davis and Robert H. Lande, Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement, 36 SEATTLE U. L. REV. 1269, 1272 (2013).

[292] *See* See Gregory J. Werden, Scott D. Hammond & Belinda A. Barnett, Deterrence and Detection of Cartels: Using All the Tools and Sanctions, 56 Antitrust Bull. 207, 227–33 (2011).

[293] *See id*. at 883-89 for a summary of the ongoing debate. *See also* AMC Report & Recommendations, p. 241-84.

[294] *See, e.g.*, R. Preston McAfee, Hugo M. Mialon, and Sue H. Mialon, Private Antitrust Litigation: Procompetitive or Anticompetitive? (December 1, 2005); available at http://www.justice.gov/atr/public/hearings/single_firm/docs/220040.pdf. *See also* R. Preston McAfee & Nicholas V. Vakkur, The Strategic Abuse of the Antitrust Laws, J. Strategic Mgmt. Ed. 1(3)

[295] AMC Report and Recommendations, p. 247 (citation omitted).

[296] AAI EC Collective Redress Comments, p 2.

unaddressed by public enforcers, and in the process has impacted the development of US antitrust jurisprudence in positive and negative ways.

e. Conclusions

As discussed above, the US experience helps illuminate types of substantive and procedural rules that can foster private enforcement, and in particular, damages actions on behalf of consumers. It has a mechanism in the opt-out class action that allows for the collective pursuit of small individual claims with large aggregate effects. It provides strong financial incentives for plaintiffs and their lawyers to pursue these claims. It gives plaintiffs access to the information they need to pursue those claims. And it has adopted rules that make it possible for plaintiffs to prove up those damages. Finally, it has the institutional capacity to handle the complex proceedings that have developed in that context. These have promoted active private enforcement that does a decent job of fulfilling its objectives. But it is a costly system.

The next sections will discuss experiences in Canada, the United Kingdom, and continental Europe where private enforcement is growing in importance. Those experiences –further reinforce the importance of these elements in the development of private damages litigation, particularly opt-out style collective proceedings mechanisms, adequate funding options, and access to evidence. But as those experiences also illustrate, there are other ways of implementing those, that may come with lower overall costs.

II. CANADA

Next to the United States, Canada has perhaps more experience with antitrust damages actions than any other country. Private antitrust enforcement, however, is a more recent development in Canada. Although the country's competition laws date back to 1889, a private right of action for competition law infringements was not introduced until 1975.[297] Even then, private damages actions remained relatively rare. By the first decade of this century, though, with class action legislation having been passed in all the major provinces, the country saw a sharp increase in competition cases brought by private litigants.[298] According to the Canadian Bar Association's Class Action Database, at least

[297] Roach, Kent and Trebilcock, Michael J., "Private Enforcement of Competition Laws." *Osgoode Hall Law Journal* 34.3 (1996): 461-508, p. 467.

[298] Aaron Levenstadt, Instituting an Indirect Purchaser Checkpoint: A Case for Blocking Illinois Brick at the Canadian Border, Canadian Competition Law Review, Vol. 24, No. 1, at 1. *See also* Canadian Competition Bureau, Relationship Between Public and Private Antitrust Enforcement, Canada.

405 competition law class actions had been filed by early 2024.[299] While some of these involve deceptive marketing claims, private enforcement actions involving cartels and other anticompetitive conduct are commonplace now. The country has a very active and skilled plaintiffs' antitrust bar, as in the United States. And it is now common for there to be Canadian analogues to class actions also being pursued south of the border.

Canada is largely a common law jurisdiction[300] and its legal system has many similarities to the US system just discussed, but there are also many important differences. There are differences in terms of the overall role of private enforcement in the competition system, which reflect divergent policy choices regarding how private enforcement can best enhance the overall functioning of the competition system. As in the US, private damages actions in Canada are seen as serving both compensatory and deterrence roles.[301] However, overall, private enforcement has played a more limited role. For instance, whereas the US Clayton Act allows private litigants to sue in courts of general jurisdiction for violations of anything prohibited by the antitrust laws, in Canada, a specialized Competition Tribunal is given jurisdiction over certain provisions of the Competition Act where private enforcement is restricted. Thus, private damages actions are largely focused on price-fixing and other horizontal conduct. That balance, however, has been shifting somewhat in recent years, and private enforcement may be set to play a more important role overall in the system.

Despite differences between the Canadian and US systems, some common threads can be seen that help explain the development of robust private damages activity in Canada:

- First, by allowing lawyers to work on a contingency basis and rewarding them for the risk undertaken, the Canadian system provides incentives for plaintiffs and their lawyers to pursue antitrust claims. Those incentives may be tempered somewhat by cost-shifting in certain Canadian provinces, where the losing party can be held responsible for paying the some of the prevailing party's costs and fees. However, other tools and strategies have arisen so that these actions can be brought despite the risks.

(DAF/COMP/WP3/WD(2015)9) ("Canada OEDC Submission") p. 4 ("In recent years [since 2015], the Bureau has seen an increase in private enforcement by civil litigants through class action proceedings in Canada.").

[299] *See* Canadian Bar Association Class Action Database, available at https://www.cba.org/Publications-Resources/Class-Action-Database (figure as of February 12, 2024).

[300] The French-speaking province of Québec is a civil law jurisdiction.

[301] The Canadian Competition Bureau has remarked that private enforcement not only empowers private citizens and organizations to seek redress for harms caused by anticompetitive conduct, it also "result[s]in increased awareness and deterrence of anti-competitive activity, which are key aspects of shared compliance." *See* Canada OECD Submission, p. 13 (§ 3.7 Shared Compliance).

- Second, by adopting opt-out class actions, as in the US, the Canadian system has allowed for small individual claims with large aggregate effects to be pursued economically. Opt-out class actions have made consumer damages actions economically feasible to pursue in the right circumstances. Indeed, just as in the US, it was not until after an opt-out mechanism was introduced that private enforcement activity surged.

- Third, Canada's ample discovery rights, while not as broad as in the US, allow plaintiffs to surmount many of the information asymmetries that typically characterize antitrust cases, particular consumer damages actions. These rights generally do not kick in until after certification. Courts, however, have adopted class certification standards that take into account the continued asymmetries at that stage in the litigation.

- Fourth, the Canadian system has largely proven to be capable of managing the complexities that can arise in private antitrust litigation involving overlapping cases spanning multiple provinces.

This section will provide a brief overview of the development of private damages actions in Canada. It will not describe the Canadian system in as much detail as the prior section on the US experience. Instead, the section will focus largely on some of the common threads just described, including how the two systems have tackled similar issues in differing manners.

a. Private Enforcement in the Canadian System

Canada's original competition law, the Anti-Combines Act, was enacted by Parliament in May 1889, and predates the US Sherman Act by more than a year.[302] The statute prohibited conspiracies and agreements by businesses in restraint of trade. The current Competition Act, a much more recent creation, was passed into law in 1985.[303] The purpose of the Act is:

> to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy

[302] Michael Bliss, "Another Anti-Trust Tradition: Canadian Anti-Combines Policy, 1889-1910", The Business History Review, Vol. 47, No. 2, Canada (Summer, 1973), p. 177.

[303] Competition Act, R.S., 1985, c. 19 (2nd Supp.), s. 19.

> and in order to provide consumers with competitive prices and product choices.[304]

Along with prohibitions against various anticompetitive practices, the Competition Act and a companion piece of legislation, the Competition Tribunal Act,[305] also created and defined the role for the Competition Tribunal, a specialized adjudicatory body charged with dealing exclusively with competition law matters.[306] The Tribunal is given exclusive jurisdiction over various issues addressed in the Competition Act, including single firm conduct like abuse of dominance, exclusive dealing and refusals to deal.[307] In addition, the Act establishes the Commissioner of Competition who, as head of the Competition Bureau, is charged with public enforcement of the Act.[308]

The substantive provisions of the Competition Act are divided into civil and criminal matters. The civil provisions relate to conduct such as refusals to deal, resale price maintenance, exclusive dealing, tying, and abuse of dominance, among others. These are referred to as the "reviewable matters", as they are subject to review by the Tribunal. The Tribunal may issue orders with respect to the conduct.[309] The criminal provisions, by contrast, are focused on horizontal agreements between competitors to fix prices, allocate markets or restrict output.[310] In addition, the Act addresses certain deceptive marketing practices, which can be addressed either civilly or criminally.[311]

Types of infringements subject to private enforcement. The Competition Act currently provides two separate avenues for private enforcement, depending on the conduct at issue. First, with respect to "reviewable" matters, private actors may bring applications before the Competition Tribunal relating to such conduct.[312] For private

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[304] R.S., 1985, c. 19 (2nd Supp.), s. 19. §1.1.

[305] Competition Tribunal Act (R.S.C., 1985, c. 19 (2nd Supp.)).

[306] Canada OECD Submission, p.3.

[307] *See* Competition Act, Part VIII (Matters Reviewable by Tribunal). *See also* Charles M. Wright, "Canada", AAI Handbook, p. 447.

[308] R.S., 1985, c. 19 (2nd Supp.), s. 19. § 7.1. Charles M. Wright, "Canada", AAI Handbook, p. 447.

[309] *See, e.g.*, Competition Act § 79 (allowing Tribunal to issue orders after finding abuse of a dominant position).

[310] *See* Competition Act, Part VI (Offenses in Relation to Competition).

[311] Canada OECD Submission, p. 3.

[312] The Competition Act provides that "[a]ny person may apply to the Tribunal for leave to make an application under section 75 [refusals to deal], 76 [price maintenance], 77 [exclusive dealing or tying] or 79 [abuse of a dominant position]. … The Tribunal may grant leave to make an application under section 75, 77 or 79 if it has reason to believe that the applicant is directly and substantially affected in the applicant's business by any practice referred to in one of those sections that could be subject to an order under that section. … (7.1) The Tribunal may grant leave to make an application under section 76 if it has reason to believe that the applicant

parties, however, unlike the Bureau, leave of the Tribunal is first required to bring an application, which may be granted if the Tribunal has reason to believe the applicant is directly (or directly and substantially) affect by the alleged conduct.[313] Leave cannot be granted, though, if the Bureau has already brought an application regarding the same matter, or if the conduct is the subject of an ongoing inquiry by the Bureau or a past inquiry that ended in a settlement with the Bureau.[314] In this manner, private enforcement of "reviewable" matters is quite limited and subject to certain gatekeeping restrictions. Moreover, the remedies available in a proceeding before the Tribunal are limited to orders relating to the conduct.[315] At present, damages are not available in those actions.[316]

Second, section 36 of the Competition Act allows private litigants to pursue legal actions in a "court of competition jurisdiction" to recover losses or damages in particular instance. This includes harm resulting from (a) conduct contrary to one of the criminal provisions of the Act, or (b) a failure to comply with an order of the Tribunal or a court under the Act.[317] This is an important difference from the US Clayton Act, which allows private

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is directly affected by any conduct referred to in that section that could be subject to an order under that section."

Competition Act, § 103.1.

[313] *Id.*

In addition, the Competition Act includes provision that can assist private actors in addressing anticompetitive conduct by applying to the Commissioner to open an inquiry into a matter. Competition Act § 9 (application for inquiry). Courts are also allowed to make restitution orders in favor of private parties. Finally, the Commissioner can enter into consent agreements with parties to obtain restitution for victims of anticompetitive conduct. *See* Canada OECD Submission, at 2.

[314] Competition Act § 103.1(4).

[315] *See, e.g.*, Competition Act § 75(1) (refusals to deal) ("the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless [certain conditions are present].").

[316] There have been some recent proposals to expand private rights of action before the Competition Tribunal, including a proposal that has the potential of becoming what has been described as "a form of a class action regime before Canada's Competition Tribunal." *See* C. Margison & R. Spillette, Canada Proposes a Significant Expansion of Private Competition Litigation: the Breakdown and Takeaways, Fasken (December 13, 2023)

[317] Section 36 of the Competition Act provides, in relevant part:

> Recovery of damages
>
> 36. (1) Any person who has suffered loss or damage as a result of:
>
> (a) conduct that is contrary to any provision of Part VI [dealing with criminal price fixing and other coordinated conduct], or
>
> (b) the failure of any person to comply with an order of the Tribunal or another court under this Act,

litigation regarding any conduct contrary to the antitrust laws. In Canada, private damages actions are limited to criminal violations, which include price-fixing and other horizontal conduct, and certain deceptive practices.[318] For other anticompetitive conduct to be subject to a damages action, there must first be an order by the Competition Tribunal, and actions are not for violations of the "reviewable" matters themselves, but for violations of the Tribunal's (or other court's) order.[319]

Unlike applications on "reviewable" matters, claims under section 36 are not brought before the Competition Tribunal.[320] Rather, they are generally filed in the Federal Court or a provincial superior court. Furthermore, for claims relating to "criminal" matters under section 36(1)(a), it is not a prerequisite for such an action that the Competition Tribunal have found an offence was committed. Similarly, there is no prerequisite that the Competition Bureau have conducted or completed an investigation into the matter. (As will be discussed later, prior public enforcement actions can still aid in private damages actions.) True stand-alone private damages actions are allowed for criminal conduct. Nevertheless, many private damages actions are "follow-on" cases in the sense that they are brought after investigations or enforcement actions in Canada, the United States or Europe.[321]

As will be discussed below, many actions under section 36(1)(a) for violations of the Competition Act's "criminal" provisions are brought as class proceedings or class actions. Indeed, prior to the introduction of class proceedings in Canada, "the ability to pursue damage[s] claims for competition violations was seemingly more theoretical than real."[322]

> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

Competition Act, § 36.

[318] *See* Competition Act, §§ 45 – 62 (Part VI).

[319] *See* Competition Act § 36(1)(b) ("Any person who has suffered loss or damage as a result of… (b) the failure of any person to comply with an order of the Tribunal or another court under this Act, may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him[.]").

[320] Nikiforos Iatrou et al, Canada: Class actions – litigation, policy and latest developments (Dec. 22, 2022), Global Competition Review, available at https://globalcompetitionreview.com/hub/class-actions-hub/2022/article/canada-class-actions-litigation-policy-and-latest-developments.

[321] Charles M. Wright, "Canada", AAI Handbook, p. 448.

[322] *Id.*, p. 447.

Despite being "criminal" acts, the civil burden of proof is applicable in damages actions.[323] Because civil cases are decided on a balance of probabilities, this means that the plaintiff must establish that it is probable that the defendant is legally liable. Unlike in the US, where Clayton Act provides for treble damages, section 36 only allows private litigants to recover the actual loss or damage suffered because of the infringement.[324] Co-conspirators are jointly and severally liable for violations of the Competition Act. The court can also award the plaintiff whatever costs it incurred investigating the misconduct and bringing the action,[325] as well as pre-judgment and post-judgment interest at the rates prescribed by relevant legislation.

Civil claims for anticompetitive conduct. Claims under the "criminal" offenses in Part VI of the Competition Act might also give rise to civil tort claims. Thus, in addition to seeking redress under section 36 of the Competition Act, competition-related claims can be brought under the common law in most provinces or the under civil liability regime under Chapter III of the Civil Code of Quebec.[326] Common law claims that are sometimes also asserted include the tort of conspiracy, including the "predominant purpose" conspiracy, and the "unlawful means" conspiracy.[327] Under any theory, the plaintiff must have suffered actual damages.[328] The Supreme Court of Canada has affirmed that plaintiffs are not precluded from asserting these common law claims alongside section 36 claims under the Competition Act.[329]

The ability to assert common law claims could have impact available remedies, since while section 36(1) provides only for single damages, tort claims open the possibility of punitive damages or equitable doctrines like restitution. In practice, however, punitive

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[323] FH v McDougall, [2008] SCC 53.

[324] Competition Act § 36(1).

[325] *Id*.

[326] Charles M. Wright, "Canada", AAI Handbook, p. 447.

[327] *See* Pro-Sys v. Microsoft, paras. 74, 80.

A predominant purpose conspiracy is made out where the predominant purpose of the defendant's conduct is to cause injury to the plaintiff using either lawful or unlawful means, and the plaintiff does in fact suffer loss caused by the defendant's conduct. Where lawful means are used, if their object is to injure the plaintiff, the lawful acts become unlawful (Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd., [1983] 1 S.C.R. 452, at pp. 471-72). The second type of conspiracy, called "unlawful means conspiracy", requires no predominant purpose but requires that the unlawful conduct in question be directed toward the plaintiff, that the defendant should know that injury to the plaintiff is likely to result, and that the injury to the plaintiff does in fact occur (Cement LaFarge, at pp. 471-72).

[328] Charles M. Wright, "Canada", AAI Handbook, p. 457.

[329] The 'unlawful means' element of this tort includes a breach of the conspiracy provisions of the Competition Act (Pioneer Corp v Godfrey, 2019 SCC 42, paragraphs 82–84).

damages awards in Canada are rare, and given that to date no competition law damages actions have reached a final judgment after trial, the availability of punitive damages remains theoretical. Moreover, plaintiffs might also seek certain equitable remedies like declaratory relief. While remedies like restitution are not available under the Competition Act, these might be sought under common law claims asserted for competition infringements.

***Indirect purchaser standing*.** The question of who can bring a claim under section 36 has been a source of controversy in Canada. Section 36, by its own terms, allows "[a]ny person" who has "suffered loss or damage" to sue for damages. For many years, however, given the rejection of indirect purchaser standing in US federal antitrust law under a statute with similarly broad language, the question of whether indirect purchasers in Canada could bring an action under the Competition Act remained unresolved.[330] In *Pro-Sys Consultants Ltd v Microsoft Corporation,* the Supreme Court of Canada ("SCC") confirmed that indirect purchasers can pursue claims under the Competition Act notwithstanding difficulties sometimes associated with estimating damages in those situations.[331]

In arriving at its decision, the SCC considered both the compensatory and deterrence roles played by private damages actions in the Canadian system. The SCC took issue with the idea underpinning *Illinois Brick* that concentrating the harm in direct purchasers necessarily enhances deterrence. The court stated that:

> allowing the offensive use of passing on should not frustrate the deterrence objectives of Canadian competition laws.... [T]here may be some situations where direct purchasers will have been overcharged but will be reticent to bring an action against the offending party for fear of jeopardizing a valuable business relationship. ... Indirect purchaser actions may, in such circumstances, be the only means by which overcharges are claimed and deterrence is promoted. The rejection of

[330] As noted above, an indirect purchaser is one who does not buy the product subject to the unlawful conduct direct from the defendant, but indirectly through an intermediary, either a reseller or other producer that incorporated the product into its goods and resold them.

[331] Another standing issue confronted by Canadian courts in competition cases involves "umbrella purchasers." Umbrella purchasers do not buy products manufactured or sold by members of an alleged cartel (or other infringement). Rather, they purchase from others in the market who, while not part of unlawful conduct themselves, nevertheless increased their prices due to the resulting distortions in the market. The Supreme Court of Canada concluded that these umbrella purchasers could pursue claims under section 36, but recognized the "significant burden" of proof that might accompany such a claim. *Pioneer Corp v Godfrey*, 2019 SCC 42, ¶ 77 ("This is not to say that umbrella purchasers' actions will not be complex or otherwise difficult to pursue. Marshalling and presenting evidence to satisfy the conditions placed by Parliament on recovery under ss. 36(1)(a) and 45(1) — showing a causal link between loss and conspiratorial conduct, and proving the *actus reus* and *mens rea* of s. 45(1) — represents a significant burden.").

> indirect purchaser actions in such cases would increase the possibility that the overcharge would remain in the hands of the wrongdoer. … [A]n absolute bar on indirect purchaser actions, thus leaving any potential action exclusively to direct purchasers, would not necessarily result in more effective deterrence than exclusively direct purchaser actions.[332]

The SCC also disagreed that the potential complexities of proof argued against indirect purchaser standing. As the court noted, while indirect purchaser cases "will often involve large amounts of evidence, complex economic theories and multiple parties in a chain of distribution, making the tracing of the overcharges to their ultimate end an unenviable task… these same concerns can be raised in most antitrust cases, and should not stand in the way of allowing indirect purchasers an opportunity to make their case."[333] In the end, the court concluded, indirect purchasers, "[i]n bringing their action, … willingly assume the burden of establishing that they have suffered loss."[334]

b. Some Features of the Canadian System that Facilitate Private Enforcement

i. Aggregation of Claims: Opt-Out Class Actions

Most private actions in Canada for violations of the Competition Act under section 36 of the Act are brought as class actions. Although the Competition Act is a federal law, most of these class actions are brought in provincial courts. Class proceedings statutes have been enacted in all the major provinces in Canada, including British Columbia, Ontario, and Quebec.[335] While many of those statutes follow a similar model in the

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[332] Pro-Sys v. Microsoft, ¶ [SCC 49].

[333] Pro-Sys v. Microsoft ¶ 44.

[334] Pro-Sys v. Microsoft ¶ 45.

[335] The text for these class proceedings acts can be found at:

- Québec, Code of Civil Procedure, R.S.Q. c.25.01, Book XI, Title III; available at LégisQuébec: https://www.legisquebec.gouv.qc.ca/en/tdm/cs/c-25.01;
- Ontario, Class Proceedings Act, 1992, S.O. 1992, c. 6; available at the Government of Ontario E-Laws website: https://www.ontario.ca/laws/statute/92c06 ; and
- British Columbia, Class Proceedings Act, R.S.B.C. 1996, c. 50; available at the Government of British Columbia Queen's Printer website: https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96050_01.

Class actions are also available in the Federal Court. *See* Federal Courts Rules (SOR/98-106), Part 5.1 (Class Proceedings). However, in Canada, the Federal Court has limited subject matter jurisdiction, and therefore does not play a major role in civil litigation in general, or class proceedings in particular. *See* W.A. Bogart,

common law jurisdictions, there are differences, sometimes important ones. Quebec, a civil law jurisdiction in a largely common law country, is the most dissimilar. Thus, the procedural rules that govern private damages actions under the Competition Act vary by jurisdiction.[336] Some of these jurisdictions, like Ontario, apply cost-shifting rules in class actions, whereas others, like British Columbia, do not. Some jurisdictions are seen as friendlier forums for plaintiffs, others for defendants.

The Supreme Court of Canada has stated that the three goals of class proceedings are (1) judicial economy, (2) access to justice, and (3) behavior modification.[337] Canadian courts therefore approach class actions and the issues raised in them with these three goals in mind.

Class actions in Canada generally proceed in three stages. The first is the certification or authorization stage, during which the plaintiff must convince the court overseeing the matter that the requirements for proceeding as a class are met. This is often a critical stage since, if the court refuses certification, the case would simply be unviable, no matter how meritorious the claims. If the case is allowed to move forward as a class,

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Jasminka Kalajdzic and Ian Matthews, Class Actions in Canada: A National Procedure in a Multi-Jurisdictional Society? A report prepared for The Globalization of Class Actions Conference, Oxford University (December 2007), available at http://www.law.stanford.edu/display/images/dynamic/events_media/Canada_National_Report.pdf.

[336] Nikiforos Iatrou et al, Canada: Class actions – litigation, policy and latest developments (Dec. 22, 2022), Global Competition Review.

[337] In Western Canadian Shopping Centres Inc. *v.* Dutton, the court wrote:

> Class actions offer three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. The efficiencies thus generated free judicial resources that can be directed at resolving other conflicts, and can also reduce the costs of litigation both for plaintiffs (who can share litigation costs) and for defendants (who need litigate the disputed issue only once, rather than numerous times)[;] ...
>
> Second, by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied[;] ...
>
> Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation[.]

[2001] 2 S.C.R. 534, 2001 SCC 46 at 27-29.

the proceedings advance to a second stage involving a trial on the common issues that were certified by the court. If the plaintiffs are successful at the second stage but individual issues (perhaps individual damages amounts) remain, the proceeding would move to a final stage in which these remaining issues are resolved. Court in Canada are given broad discretion in terms of how they resolve the individual issues.[338]

Class actions in Canada, like their counterparts in the US, are subject to a number of procedural guarantees to protect the substantive rights of absent class members. These protections, which will be discussed in the following sections, include court certification or authorization to proceed as a collective proceeding, the ability of class members to opt-out of the proceeding, and court approval of any class settlement.[339]

Class certification requirements. As noted above, private damages actions typically proceed as class actions in provincial courts, subject to the applicable class proceedings legislation. While there are differences from province to province, the common law jurisdictions all follow a similar basic structure.[340] Importantly, as in the US, there is no right to proceed in a collective manner. Rather, a plaintiff must get court approval to do so. This is accomplished through certification in the common law provinces, and through "authorization" in Québec.

The British Columbia Class Proceedings Act provides an example of the requirements that generally must be met before a private damages action can proceed collectively in Canada.

- First, the complaint must disclose a valid cause of action.[341] Under this standard, a plaintiff class must plead the elements of a viable claim under the Competition Act or common law (or both) such that it is not 'plain and obvious' that the cause of action cannot succeed.[342]

- Second, there must be an identifiable class of two or more persons.[343] This can be divided into two sub-parts: numerosity and ascertainability.[344] Regarding the former,

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[338] Branch Treatise.

[339] *See* Lenczner Slaght, Class Actions in Canada 2022.

[340] Branch Treatise.

[341] BC Class Proceedings Act.

[342] Pro-Sys v. Microsoft SCC.

[343] BC Class Proceedings Act. In Quebec, the equivalent requirement is that the "composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings." *See* QUEBEC, § 575(3).

[344] Branch Treatise.

the fact that the exact number is not known is not a bar to certification. On the other hand, simply meeting the threshold does not necessarily mean that a small class will be certified since, as will be discussed momentarily, the court must still determine that a class proceeding is the preferred procedure. As for latter sub-part, the definition must be such that a member can self-identify as part of the class.[345]

- Third, the claims of the class members must raise common issues. In British Columbia, this requirement can be satisfied whether or not those common issues predominate over issues affecting only individual members.

- Fourth, a class proceeding must be the preferable procedure for the fair and efficient resolution of the common issues.[346]

- Finally, and similar to the US, there must also be at least one class representative who can "fairly and adequately represent the interests of the class" and does not have any interest "in conflict with the interests of other class members," at least as to common issues.[347] In considering the plaintiff's adequacy, the court is also entitled to review their selection of counsel.[348] In addition, the representative plaintiff (or rather, the plaintiff's counsel) must provide the courts with a workable plan for the proceeding with the case on a class basis and for notifying class members of the action.[349]

British Columbia courts must also determine that a class proceeding is the preferable procedure, as opposed to individual actions. In making that determination, courts are directed to consider various factors, including whether common questions of fact or law predominate over individual issues; if members have an individual interest in

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[345] As Branch notes:

> "The purpose of the class definition is threefold: (a) it identifies those persons who have a potential claim for relief against the defendant; (b) it defines the parameters of the lawsuit so as to identify those persons who are bound by its result; and (c) it describes who is entitled to notice. 3 The courts will consider whether the definition of the purported class provides a basis by which members of the class can reasonably be identified in an objective manner. 4 The definition must create a structure whereby it is possible to assess whether or not a particular person falls within the class."

Branch Treatise.

[346] BC Class Proceedings Act.

[347] *Id*.

[348] In Western Canadian Shopping Centres Inc. v. Dutton, the Supreme Court of Canada stated: "In assessing whether the proposed representative is adequate, the court may look to … the competence of the representative's counsel …" (at para. 41).

[349] BC Class Proceedings Act.

controlling the prosecution of separate actions; and the practicalities of efficiently resolving claims on a class basis and administering the case on a collective basis.[350] An important difference between British Columbia and Ontario is that, under the former, predominance is one factor of many in determining whether a class proceeding is a superior mechanism to individual resolution of a matter, while recent amendments to the Ontario act require the court to find that individual issues predominate.[351]

The rule for authorization in Québec is somewhat different the certification process in the common law provinces, but again, proceeding as a collective requires that certain prerequisites be met. For purposes of authorization, the representative's lawyer must submit an application to the court specifying the facts supporting the class action; demonstrates that the cause is serious; describes the class; and establishes that a large number of people are facing the same problem. In analyzing whether a class action should be authorized, the court considers whether the facts alleged appear to justify the conclusions sought; determines if a class action is an effective manner to proceed; and assesses whether the proposed representative is able to perform that role.[352]

Some class proceedings acts allow for certification of multi-jurisdictional class actions, meaning that they would not be limited to residents of the province where the case was filed. Again, returning to British Columbia, the class proceedings act there allows a court to certify a multi-jurisdictional class proceeding when the prerequisites for certification are met and the court determines that the province is the appropriate venue for the multi-jurisdictional class proceeding.[353] In this manner, a single proceeding could be used for resolving claims nationwide (although, as will be discussed below, it is not always so simple).

Canadian class proceedings legislation generally provides for the creation of opt-out classes. Thus, once a class proceeding has been allowed (and any appeals resolved), notice is typically provided to class members, who are given an opportunity to exclude themselves from the proceeding.[354] While courts are given considerable discretion in terms of the form of notice provided, the process typically involves advertisements in national or

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[350] BC Class Proceedings Act § (2)(a)-(e).

[351] Ontario Class Proceedings Act § 5(1.1) (b).

[352] Quebec CPA.

[353] BC Class Proceedings Act §4.1(1).

[354] BC Class Proceedings Act. *See also* Quebec CPA § 576 ("The judgment orders the publication of a notice to class members; it may also order the representative plaintiff or a party to make information on the class action available to the class members, including by setting up a website.

The judgment also determines the time limit for opting out of the class. The opting-out period cannot be shorter than 30 days or longer than six months after the date of the notice to class members.").

regional newspapers and use of internet or social media channels. Direct notice could also be used in appropriate circumstances.[355] As in the US, class members who do not opt out of the proceeding will be bound by a subsequent judgment.

Classes can consist not only of natural persons but also legal persons like corporations. It is not unheard of for collective proceedings in Canada to include both direct and indirect purchasers in the same class. In cases where settlements have been reached, proceeds have been distributed based on estimates regarding the extent to which an overcharge was passed-through the distribution chain. Courts have noted that until there is a determination on the merits and a determination of the global harm to all class members, the interests of those class members do not diverge.[356] Once a proceeding reaches the point at which distribution of damages becomes an issue, subclasses might need to be formed with separate counsel representing their interests.[357]

***Gatekeeping role of courts*.** The requirement that courts in Canada certify or authorize a class proceeding means that they—like their US counterparts—perform an important gatekeeping role. Canadian courts, however, appear to impose a lower burden for certification than in the US. Echoing the Canadian Supreme Court, the British Columbia Court of Appeal has stated that the requirements for certification should be "construed generously in order to achieve its objectives" of improving access to justice by those who have been injured by criminal antitrust violations.[358] Thus, while "[t]he burden is on the plaintiff to show 'some basis in fact' for each of the certification requirements..., in conformity with the liberal and purposive approach to certification, the evidentiary burden is not an onerous one – it requires only a 'minimum evidentiary basis.'"[359] This standard is lower than the usual balance of probabilities standard.

The Supreme Court of Canada has noted that courts there "have resisted the U.S. approach of engaging in a robust analysis of the merits at the certification stage."[360] The standards are tailored to account for realities in Canadian litigation. For instance, when Microsoft argued for a robust analysis of expert evidence advanced by the plaintiffs akin to

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[355] Lenczner Slaght, Class Actions in Canada 2022, p. 9.

[356] *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2000] O.J. No. 4594 (S.C.J.).

[357] *Id*. *See also Pro-Sys Consultants, Ltd. v. Infineon Technologies AG*, [2008] B.C.J. No. 2239 (C.A.).

[358] *Pro-Sys Consultants v. Infineon Tech. AG*, 2009 BCCA 503, at ¶65 (Nov. 12, 2009) (certifying class of direct and indirect purchasers).

[359] *Id*. The process for authorization in Québec varies somewhat from in the common law jurisdictions. A request for authorization there is generally based solely on an application for authorization without additional evidence. The facts alleged in the application are assumed to be true, and the defendant can file responding affidavits or cross-examine the plaintiff only with leave of the court. Moreover, the plaintiff only has to show that they have an arguable case in order for authorized to be granted. Quebec CPA.

[360] *Pro-Sys v. Microsoft*, ¶ 105.

the standard adopted by US courts, the Supreme Court rejected that suggestion, noting that pre-certification discovery in Canada, unlike in the US, is generally not available. Under those circumstances, the higher US threshold would not be appropriate.[361]

Nevertheless, defendants still can and do defeat requests for certification on various grounds. In Competition Act class actions, for instance, defendants frequently contest whether any "loss or damage" from the alleged infraction can be established on a common basis. Similarly, this can be cast as an argument that a class proceeding is not the preferred procedure because individual issues will predominate over common ones. In either instance, plaintiffs may be required to provide expert economic evidence detailing how the class members are harmed, which can represent a significant burden for plaintiffs to bear.[362] Defendants have also been successful in defeating certification on the basis that the plaintiffs' complaint did not disclose a viable cause of action.[363] In addition, Canadian courts can hear dispositive motions, such as motions to strike, in which claims can be dismissed when it is "plain and obvious" that they have no reasonable prospect of success even assuming all the plaintiff's allegations are true. In short, even with the arguably lower threshold for certification, Canadian courts nevertheless have tools to filter out meritless claims.

Aggregate Damages in Class Proceedings. One important tool available under class proceedings litigation in Canada that arguably is not available in the United States relates to the ability for aggregate monetary awards to be made to the class.[364] Returning to British Columbia, the provincial class proceedings act allows such awards to be made when aggregate damages can "reasonably be determined without proof by individual class members."[365] The statute then allows for the award to be allocated using statistical

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[361] Microsoft ¶¶ 118-119. "In Canada, unlike the U.S.," the court observed, "pre-certification discovery does not occur as a matter of right. Although document production may be ordered at the discretion of the applications judge, Microsoft objected and Myers J. acceded to Microsoft's position and refused to order it in this case (2007 BCSC 1663, 76 B.C.L.R. (4th) 171). Microsoft can hardly argue for rigorous and robust scrutiny when it objected to pre-certification discovery and was successful before the applications judge."

[362] Nikiforos et al.

[363] In *Jensen v Samsung Electronics*, for instance, the court concluded that the plaintiffs' pleadings were defective because they did not plead the presence of an "agreement" (a necessary element of the section 45 claim) but instead merely pleaded conscious parallelism. Jensen v. Samsung Electronics Co. Ltd., 2023 FCA 89.

[364] Branch Treatise.

[365] The BC Class Proceedings Act provides:

> (1) The court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members and may give judgment accordingly if
>
> (a) monetary relief is claimed on behalf of some or all class members,

information that might not, in other situations, be admissible as evidence,[366] or for the award to be divided on a proportional or average basis.[367] As commentators have pointed out, "[t]hese provisions could allow classes to be certified in Canada in cases where, because of the difficulty of establishing individual injury and damages on a class-wide basis, certification might not be granted in the United States."[368]

Coordination of Multiple Actions. In Canada, it is not uncommon for multiple damages actions regarding the same matter to be filed when conduct affects the country as a whole. Because such claims could be brought in any provinces oftentimes those cases will be dispersed across different jurisdictions. Moreover, given the possibility of pursuing nationwide classes in some provincial courts, this can result in potentially overlapping claims having been filed in multiple jurisdictions, which can give rise to significant coordination issues. This is not dissimilar to the US, where a news of a criminal indictment or ongoing investigation can trigger the filing of multiple cases in courts across

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(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability, and

(c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

Class Proceedings Act § 29, RSBC 1996, c.50.

[366] On this point, the BC Act provides: "For the purposes of determining issues relating to the amount or distribution of an aggregate monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics." Class Proceedings Act § 30(1).

[367] The BC Act provides:

"If the court makes an order under section 29, the court may further order that all or a part of the aggregate monetary award be applied so that some or all individual class or subclass members share in the award on an average or proportional basis if

(a) it would be impractical or inefficient to

(i) identify the class or subclass members entitled to share in the award, or

(ii) determine the exact shares that should be allocated to individual class or subclass members, and

(b) failure to make an order under this subsection would deny recovery to a substantial number of class or subclass members."

Class Proceedings Act § 31, RSBC 1996, c.50.

With regards to allocating any aggregate damages awards, the British Columbia Court of Appeal stated in *Pro-Sys Consultants, Ltd. v. Infineon Technologies AG* that distribution would be open to the trial judge by assessing losses on an individual, average or proportional basis.

[368] Branch Treatise.

the country. Unlike the US, however, there is no Canadian analog to the MDL where these proceedings can be transferred to a single court. This means that when there are multiple proceedings in different provinces, each provincial court retains jurisdiction over the overlapping matters.[369]

As in the US, sometimes a leadership structure can be arrived at among those firms through "private ordering" and consensus arrived at about how to proceed with the litigation across those jurisdictions. When that is not possible, the courts can be called on to resolve "carriage disputes", namely which firm or group will have the ability to pursue the matter on behalf of the putative class. Even after that is done, however, it is possible for there to still remain multiple cases pursuing damages on behalf of all Canadian consumers. One common configuration is a class proceeding in British Columbia on behalf of residents there, another in Québec limited to residents there, and a third in Ontario on behalf of Ontario residents and everyone else in Canada not encompassed by the other actions.[370] This obviously can make the proceedings more complex than if they were being pursued in a single forum. For instance, multiple certification motions might be required. However, the parties will often agree to make one case the "lead" to move forward while others remain dormant. But settlements still require court approval in each of these jurisdictions overseeing the cases.

Court approval of class settlements. To date, there have not yet been any class cases brought under section 36 of the Competition Act in which a common issues trial has been completed.[371] Instead, they have either been disposed of the court on the merits or at certification, in a manner described above. Or they were settled by the parties either before or after certification.[372] When there are multiple class proceedings pending in more than one province, settlements will often resolve all of those matters simultaneously.

Class action settlements are subject to court approval. And as in the US, Canadian courts play a critical role in this regard. As an Ontario court recent wrote, settlement approval is:

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[369] Lenczner Slaght, Class Actions in Canada 2022, p. 4.

[370] This was the situation in the *Microsoft* litigation.

[371] In *Microsoft*, the parties were in the midst of the common issues trial (which was being presented in a novel manner agreed upon by the parties and approved by the court, CITE) when the case settled.

[372] Settlement following certification follows a certain logic, which is not, as detractors of class actions often suggest, the *in terrorum* effect of facing a class proceeding. Rather, "[c]ertification teases out the plaintiffs' theory of liability and damages, allowing the parties to determine key strengths and weaknesses of the class action and hone in on the likelihood of success at trial, reasonable estimates of damages and associated litigation costs." Nikiforous et al.

> the most important, the most difficult, and sometimes the most unpleasant part of the management and administration of class proceedings. The importance of this task is obvious. Judges are placed in the position of ensuring that the settlement fulfills the public purposes of the class proceedings regime and also does honour to the administration of justice and to the legal profession.[373]

In the event a settlement resolves pending proceedings in more than one province, each court will have to approve the settlement. (They will generally seek separate approval of any attorney's fees, which will be discussed in the next section.) The fundamental test for approval is similar to that used by courts in the US, namely the settlement must be fair and reasonable and in the best interests of the class. As part of that analysis, courts will take a number of factors into consideration, including, among other things, the risks and future expenses of continued litigation, any objections to the proposal, indicia of arms' length negotiation between the parties and the absence of collusion. Courts typically approve settlements that fall within a range of reasonable outcomes given the circumstances.[374]

Canadian courts have allowed cy pres distributions have been allowed in Canada. Theoretically these should be made to organizations that benefit the class indirectly. In at least a few cases, courts have approved settlements that consisted entirely of cy pres distributions.[375] In others, funds remaining after disbursements are made to the class are distributed to cy pres recipients. (In the *Microsoft* litigation, for instance, half of unclaimed funds went to schools that …]

Compensation for Class Counsel. Unlike in the US, in Canada the general rule is that the prevailing party receives at least a portion of its litigation costs—a rule that applies not only to the litigation as a whole, but to procedural steps as well, like class certification. That said, in some provinces, like British Columbia, this rule has been modified in class actions to resemble the "American rule" under which the parties bear their own costs.[376] And even in a province like Ontario that has maintained the general rule, courts have discretion in class actions to take into account, when awarding costs against plaintiffs, whether the proceeding was a test case, raised a novel point of law, or involved a matter of public interest.[377] Even so, cost awards there can be quite sizable,[378] and in some cases the

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[373] Fresco v. Canadian Imperial Bank of Commerce, 2023 ONSC 3335, ¶ 66.

[374] Lenczner Slaght, Class Actions in Canada 2022.

[375] Charles M. Wright, "Canada", AAI Handbook, p. 459.

[376] *Id*.

[377] Ontario Class Proceedings Act.

potential for such awards can influence where cases are pursued.[379] Despite this, private damages actions are commonly brought in Ontario.

Canada, like the US, provides adequate financial incentives for plaintiffs and their counsel to pursue private damages actions. As in the US, most Canadian competition law class actions are done on a contingency basis, which are financed through plaintiffs' counsel.[380] And class counsel ultimately are paid out of the recovery, if any, they obtain for the class. Any fees, also like in the US, must be approved by the court as fair and reasonable.[381] The underlying objective in the exercise is ensuring that compensation is sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well. As one court noted: "The opportunity to achieve a multiple of the base fee if the class action succeeds gives the lawyer the necessary economic incentive to take the case in the first place and to do it well. However, if the Act is to fulfil its promise, that opportunity must not be a false hope."[382]

Whether a requested fee is fair and reasonable is generally determined in light of the risk undertaken by plaintiffs' counsel in undertaking the litigation and the degree of success or result achieved.[383] Relevant factors a court will consider in assessing the reasonableness of a fee award include:

> (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.[384]

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[378] Lenczner Slaght, Class Actions in Canada 2022, p. 13.

[379] In the *Microsoft* cases, for instance, British Columbia was chosen as the lead jurisdiction.

[380] Charles M. Wright, "Canada", AAI Handbook, p. 460. Contingency fee agreements were illegal in Ontario until 1992, although they had been permitted in other provinces. In 1992, contingency fee agreements became lawful in Ontario but only for class proceedings under section 33 (1) of the Class Proceedings Act.

[381] BC CPA

[382] Gagne v. Silcorp Ltd. (1998), 41 O.R. (3d) 417 (C.A.).

[383] *See* Fresco v. Canadian Imperial Bank of Commerce, 2023 ONSC 3335, ¶ 53.

[384] Fresco v. Canadian Imperial Bank of Commerce, 2023 ONSC 3335, ¶ 54.

The courts have preferred percentage contingency fees over other fee arrangements, such as the lodestar or multiplier approach, which rewards counsel based on a multiplier of their base fee. The multiplier approach has been criticized for encouraging inefficient use of time and duplicative and unjustified work, discouraging early settlement, and failing to reward efficient time-management. These fee awards typically range from 15 – 33 percent of any recovery, plus out of pocket expenses and taxes.[385]

In addition, some courts have conditioned part of the fee—a "holdback"—until settlement disbursements have been made to class members. The reasons have been twofold: first, the actual claims rate provides a measure of the success of the settlement, which is a relevant factor in determining an appropriate counsel fee.[386] Second, the holdback can be an incentive to class counsel to promote uptake by class members.[387]

Third-party litigation funding is permitted in Canada, and is being used in competition law class actions. These agreements, however, require court approval. Indeed, recent amendments to Ontario's Class Proceedings Act require a court to consider whether: (i) the agreement, including indemnity for costs and amounts payable to the funder under the agreement, is fair and reasonable; (ii) the agreement will not diminish the rights of the representative plaintiff to instruct the solicitor or control the litigation or otherwise impair the solicitor-client relationship; and (iii) the funder is financially able to satisfy an adverse costs award in the proceeding, to the extent of the indemnity provided under the agreement.[388] In addition, some public funds are available in Ontario and Quebec provinces that can be used by plaintiffs in approved class action to pay for legal disbursements or to indemnify plaintiffs for costs that may be awarded against them in proceedings being pursued in "costs" jurisdictions.[389] In Ontario, in turn, the fund is entitled to receive 10 percent of any award or settlement plus a return of any funded disbursements.[390]

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[385] Jellema v. American Bullion Minerals Ltd., 2011 BCSC 925

Coburn and Watson's Metropolitan Home v. BMO Financial Group, 2018 BCSC 1183 at paras. 74-88

[386] Fresco v. Canadian Imperial Bank of Commerce, 2023 ONSC 3335, ¶ 55.

[387] This was suggested to the courts by the plaintiffs in *Microsoft*. The bulk of the fee award was paid immediately after the settlement was approved; however, fifteen percent was held back until after the settlement claims process had closed.

[388] Ontario Class Proceedings Act, § 33.1(9).

[389] *See, e.g.,* Law Foundation of Ontario, Class Proceedings Fund (Ontario) (https://lawfoundation.on.ca/for-lawyers-and-paralegals/class-proceedings-fund/); Fonds d'aide aux actions collectives (Québec) (https://www.faac.justice.gouv.qc.ca).

[390] Lenczner Slaght, Class Actions in Canada 2022, at 13.

In some of the earliest Competition Act cases, when requirements for certification and other issues were uncertain, class counsel in these matters were assuming substantial risk.[391] Fee awards and other funding mechanisms in Canada were sufficient to allow for the development of a sophisticated plaintiffs' bar.

ii. Access to Evidence: Discovery

As described above, the discovery process in common law litigation is a pre-trial phase during which the parties gather evidence from each other to prepare for trial. While Canada, like the US, follows the principle of discovery, there are notable differences in their approaches. Canada's discovery process is governed by the rules of civil procedure in each province (for example, Ontario's Rules of Civil Procedure), tends to be narrower in scope. The Canadian approach focuses more on the direct relevance of the documents to the issues in dispute, requiring that the documents relate to the matters in issue but also are likely to significantly help resolve the dispute or assist in the preparation of the trial.[392] Moreover, while the discovery process is also initiated by the parties, it tends to be more regulated by the court. Pre-trial conferences may be held to narrow the issues and determine the scope of discovery. Canadian courts play a more active role in overseeing the discovery process, ensuring that it remains focused on the issues relevant to the dispute and does not become overly burdensome or costly. The principle of proportionality is emphasized, balancing the cost and effort of discovery against its potential benefit. Because discovery often entails disclosure to other parties of confidential or other sensitive information, Canadian courts—like their US counterparts—often put in place protective orders to protect at least some of that information from disclosure.

Examinations for discovery, which are similar to depositions in the US, are more limited in Canada. As a general matter, these examinations are only allowed to be taken of parties themselves, not individual witnesses.[393] Moreover, when a corporate entity is deposed, the examination is generally limited to a single representative of the company. However, that witness is required to answer questions not just within his or her knowledge, but within his or her means of knowledge regarding relating to a matter in question in the

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[391] Charles M. Wright, "Canada", AAI Handbook, p. 448.

[392] In British Columbia, for instance, parties are required to disclose "(i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party of record at trial to prove or disprove a material fact, and (ii) all other documents to which the party intends to refer at trial." *See* BC Supreme Court Civil Rules, Rule 7-1(1). By contrast, under the Federal Rules of Civil Procedure (FRCP), especially Rule 26(b), parties are allowed to obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case. This relevance is interpreted broadly, meaning that parties can obtain a wide range of documents and information that could potentially lead to the discovery of admissible evidence.

[393] *See, e.g.,* BC Civil Rules, Rule 7-2 (Examinations for Discovery).

action.[394] Thus, that witness may be asked to make inquiries of others within the organization to inform him or herself about information within the party's possession.[395]

These default rules apply in class actions, although courts have the ability to modify them to allow for additional examinations. However, in class proceedings, discovery generally is not available before certification. Although this means plaintiffs do not have the same opportunities as in the US to obtain evidence, it also tends to make the certification process more challenging in some regards, but also less demanding. The standards for certification set out by the court have tended to reflect the limits of the information available to a proposed class.

Plaintiffs in private damages actions have also been able to seek information through other means as well. For instance, Canadian plaintiffs will often seek documents produced in parallel US litigation.[396] Similarly, plaintiffs sometimes seek discovery, including documents and third-party witness depositions, through a US procedural tool that allows a US district court for district in which a person resides or is found may order that person to give evidence for use in a proceeding in a foreign or international tribunal.[397] Whether that evidence is admissible in a Canadian proceeding, of course, remains a decision for the court there.[398] To the extent the Canadian Competition Bureau has information that might be relevant to the claims being asserted in a private damages actions, there is no general right of access to that information; rather, the regular discovery rules governing the proceeding will apply to the disclosure of that evidence.[399]

iii. Adequate Limitations Period

Claims under the Competition Act are subject to a two-year statute of limitations period.[400] The same limitations period generally applies for common law claims as well.

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[394] BC Civil Rules.

[395] *Id*.

[396] This was done in the *Microsoft* litigation, for instance. The BC plaintiffs moved to intervene in the Iowa class action to obtain access to discovery that had been produced in that case.

[397] *See* 28 U.S.C. §1782 ("The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.").

[398] Branch §15.1 Discovery After Certification.

[399] Canada OECD.

[400] The Competition Act provides: "No action may be brought… in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from (i) a day on which the conduct was engaged in, or

This is just half the time of the limitations period under the US Clayton Act. That period, however, is subject to the principle of the discoverability principle, meaning that a cause of action will not accrue for the purposes of the running of the limitation period until the material facts on which the cause of action is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence.[401] The doctrine of "fraudulent concealment" can therefore be used to delay the running of the limitations period in appropriate circumstances.[402] It is not entirely clear how courts will deal with limitation periods when a defendant engages in continuing misconduct. Nevertheless, given that the Supreme Court of Canada has held the discoverability principle applies, plaintiffs generally are afforded reasonable time in which to bring a private damages action.

c. Relationship Between Private and Public Enforcement

Private rights of action in Canada were added to the Competition Act in order to complement public enforcement efforts undertaken by the Competition Bureau and to enhance overall deterrence against anticompetitive conduct.[403] As the Bureau has observed, private litigation (though currently not damages actions) before the Tribunal could also help develop antitrust jurisprudence in the country, "which could assist the Bureau in its enforcement and application of the Act and could better delineate the bounds of legitimate behaviour for the business community."[404] The role of private litigation in Canada, however, is far more limited than in the US, where damages actions can be brought for any violation of the antitrust laws. In Canada, by contrast, such actions currently are limited to criminal violations of the Competition Act or violations of orders issued by the Tribunal. In recent years, however, there has been a move to increase the role of private enforcement in the system, which might even allow private disgorgement actions before the Tribunal if pending proposals are approved by the Canadian Parliament.

As in the US, private litigants can benefit from public enforcement efforts. Under section 36(2) of the Competition Act, the plaintiff in a private damages action can use the record of a prior criminal proceeding that resulted in a conviction to establish prima facie proof of a violation and its effects on the plaintiff.[405] Similar to section 5(a) of the Clayton

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(ii) the day on which any criminal proceedings relating thereto were finally disposed of, whichever is the later[.]"

[401] Pioneer Corp. v. Godfrey, 2019 SCC 42 (CanLII), [2019] 3 SCR 295.

[402] Pioneer Corp., 2019 SCC 42

[403] Canada OECD.

[404] *Id*.

[405] Competition Act § 36(2) ("In any action under subsection (1) against a person, the record of proceedings in any court in which that person was convicted of an offence under Part VI or convicted of or punished for failure to comply with an order of the Tribunal or another court under this Act is, in the absence of any evidence to the contrary, proof that the person against whom the action is brought engaged in conduct that

Act, this is a rebuttable presumption. As noted earlier, however, a damages action can be brought for a violation of the criminal provisions of the Competition Act whether or not a criminal proceeding was pursued by public enforcers. The damages actions exist independently.[406] And indeed, many damages actions are undertaken pursuant to section 36 without any action whatsoever by Canada's public enforcers.[407]

d. Increasing Importance of Private Damages Actions in the Canadian System

Competition damages actions have become more commonplace in Canada over the past couple of decades, although there does appear to be some tapering off in new filings since the middle of the last decade when new filings peaked at 49 in 2014. In that time, a sophisticated plaintiffs' bar has developed in Canada that has gained substantial experience in handling complex class actions. And these lawyers have obtained large recoveries on behalf of Canadian consumers in several major lawsuits.

DRAM Class Actions. A relatively early example of a damages action that recovered substantial sums for consumers was the DRAM litigation.[408] That case involved allegations of price-fixing between 1999 and 2002 by manufacturers of dynamic random-access memory (DRAM), the most common type of memory at the time used in personal computers, servers, game consoles and other electronic devices.[409] A large percentage of DRAM was sold directly to computer manufacturers like Dell and Apple. Other memory was sold to distributors and electronic manufacturing services (EMS) companies. That DRAM, however, was resold through various levels of the manufacturing and distribution chain to indirect purchaser end users. The allegations against the DRAM manufacturers were investigated by competition authorities in numerous jurisdictions, including the Canadian Competition Bureau.

Although the Bureau discontinued its investigation without taking further action,[410] class claims were filed in 2005 in British Columbia, Ontario and Quebec on behalf of direct and indirect purchasers of DRAM in Canada, seeking to recover damages for alleged

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was contrary to a provision of Part VI or failed to comply with an order of the Tribunal or another court under this Act, as the case may be, and any evidence given in those proceedings as to the effect of those acts or omissions on the person bringing the action is evidence thereof in the action.").

[406] Canada OECD.

[407] In *Microsoft*, for instance, the Canadian Competition Bureau never undertook any enforcement action against the company, preferring instead to piggyback off the enforcement efforts of the US.

[408] While my current employer, CFM Lawyers, was one of the lead firms on behalf of the plaintiffs in the DRAM litigation, I had no involvement in the litigation.

[409] DRAM BC Statement of Claim.

[410] Canada OECD.

overcharges imposed by the defendants.[411] In British Columbia, the motions court denied the certification request, but that was overturned by the Court of Appeal in 201X, making it the first of the cases to be certified as a class proceeding.[412] The Québec action was the next to be certified in [month] 2011. As in British Columbia, the motions court denied the certification request, but was reversed on appeal.[413] In Ontario, two separate actions were filed by the same representative plaintiffs, but with different defendants.[414] Plaintiffs' counsel in the three provinces agreed to work cooperatively on behalf of a class defined as all "Canadians and Canadian entities who purchased DRAM or electronic devices containing DRAM between April 1, 1999 and December 31, 2002."[415]

In 2011, the plaintiffs in the three provinces reached settlements with a subset of the defendants, and with the remaining defendants the following year.[416] These agreements resulted in the creation of a settlement fund of just under CAD$80 million (about USD$60 million).[417] This was the second largest competition settlement in Canada at the time.[418]

At the time the settlements were reached, the actual amounts that individual class members would receive had not yet been determined. Instead, plaintiffs' counsel, with the help of an economist, developed a distribution plan that they would subsequently present to the three courts overseeing the various proceedings. They also retained a former justice of the Supreme Court of Canada to provide an independent opinion regarding its fairness to the various groups within the class.[419] Under the plan that the courts ultimately approved, consumers received 50 percent of the fund, distributors and EMS, 30 percent, and other purchasers, 20 percent. Any portion of the funds allocated to the consumer class that went unclaimed would be distributed to a *cy pres* recipient.[420]

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[411] *See* Statements of Claim

[412] DRAM BC Court of Appeal

[413] DRAM Quebec Court of Appeal

[414] *See* Affidavit #3 of Melina Buckley Regarding Approval of Distribution Protocol and Appointment of Claims Administrator (25 August, 2014), ¶ 11.

[415] *Id.*

[416] *Id.*

[417] *Id.*

[418] *Id.*

[419] *Id.*

[420] End-user consumers likely bought upwards of 80 percent of DRAM during the class period. However, plaintiffs' counsel had expressed concerns that the claims rate for consumers might be low, and therefore argued that allocating more of the settlement to the others, where uptake was expected to be higher would result in class members themselves receiving a higher share of the settlement fund. *See* Jasminka Kalajdzic

Plaintiffs' counsel in the Canadian DRAM litigation devised a claims process that sought to encourage uptake by consumers. Individual consumers are less likely than institutional class members to retain records of their purchases. To account for that, the settlement allowed consumers without receipts for purchases of DRAM to fill out an online form at a settlement website, "themoneyismine.ca", and receive up to CAD$20.[421] No proof of purchase was needed to claim this compensation. Consumers with receipts could receive CAD$5 for each computer purchased during the class period, and lower amounts for other devices that contained DRAM, thereby enabling them to potentially receive more than the CAD$20 baseline. Following extensive publicity by class counsel, more than 880,000 simplified consumer claims were made, totaling in excess of CAD$17.6 million. In total, class members received more than CAD$45.5 million in the DRAM litigation.

Microsoft Class Actions. In December 2004, around the same time as the DRAM lawsuits were filed, class actions were also initiated in British Columbia and Ontario (and later in Québec) on behalf of indirect purchaser consumers against Microsoft.[422] The cases related in part to conduct that had been at issue in the litigation pursued by the Department of Justice and various state attorneys general in the United States stemming from the so-called "browser wars" in the mid- to late-1990s. That conduct was never the subject of a public enforcement action in Canada. The Canadian actions were similar to class actions that had been filed in state and federal courts across the US in the wake of the DOJ lawsuit. A major difference, however, was that in Canada no private right of action existed for single firm conduct like monopolization in the US or abuse of dominance under the Canadian Competition Act. Nevertheless, plaintiffs alleged that Microsoft's conduct breached the criminal provisions of the Act, namely section 45 (conspiracy) and 52 (false or misleading representations).[423] The plaintiffs also asserted common law claims in the British Columbia and Ontario actions.

The cases against were litigated for close to 15 years and involved a significant degree of risk throughout, given the available causes of action and uncertainty at the time about whether indirect purchasers had standing. Recognized these risks from the outset, plaintiffs' counsel made the strategic decision to lead the litigation in B.C. based upon the

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(2015) Class action dilemmas: the ethics of the Canadian DRAM settlement, Legal Ethics, 18:2, 188-198, at 191.

[421] Consumers needed to confirm as part of the claims process that "no other family member currently residing with [him or her] has nor will submit a separate claim for compensation." *See* https://themoneyismine.ca/simplified-claim.

[422] Microsoft Statements of Claim.

[423] *See* BC Statement of Claim.

diminished risk of an adverse costs award in that province.[424] By the time of settlement, the plaintiffs had faced 8 applications to strike, dismiss, or otherwise narrow their claims.[425] Moreover, certification in the BC proceeding was hotly contested, and required numerous court applications.

Although the case was initially certified, the decision was overturned when the British Columbia Court of Appeal dismissed the case, holding that indirect purchasers did not have a cause of action. The Supreme Court of Canada subsequently overturned that decision and certified the action. That decision, together with SCC rulings in the accompanying appeals in Sun-Rype Products Limited v. Archer Daniels Midland Company, 2013 SCC 58 (Sun-Rype) and Infineon Technologies AG v. Option consommateurs, 2013 SCC 59, ultimately provided much needed clarity on certification standards and indirect purchaser standing in Canada.[426]

The *Microsoft* cases are the closest any Competition Act class actions have come to conclusion at the end of trial and thus also illustrate some additional procedural aspects of the Canadian system. For instance, with respect to access to evidence, plaintiffs pursued various means of obtaining discovery. Prior to certification in British Columbia, and with the assistance of counsel working on similar cases in the US, the plaintiffs sought access to documents from the US proceedings. When the court in BC declined to order production and noted that such a request would be more appropriately brought in the US jurisdiction, the BC plaintiffs successfully sought to intervene in an ongoing class proceeding in Iowa and obtained an order allowing them access to the documents.[427] Ultimately the trial management order that the parties negotiated and the court approved allowed the parties to incorporate the enormous discovery record from the US in the BC proceeding.[428] In addition, the plaintiffs initiated a number of applications seeking to use 28 U.S.C. § 1782 to collect discovery evidence from several witnesses in the United States, which allowed them to conduct one-day depositions of former Microsoft executives like

[424] CITE JJ CAMP AFF. ¶ 13. Following the certification of the BC Proceeding, the parties agreed to certify and authorize the Ontario and Québec Proceedings by consent, and to stay those proceedings until the BC Proceeding, including all appeals was finally determined. Camp #2 at paras. 15-16 and Exhibits C and D

[425] Camp #2 at paras. 92-100, and at Exhibit B

[426] Camp #2 at paras. 19-21.

[427] Camp #2

[428] That discovery came from 17 prior proceedings in the United States that involved similar allegations and subject matter at issue in the BC action and included over 13 million documents totaling over 24 million pages, and over 800 discovery, deposition, and trial transcripts. Camp #2.

The parties also conducted further discovery for the period of time not covered by any discovery materials obtained from the US proceedings and for matters specific to the Canadian proceedings. This involved the disclosure of approximately 150,000 documents, and the examination of four senior Microsoft executives. Camp #2.

Steve Ballmer (former CEO) and James Allchin (former senior executive in charge of Windows).[429]

Although the Competition Bureau never pursued an enforcement action against Microsoft, the plaintiffs in BC sought to foreclose Microsoft from relitigating findings and rulings from the DOJ case and a number of regulatory proceedings brought against Microsoft in Europe.[430] The request was to allow the plaintiffs to numerous findings of fact regarding the conduct at issue in the BC case that had been made in the other proceedings. The application was unsuccessful, however, and without the benefit of any findings or rulings from those prior proceedings, the BC plaintiffs were required to prove the conduct anew.[431]

The parties reached a settlement in principle in February 2018, which was finalized a few months later and subsequently approved by the courts in British Columbia, Ontario and Québec. Under the terms of the deal, Microsoft was obligated to fund a claims process and class counsel fees to a maximum amount of CAD$517 million (approximately USD$395 million) and to pay administration and notice costs in addition to that amount. By the parties settled, the trial was well underway. The parties had exchanged their written cases in chief (a procedure the parties agreed to follow that deviated from the usual trial structure) in which they detailed their differing views of the facts at issue and the legal implications of those facts, with enormous evidentiary records in support. They were in the midst of actively preparing for the oral hearing, which was anticipated to occur over a period of 6 months.[432]

As with the *DRAM* settlement, the agreement in *Microsoft* included provisions aimed at encouraging claims. Class members were divided into one of two groups: (1) consumers, who purchased individual licenses for certain Microsoft software products, and (2) volume licensees, who had obtained licenses through a volume license program. Consumers with claims less than CAD$250, and volume licensees with claims under CAD$650 were not required to provide any documentation in support of their claims; they simply needed to make a sworn declaration on the claims website that the information in the claim was true.[433] While consumers received cash payments, volume licensees received transferrable software vouchers under the theory that these can be applied to pre-

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[429] Camp #2 at paras. 50-60

[430] These included the European Commission's Decisions under Article 82 of the EC Treaty (Case Comp/C-3/37.792 - Microsoft) and in relation to tying [Case Comp/39.530 – Microsoft (Tying)] (the "EC Proceedings"): Pro-Sys Consultants Ltd. v. Microsoft Corporation, 2014 BCSC 1281. *See* Camp #2.

[431] Camp #2 at para. 36.

[432] Camp #2 at paras. 45-78

[433] *See* ThatSuiteMoney *Microsoft* Litigation Claims Website https://www.thatsuitemoney.ca/en/faq.

existing information technology budgets.[434] Fifty percent of any unclaimed funds would be distributed *cy pres* to eligible schools in Canada.

e. Conclusions

As discussed above, the Canadian experience further illustrates types of substantive and procedural rules that can foster damages actions on behalf of consumers. As in the US, Canada has a mechanism in the opt-out class action that allows for the collective pursuit of small individual claims with large aggregate effects. It provides adequate financial incentives for plaintiffs and their lawyers to pursue these claims. It gives plaintiffs access to the information they need to pursue those claims. Finally, it has the institutional capacity to handle complex class proceedings.

[434] Camp #2.

PART III: PRIVATE ENFORCEMENT IN LATIN AMERICA

I. CHILE

Competition law private enforcement has played an extremely important role in the Chilean competition system since private parties were given the ability in 2003[435] to bring complaints before the country's specialized competition court, the *Tribunal de Defensa de la Libre Competencia* ("TDLC"), for violations of the Competition Act, Decree Law 211 (DL211).[436] In the first decade-plus following the 2003 reforms, almost 70 percent of "contentious" proceedings decided by the TDLC had been brought by private parties.[437] That trend has continued to the present. Private damages actions, by contrast, have been far less common. Indeed, until recently, only a handful of damages actions had been pursued.

Starting in 2007, Chile antitrust prosecutor, the *Fiscalía Nacional Económica* (FNE), uncovered a series of major price-fixing schemes across diverse sectors of the nation's economy that had direct impacts on Chilean consumers. As noted in the introduction, the FNE prosecuted major pharmacy chains for colluding to manipulate drug prices, which led to consumers paying inflated prices, and in many cases, losing access to essential medications. Shortly thereafter, the enforcement agent brought an action against poultry producers and their trade association for conspiring over many years to restrict output of chicken, a staple of the Chilean diet. That case led to the FNE also uncovering a scheme by the country's major supermarket chains to head off price wars that would have hurt profits, but that would have been precisely the kind of competition needed to delivered lower prices to their customers. And then more recently, tissue manufacturers collaborated to manipulate the prices of essential paper products, including toilet paper and tissues used by everyone. Market abuses such as these directly harmed consumers, including many vulnerable individuals already in precarious economic circumstances. They also resulted in increasing distrust in business and markets—but also awareness of, and support for, stronger enforcement.[438]

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[435] Law N° 19.911.

[436] Before the 2003 reform, private parties could only present claims to the National Economic Prosecutor's Office (*Fiscalía Nacional Económica* or FNE), which could decide whether to initiate a case before the predecessor commissions that resolved complaints before the creation of the TDLC in 2004.

[437] Note by Chile, OECD Relationship Between Public and Private Antitrust Enforcement, DAF/COMP/WP3/WD(2015)14 (June 15, 2015), at 3.

[438] As a leading Chilean competition law scholar wrote 2016:

In response to these abuses and perceived deficiencies in the existing laws, Chile enacted important reforms to DL211 in 2016 aimed at, among other things, encouraging damages actions. The cartel cases that had come to light over the past decade emphasized the need not only to have adequate civil or criminal sanctions available in order to deter future misconduct, but also to provide an avenue through which the consumers affected by the unlawful behavior could obtain compensation for their injuries.[439] The reforms included changing the forum for "follow-on" damages claims from civil courts to the TDLC—the same decisionmaker that would have decided the underlying liability claim—and allowing consumer damages class actions to be pursued in that forum following an infringement decision.[440] The hope was that these changes would spur claims for damages on behalf of affected consumers. Since then, several damages actions, including consumer actions, have been brought. And in a few instances, final resolutions have been reached, either through settlements or, in one instance, a decision by the TDLC.[441]

> A recent survey shows mistrust of enforcement agencies that deal with consumer abuse. And the survey identifies the existence of three cartels—Pharmacies, Poultry Producers, and Tissue Paper—as one of the eight most severe situations of mistrust of business. This survey also shows high understanding of the benefits of competition policy, such as lower prices; but also a high perception of consumer abuse by large firms. Moreover, ninety-seven percent of those surveyed knew factual details of NEPO's accusation in the Tissue Paper case. These results show how competition policy has become a key issue for consumers in Chile, and that consumers understand the risks of threats to competition.

Francisco Agüero, Chilean Antitrust Policy: Some Lessons Behind its Success, Law and Contemporary Problems Vol. 79, No. 4, Success and Limits of Competition Law and Policy in Developing Countries (2016), at 152.

[439] *See* Nicolás Lewin & Francisco Borquez, "The development of private enforcement regarding damages actions in Chile," CPI Antitrust Chronicle, January 2016 ("Private enforcement regarding damages actions originating from competition infringements, has slowly emerged in Chile during the last years. In this sense, high profile cartel cases filed by the National Economic Prosecutor Office (FNE) regarding pharmaceutical retail, poultry and toilet paper production, have led to the development of this area. Particularly, consumer protection has been at stake, causing awareness in a matter that prior to these events had little or no treatment in the Chilean system.").

[440] While observers commonly refer to Chile as having "follow-on" damages actions only, that may be technically correct in that a liability determination by the TDLC is required before damages can be sought under Article 30, a private party can initiate an infringement action in the first instance. This applies as well to consumer associations. *See* Arancibia Mattar, J, La legitimación activa en procesos correctivos y sancionatorios de libre competencia, Revista de Derecho núm. 56 (2021): 53-81 Pontificia Universidad Católica de Valparaíso, p. 69-70.

[441] In the interest of full disclosure, the author is currently acting in a consulting capacity with a consumer association, ARCAM, which is pursuing a damages action following the judgment in the N*avieras* collusion case CIP-6-2020 "Demanda de Arcam contra NYK y otras".

After more than seven years under the new regime, several important questions, such as indirect purchaser standing, remain unresolved. That perhaps should come as no surprise given how long it took for damages actions to take hold in other jurisdictions, including those where they are now commonplace.[442] The early returns, however, provide reason for optimism that the system is well-positioned to handle damages claims, especially as counsel representing consumer plaintiffs gain additional experience in these matters. Critically, the system allows for opt-out consumer class actions, which—as discussed above—are critical to making damages actions involving diffuse, small claims economically viable to pursue. Moreover, the ability to pursue those claims in the same venue that rendered the underlying liability judgment should go a long way towards relieving the burden on plaintiffs in a follow-on damages action.

This section will examine the current rules in place relating to damages actions and how they have evolved over time within the Chilean institutional framework. It will examine not just the relevant provision of the Competition Act itself, but also the Consumer Protection Act (LPC), which provides for consumer antitrust damages actions to be pursued on a collective basis. It will then analyze several damages cases over the past couple of decades. As should become evident, the provision of an opt-out collective proceeding mechanism has played a critical role in allowing for consumer damages actions to be pursued, though with mixed results so far.

a. The Chilean Institutional Framework

Before discussing the relevant provisions regarding private damages actions, it makes sense to provide a brief overview of the institutional framework to better understand how these actions are situated in the larger competition law system. That system traces its origins to 1959, when Law No. 13.305, the first statute relating to competition issues, was promulgated.[443] The substantive prohibitions in the law borrowed ideas from the US Sherman Act.[444] The statute also created the Antimonopoly Commission, which was charged with deciding competition-related matters brought before the body.[445] Its function was to punish harmful conduct and control industrial and commercial activities. A few years later, in 1963, the position of the National Economic Prosecutor (Fiscal Nacional Económico) was created to investigate and prosecute anticompetitive conduct before the Antimonopoly Commission.[446] For a variety of reasons, including resources and the

[442] *See* chapters on the US and Canada, *supra* at Part 2, §§ IV-V.

[443] Patricio Bernedo, Historia de la libre competencia en Chile, 1959-2010.

[444] *See* Bernedo, p. 40-44 (discussing the origins of Law No. 13.305 and the US Klein-Sacks mission).

[445] Id. p. 43.

[446] Id. p. 44

predominant economic model in Chile at the time, few competition cases were pursued in the first decade-plus.[447]

The modern Chilean antitrust system originated with the enactment of DL211 in October 1973, shortly after the military *coup d'état* that overthrew the leftist government of Salvador Allende and the *Unidad Popular*. The new law, which was part of a larger program of the civic-military regime of imposing market-oriented policies in the country and rolling back decades of state-oriented development policies that reached their crescendo during Allende's presidency, created a number of new institutions, including the Competition Commission (*Comisión Resolutiva*) and central and regional Consultative Commissions (*Comisiones Preventivas*). DL211 empowered these bodies to impose fines, issue injunctions, and make recommendations relating to anticompetitive conduct. The FNE continued in its investigative and prosecutorial role.[448]

Amendments enacted in 2003, Law No 19.911, created a new competition tribunal the following year, the TDLC, with the goal of strengthening the independence of competition authorities.[449] The TDLC, which is made up of three lawyers and two economists who are experts in competition law and industrial organization,[450] was given exclusive jurisdiction over competitions matters that arise anywhere in Chile.[451] The current institutional structure in place in Chile thus follows a "judicial" model, in which a prosecutorial entity, the FNE, is empowered to conduct investigations into suspected anticompetitive conduct. Complaints by the agency (or by private parties following the introduction of a private right of action in 2004) are decided by a separate body, the TDLC. The tribunal carries out judicial and non-judicial functions[452]. The former consist of deciding the cases that are brought before it through the "contentious procedure."[453] Decisions by the TDLC can be challenged on an appeal to the Chilean Supreme Court.[454]

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[447] Id.

[448] Id.

[449] Id.

[450] DL211, Art. 6.

[451] DL211, Arts. 5 and 18.

[452] Some legal scholars refer to these non-judicial functions as "administrative" and/or "regulatory" functions. AGÜERO, Francisco, El Tribunal de Defensa de la Libre Competencia como un contencioso-administrativo, Una forma de control judicial de la intervención estatal en la economía, Ediciones DER, 2022. p. 95.

[453] DL211, Art. 18, 2).

[454] DL211, Art. 27. On the other hand, the TDLC also exercises non-jurisdictional powers, which are more regulatory in nature. Thus, it has the power to rule on queries made by individuals, to recommend to the President of the Republic the issuance of new regulations, and to directly issue "instructions of a general nature" binding on individuals (see paragraphs 2 to 5 of article 18 of DL 211).

Additional reforms were enacted in 2009 and 2016 in efforts to further improve the overall effectiveness of the system. For present purposes, the most relevant provisions in the 2009 reforms, Law No 20.361, included the establishment of a leniency program; and an increase in the maximum available fines for cartel cases, from 20,000 UTA (Unidad Tributaria Anual or yearly tax unit,) to 30,000 UTA.[455] The 2016 reforms, Law No 20.945—which was approved after revelations following the 2009 reforms of additional cartel conduct by Chilean firms that hit consumers particularly hard—included not just the re-criminalization of hardcore cartels, but also a further and substantial increase in the maximum available fines of up to 30% of the infringer's sales of the product or service line relating to the infringement during the period of the unlawful conduct, or up to twice the economic benefit obtained.[456] Most importantly, with respect to private damages actions, the reforms gave jurisdiction to the TDLC over follow-on actions arising from infringements of DL211.[457]

Substantively, DL211 is quite open-ended and reaches any act or agreement, individually or collectively, that prevents, restricts or hinders competition, or that tends to produce such anticompetitive effects.[458] The second paragraph of article 3 enumerates some examples of unlawful anticompetitive conduct, including collusion among competitors and abuse of a dominant position.[459] Ultimately, however, the boundaries of what constitutes an infringement of the prohibitions set out in the act are being defined through cases brought before the TDLC and the decisions of the tribunal, as reviewed by the Chilean Supreme Court,[460] in a manner very reminiscent (though with some important differences) of the common law. DL211 reaches conduct that has an effect within Chile, even if the conduct took place outside of the country.[461]

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[455] *See* Law No. 20.361.

[456] *See* Law No. 20.945. When it is not possible to determine the amount of sales involved in the unlawful conduct, or the economic benefits obtained by the defendant, fines of up to 60,000 UTA (approximately US$48 million) can be imposed.

[457] *See* Law No. 20.945.

[458] DL 211, art. 3 ¶ 1.

[459] DL211, art. 3.

[460] Final judgments by the TDLC are subject to review by the Chilean Supreme Court under a process known as a "recurso de reclamación". DL 211, Art. 27. It has been noted that this review early on tended to follow a "clear error" standard with respect to legal conclusions or "abuse of discretion" on other matters, and few decisions of the TDLC were overturned. More recently, however, the Supreme Court has taken on a more assertive role within the system, and shown more willingness to overturn rulings by the tribunal. *See* Stella Muñoz & Diego Hernández, Chile, Chambers and Partners: Antitrust Litigation 2022, § 11.1.

[461] In asserting its jurisdiction over conduct that took place outside Chile but that had effects within the country, the TDLC has stated that:

b. Private Damages Actions in the Chilean System

As alluded to earlier, there have been three distinct periods in terms of how private enforcement was handled in the Chilean system. In the first, prior to 2003, neither the Competition Act nor any other legislation in Chile included specific provisions relating to private damages actions arising from anticompetitive conduct. Such actions damages—and indeed, there was one, *Pivcevic et al. c/ Lan Chile* (2006), which will be described in more detail below—would have been governed by the general rules and principles of civil liability in the Civil Code (ie., Title XXXV).[462]

The second period began with the enactment of Law No. 19.911 in 2003 and entry into force of Article 30 of DL211 the following year.[463] Article 30 for the first time explicitly allowed private parties to seek to recover damages in civil courts for damages caused by anticompetitive conduct, but only after a final decision by the TDLC finding an infringement of DL211.[464] But it also gave the civil plaintiff the advantage of treating the decision of the TDLC as established in the subsequent proceeding, so that the claimant would only have to prove the amount of damages and the causal link with the unlawful conduct found in the

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> "(...) a position contrary to the one described above would generate the perverse incentive to leave unpunished those who, wanting to undermine competition in the Chilean markets, expressly adopt anti-competitive decisions or execute actions to implement them outside of Chile, traveling for such purpose to another country, or using media or intermediaries which are not located in Chile, in such regard, although the effects of these decisions and actions would affect our markets, there would be no submission to this Tribunal" .

TDLC Sentencia N° 122 (2012), "FNE v. Tecumseh Do Brasil Ltda. y otro", c. 6. This position was subsequently affirmed by the Supreme Court. Supreme Court (2013), Case N° 5308-2012, "FNE v. Tecumseh Do Brasil Ltda. y otro", c. 2. *See also* Antonio Bascuñán Rodríguez, "La jurisdicción chilena sobre infracciones al Decreto Ley 211 cuya ejecución parcial o total tiene lugar en el extranjero," p. 618-19, in *Reflexiones sobre el derecho de la libre competencia: Informes en Derecho solicitados por la Fiscalía Nacional Económica (2010-2017)*.

[462] *See Boetsch* CeCo article.

In *Pivcevic et al. c/ Lan Chile* (2006), the Supreme Court ordered the defendant to pay consequential damages (operating losses) and loss of profits (loss of profits) due to predatory pricing achieved via tariff reductions.

[463] Boetsch, p.3.

[464] Article 30 provided:

> The action for compensation of damages that may arise, due to the issuance by the [TDLC] of a final enforceable judgment, will be filed before the competent civil court in accordance with the general rules, and will be processed in accordance to the summary procedure, established in Book III of Title XI of the Code of Civil Procedure.
>
> The competent civil court, when ruling on the compensation for damages, will base its ruling on the conduct, facts and legal classification of the same, established in the ruling of the [TDLC], issued on the occasion of the application of this present law.

DL211, Art. 30 (author's translation), as enacted by Law No. 19.911 (2003).

liability proceeding before the specialized tribunal.[465] Again, as will be discussed in more detail below, there are examples of cases brought during this period, largely between competitors, that illustrate how the 2003 reforms improved the system somewhat.[466] However, attempts to bring actions on behalf of Chilean consumers who had been harmed by a number of high-profile cartel exposed important limitations that remained.[467]

The third, and current, period began in 2016 with the enactment of Law No. 20.945, which introduced important changes to how private damages actions, especially consumer antitrust class actions, are handled. The 2016 amendments gave jurisdiction over individual follow-on damages actions to the TDLC.[468] Moreover, changes were introduced to the LPC, the consumer protection law, which explicitly allowed follow-on consumer class actions also to be brought before the same tribunal. Thus, following a judgment finding an infringement of DL211, the TDLC is empowered to hear damages complaints on an individual or class basis. Largely in line with the prior language of article

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[465] *Id*.

[466] The best-known case is *Philip Morris Chile Comercializadora Limitada c/ Compañía Chilena de Tabacos S.A.* (2013), which will be discussed in some detail below. Others, which will not be discussed because they are not as relevant here, include *Cementa con James Hardie Fibrocementos Ltda.* (2009) and *Production Química y Electronica Quinell S.A. con James Hardie Fibrocementos Ltda*. (2009) which were settled before a final resolution by the appellate courts, and *TV Cable Loncomilla S.A. con Barra y otros* (2011), which was ultimately rejected by the Supreme Court. *See* Boetsch, p.3. n.5.

[467] During this period, several collective proceedings were brought under article 30 of DL211 on the theory that such actions were allowed under article 2 bis of Law No. 19.496 on the Protection of Consumer Rights (*Ley de Protección de los Derechos de los Consumidores*, "LPC"). Class actions were filed in the *Farmacias* and *Pollos* cases, as well as in the *Tissue* cases. These will be discussed in more detail below.

[468] The Act presently provides:

> The action for compensation of damages that arises due to the issuance by the [TDLC] of a final enforceable judgment will be filed before that same Court and will be processed in accordance with the summary procedure established in Title XI of the Third Book of the Code of Civil Procedure. The resolutions pronounced in this procedure, except for the final sentence, will only be susceptible to the appeal for reconsideration, which may be processed incidentally or resolved outright. Only the final ruling will be subject to appeal before the Supreme Court.
>
> When ruling on the action for compensation for damages, the [TDLC] will base its ruling on the facts established in its ruling that serve as background to the claim. The Court will evaluate the evidence according to the rules of sound criticism.
>
> Compensation for damages will include all damages caused during the period in which the infringement continued.
>
> The action for compensation for damages derived from the agreements sanctioned in Title V of this law will be carried out in accordance with the provisions of this article, and with respect to them no civil actions may be filed in criminal proceedings.

Article 30 (author's translation).

30, the revised version states that any ruling in this subsequent proceeding will be based "on the facts established in [the TDLC's prior] ruling [on liability] that serve as background to the claim."[469] Thus, the unlawful nature of the anticompetitive conduct at issue in the prior proceeding cannot be subject to review.[470] The plaintiffs must simply prove, in a summary proceeding, the existence and amount of damages, and the causal link the between violation and the harm.[471]

The rationale underlying the 2016 amendment was threefold.

- First, changing the venue for damages actions to the TDLC was expected to contribute to judicial economy and lead to a more expeditious handling of the claims. This view was based on not only the knowledge the tribunal would already have about the case from the infringement proceeding, but also the lower workload of the TDLC compared to the civil courts.

- Second, proponents believe that, because the substance matter expertise of the TDLC and other resources at the tribunal's disposal, that body would be better suited than the civil courts for dealing with the complexities associated with damages determinations; and

- Third, placing all decisions regarding damages in a single forum would lead to more consistent application and standardization of legal norms, which in turn would provide greater predictability.[472]

This changes, combined with reforms to the LPC enacted simultaneously, to explicitly allow consumers to bring class actions under the LPC and Article 30, have laid a stronger foundation for the proliferation of damages cases to provide compensation to consumers and others harmed by anticompetitive conduct.

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[469] DL211, Art. 30. Note, however, that the earlier version stated that the court in the subsequent damages action would base its ruling "on the conduct, facts *and legal classification* of the same." (Earlier version available in https://www.bcn.cl/leychile/navegar?idNorma=236106&idVersion=2005-03-07. Whether this has any practical implication is debatable. *See* Bernedo, pp. 7-8.

[470] Some commentators have suggested that since the rule no longer refers to the "legal classification" of the facts and conduct sanctioned, it will be necessary in the damages trial to allege and prove the existence of fault or malice on the part of the defendant or the defendants. Boestch CeCo article, p. 12.

[471] *See* Stella Muñoz & Diego Hernández, Chile, Chambers and Partners: Antitrust Litigation 2022, § 2.1. Similarly, article 51 of the LPC refers to the action for compensation of damages "on the occasion of infringements [of DL 211], declared by an enforceable final judgment".

[472] *See* Javier Maturana Baeza, "La acción de indemnización de perjuicios por ilícitos anticompetitivos desde la perspectiva procesal" (julio, 2020), p. 2, available at https://centrocompetencia.com/la-accion-de-indemnizacion-de-perjuicios-por-ilicitos-anticompetitivos-desde-la-perspectiva-procesal/; *see also* Historia de la Ley Nº 20.945, 89, 134-5, 154-5, 464, 571-5 y 876-7.

***Nature of Damages Actions Before the TDLC*.** While Chile, like many countries in Europe, is commonly said to have "follow-on" damages actions only, given that a liability determination by the TDLC is required before damages can be sought under Article 30, in fact a form of "stand alone" action is possible. As noted above, a private party can initiate the underlying infringement action in the first instance.[473] This applies not just to individuals and firms affected by anticompetitive conduct, but to consumer associations as well.[474] Thus, private damages actions before the TDLC are possible without there having been any public enforcement activity.

As in the US, but unlike Canada, private damages actions in Chile could be brought for any violation of DL211 found by the TDLC.[475] As noted earlier, Article 3 provides a non-exhaustive list of anticompetitive conduct that could constitute an infringement of the Competition Act, including agreements between competitors, abuse of a dominant position, predatory pricing or other unfair competitive practices, and competitor interlocks, among others.[476] Thus, provided that the plaintiff can prove causation and damages, damages actions theoretically should be available for the entire range of anticompetitive conduct. While consumers are commonly harmed by collusion, it is also possible for them to suffer damages from other anticompetitive conduct, such as abuses of dominance. Allowing damages actions for the full range of anticompetitive conduct (as in the US, and unlike Canada at present) should tend to facilitate providing compensation for all harms suffered.

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[473] DL211, Art. 18(1) (stating that the TDLC can "[c]onocer, *a solicitud de parte* o del Fiscal Nacional Económico, las situaciones que pudieren constituir infracciones a la presente ley.") (emphasis added).

It has been argued that these actions before the TDLC might not, strictly speaking, be considered "private enforcement" since they are limited to the TDLC adopting one of the measures contained in Article 26 of DL 211, which includes modification or termination of the challenged acts, dissolution of legal persons, imposition of fines, and prohibition of contracting with the state, among other remedies, but not compensation for damages, which can only be sought after an infringement has been found. *See* Boetsch Gillet, Cristián. Indemnización de perjuicios a consumidores por atentados a la Libre Competencia, Investigaciones CeCo (2021), at 8 n. 30. However, as noted in the discussion on the US, not all private actions there are necessarily damages actions. Some, like Epic's recent trial against Google, involve only requests for injunctive relief similar to some of the measures available under Article 26.

[474] See Arancibia Mattar, J, La legitimación activa en procesos correctivos y sancionatorios de libre competencia, Revista de Derecho núm. 56 (2021): 53-81, Pontificia Universidad Católica de Valparaíso, pp. 69-70.

The question of indirect purchaser standing will be discussed in the following section.

[475] *See* DL211, Art. 30 (referring without limitation to an action based on "la dictación por el Tribunal de Defensa de la Libre Competencia de una sentencia definitiva ejecutoriada").

[476] DL211, Art. 3.

There is some uncertainty about whether actions that implicate competition law might also be possible to bring in the civil courts without a prior judgment by the TDLC.[477] If a damages action is premised on a violation of DL211 and grounded on an infringement decision of the TDLC, the claim almost certainly will need to be brought under Article 30 before the TDLC.[478] Some recent decisions suggest there may be room for such actions in certain circumstances. This makes sense given that, as experience has shown in the US and Canada, various legal norms, such as consumer protection and unfair competition laws, that protect different rights that can be implicated by the same facts that constitute an infringement of the antitrust laws.[479]

A prior infringement decision is not only a prerequisite of a damages action under Article 30, that decision by the TDLC also delimits the scope of the conduct for which compensation may be claimed in the subsequent proceeding.[480] Moreover, the damages that can be sought only extent to the period in which the infraction took place,[481] which again can lead to under-compensation to the extent harm continued after the anticompetitive conduct ended.[482] These are important limitations given that in many other

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[477] *Compare, e.g.,* Hernández & Tapia, p. 100 ("En nuestra opinión, dicha sentencia [of the TDLC] se requiere *solo* para incoar el juicio indemnizatorio individual o colectivo ante el TDLC y contar con el beneficio del efecto reflejo de la cosa juzgada.... [I]gualmente podrían interponerla ante el tribunal civil competente, pero en ese caso no contarían con el beneficio del efecto reflejo de la cosa juzgada, debiendo probar en el proceso correspondiente *todos* los requisitios de la responsabilidad civil.") with Boetsch pp. 6-7 ("We would like to disagree with this opinion, of course because it does not agree with the clear meaning and tenor of the provisions that regulate the matter (articles 30 DL 211 and 51 LPC) on this point, which precisely show that the action for compensation only comes into legal life on the occasion of an enforceable judgment issued in a place of free competition.").

[478] Maturana Baeza, p. 6.

[479] *See* Maturana Baeza, "La acción de indemnización de perjuicios por ilícitos anticompetitivos desde la perspectiva procesal" (julio, 2020), p. 5-6.

[480] *See id.*, citing *Netline Mobile S.A. con Telefónica Móviles Chile S.A. y otros,* Rol Nº 7.368-2018, Sentencia Corte Suprema (2020), c. 14. *See also Papelera Cerrillos S.A. con SCA,* Rol CIP N° 3-2020, Ruling N°188/2023. See UAI CentroCompetencia's case summary.

[481] *See* DLL 211, Art. 30 ("La indemnización de perjuicios comprenderá todos los daños causados durante el período en que se haya extendido la infracción.")

[482] *See* María Victoria Edwards V., Jorge Fantuzzi M. y José Miguel Gana E., "Acciones de indemnización de perjuicios a partir de conductas anticompetitivas", CentroCompetencia UAI (abril, 2020), available at https://centrocompetencia.com/acciones-de-indemnizacion-de-perjuicios-a-partir-de-conductas-anticompetitivas/.

As the authors note regarding the potential for under-compensation by assuming that further damages do occur after the cessation of the infringement:

> "It is not difficult to understand that, for example, for a company that has been the victim of exclusionary conduct for a prolonged period – which implies losing or not attracting customers – things will not return to normal the day after the cessation of the

jurisdictions even "follow on" cases include "stand alone" elements, either in terms of conduct or time.

The inability to broaden the scope of conduct for which damages can be claimed in the subsequent proceeding can potentially lead to under-compensation if the earlier proceeding did not encompass (for whatever reason) the totality of the anticompetitive conduct or harm. That said, to the extent interested parties are allowed to participate in proceedings during the infractional stage, or to bring their own "stand alone" infractional claims (as is the case under DL211), that should make these concerns less problematic than if the claimant had no opportunity to do so and was strictly reliant on public enforcers to obtain the underlying judgment. Furthermore, not restricting the damages action to the conduct at issue in the earlier phase would negate many of the efficiency benefits being sought.

Available Damages. DL 211 provides that "all damages caused" shall be compensated. In other words, actual damages are available, which include both economic and non-economic damages[483]. While Article 30 does not refer specifically to the types of damages that are recoverable, under the general rules, economic harms suffered as a result of an infringement, such as an overcharge paid by consumers, would be recoverable (*daño emergente*). Similarly, lost earnings would also be compensable (*lucro cesante*).[484-485] In consumer cases, under Article 3(e) of the LPC, not only are all material damages

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anticompetitive conduct, but some period is required for the affected company to be able to operate in this "competitive" market in order to recover or capture the customers it lost."

Id. at 6.

[483] *See* Alvarado García & Guevara Parra, "Reparación del daño moral en procedimientos colectivos originados por conductas anticompetitivas" CentroCompetencia UAI (October 2022), available at https://centrocompetencia.com/wp-content/uploads/2022/10/Alvarado-y-Guevara-Reparacion-dano-moral.pdf

[484] Código Civil 1556: "La indemnización de perjuicios comprende el daño emergente y lucro cesante, ya provengan de no haberse cumplido la obligación, o de haberse cumplido imperfectamente, o de haberse retardado el cumplimiento. Exceptúanse los casos en que la ley la limita expresamente al daño emergente."

See Hernandez & Tapia, p. 32-40 for a more detailed discussion.

[485] Some authors also argue that the "loss of a chance" (i.e., compensation for the business opportunity that is lost) is also a category of compensable damage in the field of competition law, with some discussion as to whether this is a separate category or rather a sub-category of lost profits. *See* Fantuzzi & Sanders, "*Pérdida de Chance y Libre Competencia"*, CentroCompetencia UAI (November 2022), available at: https://centrocompetencia.com/wp-content/uploads/2022/11/Fantuzzi-Sanders-Perdida-de-chance-y-libre-competencia.pdf.

recoverable but also "moral" (non-economic) damages are recoverable as well when the physical or phycological integrity or dignity of the plaintiff has been affected.[486]

Punitive damages are not generally available. However, in consumer class actions, which will be discussed in the next section, a 2018 amendment to the LPC, Article 53(B)(c), allows the court can increase a damages award by 25 percent when certain aggravating circumstances are present, including if the defendant had previously been sanctioned for the same conduct or the conduct caused serious economic harm to consumers, among others.[487] Only post-judgment interest is available. Importantly, under the Civil Code, tortfeasors are jointly liable for damages caused by unlawful practices.[488]

While the absence of punitive damages or treble damages in the US is often cited as a reason why private damages actions might not be common in a particular country, the experience in Canada and more recently in some European jurisdictions calls that into question. The damages available in Chile in some ways go beyond what is likely recoverable even in the US in terms of breadth. But even the ability to recover more conventional damages, like overcharges and lost profits, should be sufficient *provided that they are accompanied by appropriate burdens of proof that do not make them simply theoretical in light the access to evidence that is allowed*. As discussed below, making the TDLC—with its technical expertise—the venue for damages actions under Article 30 is one way in which the 2016 reforms is most likely to contribute to the viability of damages actions in Chile.[489]

Summary Procedure. Article 30 provides that damages actions before the TDLC will be handled as "summary procedures" under Title XI of the Code of Civil Procedure. These are rules designed to expedite the resolution of certain types of disputes in a swift and efficient manner, while ensuring that parties still have the opportunity to present their arguments and evidence. In theory, a summary procedure is intended to be primarily oral,

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[486] LPC, Art. 51 ("Las indemnizaciones que se determinen en este procedimiento podrán extenderse al daño moral siempre que se haya afectado la integridad física o síquica o la dignidad de los consumidores.").

Using an example from the *Farmacias* case, if an individual was unable to purchase necessary medication because of a price increase, and that led to a worsening of a medical condition, the health impairments suffered as a result of the collusion theoretically could be compensable. Hernández & Tapia, p. 39.

[487] *See* Hernández & Tapia, p. 48.

[488] Código Civil, Art. 2317: "Si un delito o cuasidelito ha sido cometido por dos o más personas, cada una de ellas será solidariamente responsable de todo perjuicio procedente del mismo delito o cuasidelito, salvas las excepciones de los artículos 2323 y 2328".

[489] Edwards et al (CeCo), p. 5 ("la composición mixta del TDLC (abogados y licenciados o con postgrados en ciencias económicas) le permite valorizar y considerar de mejor forma los efectos económicos reales provocados por las conductas que han entendido como anticompetitivas, ya no sólo por sus efectos en el mercado en general (lo que fundamentalmente determina la sanción), sino que por sus efectos dañosos a actores específicos del mercado de que se trata.").

but the parties may—and in these cases, always will—present written materials establishing the facts alleged and the requests made.[490] The court will review the written submissions and evidence provided by both parties and may issue a judgment based solely on this information. However, parties may still request a hearing if they believe oral testimony or additional evidence is necessary to support their case, which shall be conducted in accordance with the rules and deadlines of the "incidents" proceedings.[491]

Despite the intent that follow-on damages matters be handled expeditiously, these matters have generally proceeded slowly[492]. This could be attributed to a variety of explanations. To the extent these are the result of claimants seeking access to information from the infringement proceeding that they believe is needed to establish their claims, this could improve over time if, for instance, the TDLC adopted clear rules under article 18(6) regarding such access for claimants. Moreover, as additional clarity is gained regarding what evidentiary burdens plaintiffs will be expected to meet, and as counsel for consumer plaintiffs gain additional experience, one might expect to see improvements.

It is important to note that this summary procedure before the TDLC only applies when the plaintiff for damages is a company, an individual consumer or a group of less than 50 consumers. However, when the plaintiff is the SERNAC, a consumer association, or a group of not fewer than 50 consumers, then the applicable procedure is the one regulated under the LPC, for the protection of the collective or diffuse interests of consumers (as will be explained in the next section).[493]

Limitations Periods. An infringement proceeding under DL211 must be commenced three years of the conduct on which it is based. That period, however, is

[490] Código de Procedimiento Civil, Art. 682.

[491] Código de Procedimiento Civil, Art. 686 ("La prueba, cuando haya lugar a ella, se rendirá en el plazo y en la forma establecida para los incidentes").

[492] For instance, in *Papelera Cerrillos S.A. con SCA* (Rol CIP N° 3-2020), the case took almost 3 years and 8 months from the filing of the damages action to its final ruling by the TDLC (which currently is being reviewed by the Supreme Court; Rol 471-2024). Some of the procedural episodes that explain part of this slowness are the time it took for the plaintiff to serve the lawsuit (more than two months) and to serve the resolution that received the case for evidence to the defendant (6 months; which is the legal deadline for this action), as well as a few incidents regarding evidentiary proceedings.

[493] LPC, Art 51 ("No obstante lo dispuesto en el artículo 30 del decreto e) con fuerza de ley N° 1, de 2004, del Ministerio de Economía, Fomento y Reconstrucción, que fija el texto refundido, coordinado y sistematizado del decreto ley N°211, de 1973, y sin perjuicio de las acciones individuales que procedan, la acción de indemnización de perjuicios que se ejerza ante el Tribunal de Defensa de la Libre Competencia, con ocasión de infracciones a dicho cuerpo normativo, declaradas por una sentencia definitiva ejecutoriada, podrá tramitarse por el procedimiento establecido en este párrafo cuando se vea afectado el interés colectivo o difuso de los consumidores").

interrupted by complaint brought before the TDLC by the FNE or private party.[494] Cases involving cartels must be brought within five years, but that period does not begin to run while there are still effects attributable to the unlawful conduct.[495]

In cases of follow-on damages actions under Article 30, the statute of limitations is unlikely to be an impediment to effective enforcement. Under Article 20 of DL211, claimants have four years from the date of the TDLC infringement judgment in which to bring a claim.[496] If actions before civil tribunals are allowed, the limitations period is also four years.[497] That period, however, runs from the time the act was committed.[498]

c. Consumer Class Actions Based on Competition Law Infringements

Consumer damages actions can be done individually or on a class basis.[499] Regarding class actions, as noted earlier, one of the reforms introduced in 2016—in the wake of several cartel matters involving consumer products—was to explicitly allow these actions to be brought before the TDLC to seek damages caused by anticompetitive conduct. Article 51 of LPC, and Article 30 of DL211, allows consumers who have been harmed to bring actions seeking compensation following an infringement ruling by the Tribunal.[500]

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[494] DL211, Art. 20. Note that the "interruption" of the limitation period means that the calculation of the period is reset (to zero) by the complaint. This is different from the "suspension".

[495] DL211, Art. 20.

[496] *Id*.

[497] Código Civil 2332. However, in the event there is a contractual relationship between the parties, the limitations period would be five years. Hernández & Tapia, p. 151.

[498] *Id*. Arguably the four years run from the time the harm is produced and is known by the victim of the conduct. *See* Hernández & Tapia, pp. 151-52. That would be more consistent, as the authors note, with the EU Damages Directive, which states that the limitations period should not begin to run before the infraction has ended and the claimants know, or could reasonably know, about (a) the conduct, (b) the infraction, and (c) the identity of the wrongdoer.

[499] Art. 50, LPC.

[500] Article 51, which establishes a procedure for class proceedings under the LPC, provides in relevant part:

> "[T]he action for compensation of damages that is exercised before the [TDLC], on the occasion of violations of said body of regulations, declared by a final enforceable ruling, may be processed by the procedure established in this Paragraph when the collective or diffuse interest of consumers is affected. The resolutions that said court issues in this procedure, except for the final sentence, will only be susceptible to the appeal for reconsideration, which may be processed incidentally or resolved outright. Only the final ruling and those resolutions that put an end to the procedure or make its continuation impossible will be subject to appeal in this case, to the Supreme Court."

In class cases, the legislation contemplates two different types of interests that can be protected:

- Collective interests: These apply to actions that are promoted in defense of rights common to a specific or determinable group of consumers, linked to a supplier by a contractual link.

- Diffuse interests: These are actions that seek to defend an indeterminate group of consumers whose rights are affected.[501]

These actions can be brought on a class basis by any of the following: (1) Chile's consumer protection agency, SERNAC (*Servicio Nacional del Consumidor*); (2) a consumer association that had been established at least six months before the action is brought and that has been authorized by its board of directors to proceed with such an action; or (3) a group of not fewer than 50 who share the same interest in the matter.[502] The 2016 reforms explicitly note that the claimants need not have taken part as an interested party during the prior infringement proceedings before the TDLC.[503]

Importantly, for the reasons discussed in earlier sections, class actions brought under the LPC are very similar to an opt-out proceeding. The LPC does not require that affected consumer take any steps in order for the outcome of the proceeding to be applicable to them, nor are they required to authorize direct representation to the plaintiff.[504] Once the court admits the claim, it must order the plaintiff to notify the affected consumers through publication in a medium with national circulation and on the SERNAC website, and consumers then have 20 days in which to either exercise the right to join the action or to reserve their rights, i.e., opt out of the proceeding.[505] Article 53C of the LPC

[501] Art. 50, LPC.

An example of a group with diffuse interests can be found in the *Farmacias* case, consisting of individuals who, because of the price increase of pharmaceuticals, were unable to obtain the medications they needed, or had to substitute inferior medications. *See* Hernandez & Tapia, p. 81.

[502] Art 51(1). The legislation further provides that the tribunal will notify SERNAC of the action when the agency was not the one initiating the proceeding.

[503] Art. 51, LPC ("Para interponer la acción a que se refiere el inciso anterior, no será necesario que los legitimados activos señalados en el numeral 1 de este artículo se hayan hecho parte en el procedimiento que dio lugar a la sentencia condenatoria.").

In addition to being able to bring class actions, SERNAC, since 2019 with the enactment of Law No. 21.081, has also had the ability to initiate a voluntary procedure in which firms that had been sanctioned by the TDLC can participate, and offer compensation to affected consumers. The idea is to provide a faster means of obtaining compensation for antitrust infringements. If this procedure does not result in a resolution, damages claims can be pursed before the TDLC.

[504] Hernández y Tapia, Colusión y Daños a los Consumidores, p. 86.

[505] LPC Art. 53.

gives the court the power to order compensation without the need for the consumers to appear in the proceeding.[506] Moreover, article 54 provides that the final ruling issued in a collective trial must be made known to all similarly situated victims of the conduct at issue so that they can claim their corresponding compensation.[507]

***Consumer Associations*.** Before moving on to certain procedural issues under the LPC, it is perhaps a good time to provide a brief synopsis about consumer associations in Chile and how they operate. *Consumer associations are not-for-profit organizations regulated by the LPC. These groups must be "independent of any economic, commercial or political interest,"* [508] *are legally authorized to represent consumers in infringement and damages proceedings, both with respect to the collective and diffuse interest of consumers.*[509] *Currently there are more than 30 consumer associations throughout the country.*[510]

The LPC imposes several funding constraints on consumer associations to maintain their non-profit nature. Among other restrictions, they may not be incorporated or operated for the purpose of redistributing their funds to their founders or members.[511] *They are not allowed to distribute any attorneys' fees or costs recovered through their legal activities, or any profits, to their members. Instead, their income must be used exclusively for the*

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[506] LPC Art. 53 C "En todo caso, el juez podrá ordenar que algunas o todas las indemnizaciones, reparaciones o devoluciones que procedan respecto de un grupo o subgrupo, se efectúen por el demandado sin necesidad de la comparecencia de los interesados establecida en el artículo 54 C, cuando el juez determine que el proveedor cuenta con la información necesaria para individualizarlos y proceder a ellas. En este último caso, la sentencia deberá establecer un conjunto mínimo de acciones destinadas a informar a quienes resulten alcanzados por el respectivo acuerdo las acreencias que tienen a su favor, facilitar su cobro y, en definitiva, conseguir la entrega efectiva del monto correspondiente a cada consumidor, pudiendo imponer al proveedor la carga de mandatar a un tercero independiente para la ejecución de dichas acciones, a su costa y con la aprobación del tribunal. El proveedor deberá transferir la totalidad de los fondos al tercero encargado de su entrega a los consumidores. La sentencia deberá establecer, además, un plazo durante el cual las diligencias referidas en este inciso deberán ejecutarse. Transcurridos dos años desde que se cumpla dicho plazo, los remanentes que no hayan sido transferidos ni reclamados por los consumidores caducarán y se extinguirán a su respecto los derechos de los respectivos titulares, debiendo el proveedor, o el tercero a cargo de la entrega, enterar las cantidades correspondientes al fondo establecido en el artículo 11 bis".

[507] LPC Art. 54, inc. 2 "La sentencia será dada a conocer para que todos aquellos que hayan sido perjudicados por los mismos hechos puedan reclamar el cobro de las indemnizaciones o el cumplimiento de las reparaciones que correspondan".

[508] LPC, Art. 5.

[509] LPC, Art. 7 (e).

[510] *See* "Conciliación parcial por indemnización del 'Caso Pollos': las preguntas e inquietudes pendientes" CentroCompetencia UAI (January 2023), available at: https://centrocompetencia.com/conciliacion-parcial-indemnizacion-caso-pollos/

[511] LPC, Art. 9(a).

organization's financing, institutional development and research.[512] *In view of these constraints, the law created a fund to finance the initiatives of these associations, which is financed through budgetary contributions by SERNAC, donations by non-profit bodies to, and the unclaimed remnants of agreements reached in class actions (as will be discussed below)*.[513]

Admissibility. Unlike in jurisdictions like the US and Canada, there is no class certification phase under the LPC in Chile. Rather, there is only an admissibility phase. Assuming a complaint filed by a plaintiff with legal standing complies with the pleading requirements applicable to all complaint, the class action will be admitted.[514] Even before reforms promulgated in 2018, in Law No 21.081, the LPC only required that the complaint contain a clear statement of the facts and legal bases that reasonably justified the alleged collective or diffuse interest.[515] Since then, the requirements have been eased further.[516] Nevertheless, under Article 53 A of the LPC, the tribunal retains the authority throughout the process to form groups or subgroups.[517]

***Coordination of Actions*.** It is possible for multiple damages actions relating to the same subject to be filed and pursued simultaneously. In some instances, the plaintiffs might be representing different interests (for example, multiple firms seeking to recover their individual damages); in others, however, the cases might overlap in terms of the consumers they are representing.[518] To the extent those cases are filed in the TDLC, these can be joined in a single proceeding.[519] No procedural rules like US MDL exist that would

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[512] LPC, Art. 9(b).

[513] LPC, Art 11 bis.

[514] Stella Muñoz & Diego Hernández, Chile, Chambers and Partners: Antitrust Litigation 2022, § 3.2.

[515] Hernandez & Tapia, p. 81.

[516] *See id*. Article 52 provides: "The court will examine the claim, declare it admissible and process it, once it verifies the concurrence of the following elements: a) That the claim has been filed by one of the legitimate assets identified in article 51. b) That the claim complies with the requirements established in article 254 of the Code of Civil Procedure, which will only be verified by the judge, without being able to be discussed at this stage."

[517] LPC, Art. 53 A ("During the trial and up to and including the issuance of the final sentence, the judge may order, according to the characteristics that are common to them, the formation of groups and, if justified, subgroups, for the purposes of what is indicated in the letters c) and d) of article 53 C. The judge may also order the formation of as many subgroups as deemed appropriate.")

[518]For instance, in the *Pollos* case (CIP 2-2019), both Conadecus and FOJUCC (both consumers associations) filed a joint lawsuit representing a diffuse group of consumers.

[519] Pursuant to the general rules of *litisconsorcio* established in the Civil Procedural Code, which are applicable to any judicial procedure (Title II: "Plurality of Actions and Parties"; articles 18 to 24). Art. 18 establishes that "In the same judicial proceeding, several individuals may intervene as plaintiffs or defendants provided that the same cause of action is asserted, or actions that directly and immediately arise

allow for cases brought in a civil court to be transferred to the TDLC, and overlapping actions conceivably could proceed in parallel.[520] Of course, similar situations can and do occur elsewhere, and it is not an insurmountable obstacle to the system functioning. But some method of coordination would be beneficial in these circumstances.

As consumer associations proliferate and damages actions become more frequent, it is likely that conflicts will arise between plaintiffs. Currently, there is no mechanism to allow for a leadership structure to be appointed. One procedural rule[521] allows multiple plaintiffs to act jointly in a single trial, through a common attorney or "procurador", when their lawsuits stem from the same facts and they all have compatible interests regarding the result of the trial. This might be sufficient in follow on cases under Article 30 to address any issues. However, the lack of any mechanism for designating leadership of a particular class could lead to free riding and disincentivize attorneys from taking on more ambitious litigation, including "stand alone" proceedings, on behalf of consumer associations.

***Indirect Purchaser Standing*.** One fundamental question that remains unanswered—and that will significantly impact the ability of the current system to compensate Chileans who have been harmed by anticompetitive conduct—relates to the ability of indirect purchasers to pursue damages claims. As noted elsewhere, when anticompetitive conduct upstream in the distribution chain, prices increases can potentially cause harm not only to direct purchasers, but also intermediaries that use the goods as inputs, and end consumers of the good. Indeed, some of the high-profile cartel cases in Chile in recent years, including *pollos* and *tissue*, have implicated consumer goods.

While Article 30 of DL211 seems clear that any "indemnification of harms will encompass all damages caused",[522] most indirect purchaser consumer cases involve small individual claims that can only be addressed economically in a class proceeding. And it is the class action mechanism of the LPC where questions have arisen, particularly the language in article 50, which defines a "collective interest" as an action involving the defense of rights common to a specific or determinable group of consumers "linked to a supplier by a contractual relationship", and adds that, for purposes of determining the appropriate compensation or reparations, "it will be necessary to prove the damage and

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from the same event, or when proceedings are conducted jointly by many or against many in cases authorized by law".

[520] In fact, a somewhat analogous situation is presently occurring in the *Navieras* case before the TDLC and *ODECU CASE* in civil court. These will be discussed further below.

[521] Art. 18, 19 & 20, Código de Procedimiento Civil.

[522] Art. 30, DLL211 (author's translation).

the contractual link that binds the offender and the affected consumers."[523-524] Thus, commentators have argued, and in at least one antitrust damages case, *pollos*, a civil court has agreed, that this provision precludes indirect purchaser actions.[525] Others, however, do not see this as an obstacle to indirect purchasers being able to pursue damages claims.[526] As two experienced Chilean competition practitioners have written:

> "The case law in this area has shown an evolution in terms of extending the concept of a consumer, recognizing not only onerous contractors, but also those who enjoy or use the good or service without necessarily having entered into a contract with the supplier. In this sense, it is possible for an indirect consumer to bring an action for damages, especially in the case of class actions that protect a diffuse interest. However, there is no consensus among academics."[527]

If the TDLC (and more importantly, the Supreme Court) ultimately allows indirect purchaser class actions, there still remains the question of which indirect purchasers might be able to do so. Recall that in the US and Canada, class actions sometimes encompass multiple levels of indirect purchasers, including indirect purchaser intermediaries who subsequently resold the affected goods. In Chile, however, that might not be possible. The LPC defines a consumer as an individual or legal entity who "acquires, uses or enjoys a good or service as a final recipient."[528] A supplier, in turn, is defined as one who "habitually produces, manufactures, imports, constructs, distributes or commercializes goods or provides services to final consumers for which a price or fee is

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[523] LPC, Art. 50 ("Se considerarán de interés colectivo a las acciones que se promueven en defensa de derechos comunes a un conjunto determinado o determinable de consumidores, ligados con un proveedor por un vínculo contractual. Son de interés difuso las acciones que se promueven en defensa de un conjunto indeterminado de consumidores afectados en sus derechos.").

[524] On September 2023, the Government submitted to the Congress a bill of law (*Boletín N°16271-03*) that, among other reforms, intends to eliminate the requisite of contractual link in order to file a collective interest action (available at https://www.camara.cl/legislacion/ProyectosDeLey/tramitacion.aspx?prmID=16826&prmBOLETIN=16271-03).

[525] Boetsch p. 14. in the *pollos* case, a civil court ruled that the defendants could not be sued "because they are not suppliers and because they are not contractually related to the consumers of these products." Servicio Nacional del Consumidor con Agrícola Agrosuper S.A. y otros, Rol C N° 28.470-2015, del 29° Juzgado Civil de Santiago.

[526] *See, e.g.*, Hernández & Tapia, pp. 145-150.

[527] Stella Muñoz & Diego Hernández, Chile, § 2.5 (direct and indirect purchasers). In addition to Hernandez & Tapia, other commentators have argued that indirect purchasers have standing to bring damages actions (Fuchs and Vives, 2014; Lewin, 2009 and 2011).

[528] LPC, Art. 1 (1).

charged."[529] The LPC explicitly excludes suppliers from the definition of consumers for the purposes of the law.[530] In that case, it seems likely that only end user indirect purchaser class actions are feasible.

Not allowing indirect purchaser to pursue damages claims on a class basis would severely undermine the ability of the Chilean system to fulfill its compensatory role. Given the impact of cartels and other anticompetitive conduct on end consumers, disallowing indirect purchaser standing is likely to mean that no compensation is paid. Even if indirect purchasers could sue individually under Article 30 of DL211, that most likely would be feasible only with large-scale purchasers or purchases involving high value goods. Harms in typical consumer claims would go uncompensated. Even if they are allowed, however, the inability of intermediate indirect purchasers to bring class claims will likely result in under-compensation in situations where overcharges are not passed through in their entirety and the individual claims of those intermediaries are not large enough to pursue economically. Nevertheless, the additional complexities that would be introduced into the process might not justify any added benefit.

Class Compensation and Remainders. The LPC gives the tribunal broad authority over determining the indemnification that will be ordered, with the only limitation that it be the same for similarly situated class members.[531] When making a final judgment, the court is required to set out the compensation or reparations owed, and the amount to each group or subgroup, when applicable.[532]

In some situations where the defendant has information the identity of class members, the court, under Article 53 C (inciso segundo), can order some or all of the compensation be made without the need for their appearance.[533] In that case, the ruling is also to establish a minimum set of actions aimed providing notice to class members, of facilitating the collection of the amounts owed, and ultimately, of effectuating delivery of the corresponding amount to each consumer.[534] In addition, the court can require the defendant to contract with an independent third party to carry out the distribution of the funds, at the defendant's expense. In that case, the funds are transferred to the third

[529] LPC, Art. 1 (2).

[530] LPC, Art. 1 (1) ("En ningún caso podrán ser considerados consumidores los que de acuerdo al número siguiente deban entenderse como proveedores.").

[531] Hernández & Tapia, pp. 71-72. *See also* LPC, Art. 51(2). Recall that throughout the trial and up to and including the issuance of the final judgment, the judge may order the formation of groups and subgroups according to their common characteristics. LPC, Art. 53A.

[532] LPC, Art. 53 C (d).

[533] LPC, Art 53 C (inciso segundo).

[534] *Id*.

party.[535] If, as commonly occurs, funds are left over, those are not returned to the defendant. Instead, they are transferred to a fund destined to financing consumer association initiatives.[536]

This procedure is very reminiscent of processes that have been used elsewhere for distribution of funds obtained in class proceedings and is very effective in facilitating both the compensatory function, in getting funds to consumers, either directly or indirectly, through a *cy pres* like payment of the remainder. Additionally, it strengthens the deterrent effect of a judgment, since the entire amount is paid out (unlike in, for example, the Colombia context, where remainders are returned to the defendant). However, this provision appears to apply only when the defendant actually knows the identity of class members, which is unlikely to be the case in many indirect purchaser situations. In that case, consumers must, within a prescribed period of time, make an appearance before the tribunal in order for her status as a member of a class or subclass to be accredited. In a large class case, such a procedure would impose significant burdens on a tribunal. In addition, it is unclear what would happen to any unclaimed remainder. The process set out in Article 53 C, described above, or the similar process provided for in the settlement context would serve as better models.[537]

Settlements. The LPC places considerable emphasis on voluntary settlements. Apart from the voluntary procedure that potential defendants can enter into with SERNAC,[538] the LPC allows litigants to reach negotiated agreements or conciliations.[539] Any such agreements must be public, and in fact, they must—like with Article 53 C—an adequate process for notifying affected consumers. The LPC contemplates that any such settlements will involve distribution of benefits to class members through independent third parties, with any remaining funds being distributed in a *cy pres* like manner.[540]

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[535] *Id*.

[536] *Id*.

[537] In the *Tissue* case, which will be discussed more below, all consumers 18-years or older as of the date of the settlement, were entitled to receive CLP$7,000. Similar to the mechanism under Article 53 C, those who had certain bank accounts at BancoEstado or who received permanent monthly payments from the Instituto de Previsión Social (i.e., those who could be identified and provided compensation with existing information) received payment automatically. Others were able to make a claim on a website, micompensacion.cl. Remaining funds were distributed to vulnerable citizens through IPS. *See* SERNAC, Compensación papel higiénico, https://www.sernac.cl/portal/604/w3-propertyvalue-59118.html.

[538] LPC, Art. 54 H.

[539] LPC, Art. 53 B.

[540] LPC, Art. 53 B ("Likewise, these agreements must designate an independent third party mandated to carry out, at the provider's expense, the previously indicated procedures, unless other means are preferable, in the specific case, to achieve the effective transfer of the money that corresponds to each consumer. To comply with said mandate, the provider must transfer all of the funds to the third party in charge of delivering them to

Agreements also need to be approved by the Tribunal, provided that they do not contravene any principles set out in the Competition Act.[541] The first such agreement presented to the TDLC came in late-December 2022 in a follow-on class action filed by two consumer associations, CONADECUS and *FOJUCC, based on the judgment in the Pollos cartel. The settlement provided for a cy pres distribution of almost US$25 million to 23 non-profit foundations. While there were good arguments to justify the settlement, it nevertheless came under harsh criticism.*[542] *SERNAC, for instance, objected that a "settlement offer" would have to comply with a series of requirements that were not present in the agreement presented to the TDLC, including: (i) some indication of the overall amount of damage caused to consumers, and the objective bases used for its determination; and (ii) the identification of the groups or subgroups of consumers affected.*[543] *At a minimum, some analysis along these lines—combined with a consideration of further litigation risks—would be desirable to ensure that a settlement is fair and reasonable.*

d. Other Issues Relevant to Effective Private Enforcement

i. Access to Evidence

Access by claimants to the evidence necessary to prove their claim is an important issue that will have obvious impacts on the evolution of the Chilean system. Unlike in the US and Canada, but like other civil law jurisdictions, there is no pre-trial discovery phase. As was noted in Europe, this poses a real problem for claimants not just in standalone cases but also follow-on matters.[544]

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consumers. These agreements must establish, in turn, a period during which the procedures referred to in this section must be executed. After two years from the expiration of said period, the remainders that have not been transferred or claimed by consumers will expire and the rights of the respective owners will be extinguished, and the supplier, or the third party in charge of delivery, must inform the amounts corresponding to the fund established in article 11 bis.")

[541] DL211, Art. 22 ("Acordada una conciliación, el Tribunal se pronunciará sobre ella dándole su aprobación, siempre que no atente contra la libre competencia.").

[542] *See* Ana María Montoya, Compensaciones y caso Pollos: algo está fallando, Diario Financiero (March 3, 2023) ("A mi juicio, esta conciliación deja mucho que desear. Gran parte de la legitimidad del sistema recae en tener autoridades que han ejercido sus atribuciones para investigar y sancionar carteles. Pero también debe considerar la relevancia que tiene la compensación de los daños a los consumidores finales.").

[543] LPC, Art. 53 B.

[544] *See* Levin & Borquez ("This leads to a problem for cases where the FNE is not willing to act (most cases where there is little or no public interest involved) and obtaining evidence of a conduct or market becomes difficult for filing a suit before the TDLC and the follow-on action afterwards. In cases where the FNE is involved, the agency uses its powers in order to obtain the evidence needed regarding the conduct and the markets involved.")

Disclosure of evidence during trial in Chile is governed by Article 349 of the Code of Civil Procedure, which allows a party to request the disclosure of specific documents in the possession of another party or third party that are directly related to issues in dispute.[545] Expenses incurred by the exhibition are to be borne by the party making the request. The target of the request is not required to make the disclosure, and sanctions for the refusal seem insufficient. Disclosure in the consumer context, however, is more demanding. Article 51 of the LPC requires that defendants deliver to the court all instruments that the court, on its own or at the request of a party, orders, provided that the documents are in the defendant's possession (or should be) and have a direct relationship to the matter at issue. Refusal to do so allows the court to treat the allegations of the opposition party on that issue as proven.[546] In addition, certain documents can be requested before trial begins as a preparatory matter. [547-548] This is one of the more common avenues for access to evidence in the TDLC.

There is not a lot of experience yet with how the TDLC will handle requests for access to evidence in damages cases. Given the experience of the tribunal with the particular needs of litigants in competition-related matters, however, this is one important area in which having these issues decided by a specialized body could be beneficial. One

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[545] Art. 349 (338) provides:

> Podrá decretarse, a solicitud de parte, la exhibición de instrumentos que existan en poder de la otra parte o de un tercero, con tal que tengan relación directa con la cuestión debatida y que no revistan el carácter de secretos o confidenciales.
>
> Los gastos que la exhibición haga necesarios serán de cuenta del que la solicite, sin perjuicio de lo que se resuelva sobre pago de costas.
>
> Si se rehúsa la exhibición sin justa causa, podrá apremiarse al desobediente en la forma establecida por el artículo 274; y si es la parte misma, incurrirá además en el apercibimiento establecido por el artículo 277.

[546] LPC, Art. 51 (inciso final) provides:

> Los proveedores demandados estarán obligados a entregar al tribunal todos los instrumentos que éste ordene, de oficio o a petición de parte, siempre que tales instrumentos obren o deban obrar en su poder y que tengan relación directa con la cuestión debatida. En caso de que el proveedor se negare a entregar tales instrumentos y el tribunal estimare infundada la negativa por haberse aportado pruebas acerca de su existencia o por ser injustificadas las razones dadas, el juez podrá tener por probado lo alegado por la parte contraria respecto del contenido de tales instrumentos.

[547] A person can also request the disclosure of specific documents in a pre-trial stage, pursuant to Art. 273 N°3 of the Civil Procedural Code ("public or private documents that, by their nature, may be of interest to various individuals"). For this, the applicant must indicate: (i) the action that she is going to file, (ii) its basis grounds, and (iii) how the exhibition is necessary so that she can begin the procedure (see articles 273 and 287 CPC).

[548] Stella Muñoz & Diego Hernández, Chile, § 2.5.

matter is perhaps instructive of what can be expected. In a complaint brought by the consumer association AGRECU in the *Supermercados* matter, the tribunal ordered the disclosure of a broad range of sales data that would be crucial for calculation of consumer damages.[549] The TDLC also appears to be willing to implement innovative approaches to ensure that confidentiality concerns—which common arise in these matters—do not preclude such access.[550] If the TDLC demonstrates over time that relevant evidence will be made available to claimants that will allow them to be able to prove their claims, that will likely foster the growth of damages actions.

Access to evidence might be made available through other mechanisms as well. One that could go a significant way towards facilitating damages actions would be to automatically grant plaintiffs in a follow-on proceeding with access (under appropriate non-disclosure obligations) to the FNE investigative file from the underlying infractional proceeding.[551] Exceptions might be advisable for certain categories of information provided by leniency applicants, along the lines set out in the EU Damages Directive.[552] Such a measure would provide confidence to claimants that critical information needed for pursuing their damages claims will be made available, at least to the extent it is available from the prior proceeding. It would also relieve the TDLC from the burden of having to deal with such requests on a case-by-case basis.

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[549] CIP-5-2020 (Demanda de Agrecu en contra de Cencosud S.A y otras). SERNAC requested a series of documents, including: (1) employment contracts for buyers with the Cencosud, Walmart, and SMU chains responsible for poultry purchases; (2) databases that include all poultry SKUs, with information on daily sales, units sold, average costs, replacement costs, etc. and replenishment volumes; (3) databases with all pork SKUs, with the same information; and (4) databases including the 8 best-selling SKUs of beef, turkey, rice, mashed potatoes, carbonated softdrinks, avocados, and tomatoes, with the same information. All these documents from the date of January 1, 2008 to January 20, 2020, for each of the defendants. The court ordered disclosure of SKU databases for poultry and fresh pork, indicating daily sale, units sold, weighted average costs, replacement costs, and replenishment volumes from January 1, 2003 to December 31, 2016. With regard to the other documents, the tribunal decided that they were not directly related to the issues under discussion. The tribunal subsequently resolved, ex officio, and by virtue of Article 51 of the LPC, to order Walmart, SMU and Cencosud to deliver the documents requested by SERNAC, with the only difference that the 8 best-selling SKUs are ordered between the period of 2003 and 2020.

[550] In a case involving Visa and MasterCard, the TDLC granted a request last year by MasterCard to appoint experts who can access confidential information of their counterparts. *See* CentroCompetencia's note: "Peritos y confidencialidad: una respuesta "práctica" del TDLC" (August, 2023), available at: https://centrocompetencia.com/peritos-y-confidencialidad-una-respuesta-practica-del-tdlc/. The TDLC, in another matter, involving a complaint by the FNE against Biomar and others (C-386-2019), established a system of shifts so that each party could review confidential documents, subject to various security measures, and a non-disclosure agreement. Whether or not these are the most efficient mechanisms for allowing such access, the fact that the TDLC is experimenting with possible solutions is encouraging.

[551] This could perhaps be done through an *auto acordado* under Article 18, 6) of DL211.

[552] *See* EU Damages Directive, (access to leniency documents).

ii. Standard of Proof

Under Chilean law, the claimant in a damages action has the burden of proving nature and extent of any damages, as well as a causal link between the harm and the unlawful conduct.[553] The TDLC will evaluate evidence presented according to the rules of *sana crítica*, in which the judge is following any set criteria for weighing the evidence, but rather doing so on the basis of a reasoned analysis that the court explains in its decision, taking into account the laws of experience, logic and scientifically established knowledge. The burden of proof is on the plaintiff.

While there is no explicit provision in the Civil Code setting forth a standard of proof, "the relevant standard of proof for damages cases, established by case law, is that of 'reasonable probability' or 'preponderance of evidence,' which is founded on a rational decision made by a court that a determined hypothesis has a higher probability of occurring than other scenarios[554].

In the case of class actions, the standard the courts have usually applied is that of reasoned judgment."[555] Indeed, in some recent decisions (competition and non-competition matters), the Supreme Court and Court of Appeals for Santiago have used language reminiscent of *Story Parchment* from the US.[556]

How the TDLC will, as a practical matter, follow these standards in a damages action is still unknown since it has not yet issued any such rulings. However, one of the rationales for having the tribunal, as opposed to ordinary civil courts, decide such matters is that the TDLC will be better equipped to understand the economic evidence in these cases under the relevant standards.[557] Moreover, the TDLC might be in a position to develop judicial rebuttable presumptions in appropriate cases (e.g., that cartels result in

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[553] *See* Hernández & Tapia, pp. 28 et seq., for a more detailed discussion.

[554] This is a lower standard than the one applicable to criminal cases (which is "beyond reasonable doubt").

[555] Stella Muñoz & Diego Hernández, Chile, § 2.4.

[556] *See* Sentencia Corte Suprema, 7 de septiembre de 2015, en causa Rol ingreso Corte N°2292-2015 ("Indeed, it is wrong to require absolute certainty as to the existence and extent of this type of damage, since by its nature it will always have, as has just been indicated, some degree of uncertainty") (non-competition matter); Sentencia Corte de Apelaciones de Santiago, 7 de abril de 2016, en causa Rol ingreso Corte N°9.666-2015 ("assuming the normal course of the commercial activity of the affected party and considering, in addition, the difficulty in proving what is at stake, a difficulty which, in no case, can favor the perpetrator of the competitive offence") (competition matter).

[557] See Javier Maturana Baeza, "La acción de indemnización de perjuicios por ilícitos anticompetitivos desde la perspectiva procesal" (julio, 2020), p. 2 available at https://centrocompetencia.com/la-accion-de-indemnizacion-de-perjuicios-por-ilicitos-anticompetitivos-desde-la-perspectiva-procesal/.

price increases) based on the economic literature[558]. At a minimum, when the TDLC begins making its first damages awards, private litigants will have a much better sense of how the tribunal (and Supreme Court) is analyzing these cases and the levels of proof required to meet the standards set out in those rulings.

e. Relation with Public Enforcement

There is an especially strong link between public enforcement and private damages litigation in the Chilean system as currently constituted. With the TDLC empowered to hear damages complaints following a judgment finding an infringement of DL211, consumer cases so far have been reliant on the FNE to bring the infractional proceeding, at which point the plaintiffs are able to benefit from the public enforcement action since any ruling in this damages proceeding will be based "on the facts established in [the TDLC's prior] ruling [on liability] that serve as background to the claim."[559] The plaintiffs must simply prove, as noted previously, the existence and amount of damages, and the causal link the between violation and the harm.[560]

There are areas for improvement, nevertheless, in how public enforcement efforts could benefit private damages claimants. As has been suggested by others, the TDLC might provide more detail in its decisions at the infractional stage about the harm caused by the anticompetitive conduct. This could assist plaintiffs in follow-on actions to at least determine whether they have damages claims, or perhaps even help with proving the claims in a subsequent proceeding. Similarly, as discussed above, access could also be given to the record from the underlying proceeding, subject to appropriate confidentiality restrictions. Carve outs might also be appropriate for certain categories of information from leniency applicants to not undermine the effectiveness of the FNE's leniency program.

Private damages litigation could also, over time, enhance the overall deterrent effect of the competition system (even if the goal of such cases is primarily compensatory in nature). While the FNE is an extremely capable competition agency, it also has limited resources and has to decide whether to focus its efforts. For some time in recent years, the focus had been on prosecution of cartels. Private litigants, by contrast, focused their

[558] Aside from developing a judicial presumption, the TDLC could apply the criteria of "scientifically established knowledge"—which is part of the *sana crítica* standard—for assessing the economic evidence in line with the main consensus in the economic literature.

[559] DL211, Art. 30.

[560] *See* Stella Muñoz & Diego Hernández, Chile, Chambers and Partners: Antitrust Litigation 2022, § 2.1. Similarly, article 51 of the LPC refers to the action for compensation of damages "on the occasion of infringements [of DL 211], declared by an enforceable final judgment".

efforts on abuse of dominance and other exclusionary and exploitative practices.[561] Since many were brought independently of the FNE, these efforts tend to augment the overall deterrent effect of the system. In some cases, these private efforts also led to follow-on damages actions by the same parties.[562] At present, that has not happened in consumer-focused cases, but it is theoretically possible, and as the system matures, it is possible that these could eventually fill other gaps in public enforcement, for example, global cartels that have impacted Chilean consumers.

f. Evolution *of Private Damages Actions in Chile*

As described above, the 2016 reforms to DL211 and the LPC, appear to have put in place many of the foundations needed for private damages litigation to develop further in Chile. The most important change, concerning the viability of consumer damages actions, was allowing class proceedings under the LPC to be brought before the TDLC to seek compensation for harms caused by anticompetitive conduct. To date, none of those cases has resulted in a final judgment awarding damages to consumers. The cases generally have moved slowly-likely more slowly than anticipated when the 2016 reforms were enacted. That said, there is going to be a learning curve for litigating consumer damages cases under the new system. Moreover, some consumer settlements were reached in matters brought by SERNAC and consumer associations in other proceedings that could be attributable at least in part to some of the changes being implemented during this time. This section is going to take a brief look at some of the more important damages actions over the years, with the objective of analyzing how the system has improved for claimants.

i. Private Damages Actions Before 2003

As noted above, before 2003, neither the Competition Act nor any other legislation in Chile included provisions relating to private damages actions. Rather, such actions would have been governed by the general rules and principles of liability in the Civil Code and would have been pursued in ordinary civil courts. The main challenge in damages actions *relates to the quantification of damages, and the causal link between those damages and anticompetitive conduct, issues with which civil courts in Chile, at least at*

[561] Francisco Agüero, Chilean Antitrust Policy: Some Lessons Behind its Success, Law and Contemporary Problems Vol. 79, No. 4, Success and Limits of Competition Law and Policy in Developing Countries (2016), p. 151.

[562] *Id*.

the time, were not familiar.[563] *Thus, before enactment of Law N° 19.911, very few damages cases were presented before the civil courts.*[564]

Pivcevic et al. c/ Lan Chile (2006).[565] Perhaps the first example of a "successful" competition law damages claims involved a claim filed by a local airline, Aerovías DAP, seeking compensation for harms resulting from predatory practices engaged in by several airlines including Lan Chile, Ladeco, and National Airlines. In this case, the Resolutive Commission (the predecessor to the TDLC) had found the defendants guilty of abusing their dominant position on the Santiago-Punta Arenas-Santiago route by engaging in dumping, selling large volumes of tickets at low prices. Aerovías DAP entered the market in January 1996 with lower fares, prompting the defendants to terminate their ground handling contract and drastically reduce ticket prices between March and May of that year.[566]

When Aerovías DAP brought its civil claim, the lower court found the defendants guilty of anticompetitive and unfair practices aimed at restricting Aerovías DAP's market participation, akin to fraud. The defendants were jointly and severally condemned, with the judge presuming their concerted effort to commit fraud based on direct participation in the market. A causal relationship between anticompetitive conduct and pecuniary damage was established through an expert report, indicating that the defendants' actions had hindered Aerovías DAP from selling tickets at projected prices. However, the court limited compensation for damages to the period between March and May 1996, disregarding subsequent losses until the time Aerovías DAP exited the market in March 1997.[567]

Both the Court of Appeals and the Supreme Court upheld the lower court's decision but dismissed moral damages due to a lack of evidence regarding injury to Aerovías DAP's reputation. Consequential damages were identified as operational costs for aircraft operation and maintenance, which Aerovías DAP couldn't cover with ticket sales due to pricing pressure exerted by the defendants. Loss of profits stemmed from the revenue Aerovías DAP was unable to realize. Joint and several liability was justified based on collusion.[568]

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[563] Note by Chile, OECD Relationship Between Public and Private Antitrust Enforcement, DAF/COMP/WP3/WD (2015)14 (June 15, 2015), p. 3.

[564] *Id*. *See also* Cristián Banfi del Río, Acerca de la Imputación de Responsabilidad Civil por Ilícitos Anticompetitivos entre Rivales en Chile, Revista Chilena de Derecho, vol. 41 Nº 1, p. 37 - 58 [2014], p. 46-47.

[565] This summary relies greatly on Cristián Banfi del Río, Acerca de la Imputación de Responsabilidad Civil por Ilícitos Anticompetitivos entre Rivales en Chile, p. 46-47.

[566] *Id*.

[567] *Id*.

[568] *Id*.

Even before Article 30, then, it was possible to pursue damages claims. However, the ruling in the prior proceeding before the Resolutive Commission still provided assistance with respect to culpability, which was an essential element of a civil claim.[569] As one leading scholar has noted,

> "It is crucial to have a prior declaration of anti-competitive illegality, since it produces res judicata in the subsequent civil trial regarding the conduct and its legal classification, which allows the discussion to be confined to the existence, type and amount of the damage and the relationship causal. On the other hand, filing an autonomous civil liability action is a risky strategy."[570]

And in this instance, the economics of those risks made anything other than large individual claims feasible.

ii. Private Damages Actions Between 2003-2016

After the enactment of Law No. 19.911, which made decision of the TDLC binding in the subsequent civil proceedings, there was a slight increase in the number of private damages litigation, with around 10 cases filed between 2004 and mid-2015, and most of these (like the *Pivcevich* case) were large claims involving allegations of abuse of dominance or unfair competition.[571] *In only two cases did the plaintiffs obtain any damages awards, both involving sizeable damages claims.*[572] *It was also during this period, however, when some of the first efforts were made to obtain compensation for consumers affected by a high-profile cartels that were being prosecuted by the FNE.*

Philip Morris c/ Chiletabacos.[573] Perhaps the most well-known damages case of this era was the US$125 million claim made Philip Morris against Compañía Chilena de Tabacos (*Chiletabacos*) based on the defendant's erection of artificial barriers preventing

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[569] *Id*.

[570] *Id*.

[571] Note by Chile, OECD Relationship Between Public and Private Antitrust Enforcement, DAF/COMP/WP3/WD (2015)14 (June 15, 2015), p. 3.

[572] *Id*. Aside from the *Chiletabacos* case discussed in this section, the first successful damages action under Article 30 was *Cementa v. Volcán*, which involved claims of predatory pricing. The civil court concluded that, because the TDLC had established a violation of DL211, it was unnecessary to prove culpability in the damages proceeding. Instead, the court's inquiry was focused on causation and quantification of damages. The court awarded the plaintiff approximately US$13.5 million. The case settled on appeal.

[573] This summary relies heavily on Cristián Banfi del Río, "Acerca de la Imputación de Responsabilidad Civil por Ilícitos Anticompetitivos entre Rivales en Chile", p. 46-47.

the plaintiff's entry into the Chilean cigarette market. Philip Morris sought compensation from *Chiletabacos* for consequential damages, moral damages affecting its commercial image, and loss of profits spanning from 2002 to 2018 due to its failure to attain a 25% market share. Initially, despite the prior infractional ruling against *Chiletabacos*, the damages claim was dismissed on the grounds of lack of evidence regarding damage and causality. Philp Morris, the court concluded, had failed to demonstrate efforts to capture market share or make sufficient investment in advertising, unlike *Chiletabacos'* significant and continuous investments. The further court considered Philip Morris' aspirations for 25% market share unrealistic, given its modest growth rate and limited market coverage.[574]

The Court of Appeals partially accepted Philip Morris' appeal, acknowledging *Chiletabacos*' anticompetitive conduct as a civil wrong causing quantifiable damage. Philip Morris was recognized as having suffered loss of profits and operational losses due to its inability to penetrate the market, albeit limited to the period from 2002 to 2005. The court nevertheless found Philip Morris' projected profits for 2006-2018 speculative, given *Chiletabacos*' dominant market position. The second instance judgment upheld the dismissal of non-pecuniary and consequential damages, though a dissenting opinion acknowledged loss of profits for the extended period, arguing that economic effects of unlawful acts extend into the future.

The protracted litigation ended with the Supreme Court's judgment on July 25, 2013, rejecting appeals from both *Chiletabacos* and Philip Morris. However, the court's decision primarily focused on procedural matters, deferring analysis of loss of profits and causal relationships to a future occasion. Nevertheless, the case underscored the complexities of proving damages in antitrust litigation before the civil courts, where Philip Morris ultimately obtained US$2.2 million of the far greater damages it had sought.[575]

Farmacias Collective Demand. The *farmacias* (pharmacies) collusion case, which came to light in 2008, was the first of several large cartel cases affecting consumer markets that would shake the country over the next decade. The case revolved around allegations that the three major pharmacy chains in Chile, Ahumada (FASA), Cruz Verde, and Salcobrand, had agreed to fix the prices of at least 222 medications between 2007 and 2008. These medications included essential drugs for chronic conditions such as diabetes,

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[574] *Id*.

[575] El Mostrador, "Corte Suprema sentencia a Chiletabacos a pagar multa de US$2,2 millones a Phillip Morris por abuso de posición dominante," (https://www.elmostrador.cl/noticias/pais/2013/07/25/corte-suprema-sentencia-a-chiletabacos-a-pagar-multa-de-us22-millones-a-phillip-morris-por-abuso-de-posicion-ominante/).

For additional discussion of the difficulties faced by individual plaintiffs pursuing damages actions in Chilean civil courts, see María Victoria Edwards V., Jorge Fantuzzi M. y José Miguel Gana E., "Acciones de indemnización de perjuicios a partir de conductas anticompetitivas", CentroCompetencia UAI (abril, 2020), at p. 3-5.

hypertension, and psychiatric disorders, affecting a significant portion of the Chilean population. The revelations generated significant public outrage, as the alleged conduct affected prices for essential medications and highlighted the societal impact of collusion beyond simply prices. When the FNE filed a complaint before the TDLC in December 2008,[576] the defendants initially denied the allegations. Later, in April 2009, however, the FNE and FASA reached a settlement in which, among other things, the pharmacy acknowledged that it had participated in the collusive arrangement.[577] FASA also announced a US$4.4 million compensation plan through which it would provide refunds and discounts to customers who had purchased the medication involved.[578] In January 2012, the TDLC found the companies guilty of collusion and imposed fines against CruzVerde and Salcobrand totaling around US$40 million, the largest penalties for antitrust violations in Chile at the time.[579]

In February 2013, SERNAC, the Chilean consumer protection agency, filed a collective action in civil court against the three pharmacies.[580] While not a private action, it represented one of the first efforts to obtain compensation for consumers under the LPC in an antitrust matter. The complaint sought damages on behalf of two groups of consumers: (1) those who has overpaid for medications that had been the subject to the collusive arrangement; and (2) those who had been unable to obtain the medications due to the price increases and had to cease their treatments or use lower quality medications (a diffuse collective). Regarding the quantification of damages, SERNAC emphasized that the Supreme Court, in the FNE proceeding, had already established that the pharmacies obtained revenues in the amount of CLP 27,000,000,000 (approximately US$57 million at the time), without prejudice to greater damages that may be proven during the evidentiary period.

In December 2019, the court of first instance rejected the defendants' exceptions, including lack of active and passive standing, and ruled that the defendants caused harm to two groups of consumers: those who purchased from the pharmacies at inflated prices, and those who stopped buying medicines due to the increase in prices.[581] Based on an

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[576] Causa Rol C 184-08, Requerimiento de la FNE en contra de Farmacias Ahumada S.A. y Otros, Tribunal de Defensa de la Libre Competencia.

[577] Acta de la Audiencia de Conciliación del 1 de abril de 2009. Tribunal de Defensa de la Libre Competencia.

[578] *See* press release.

[579] Ruling No. 119/2012 by the TDLC, on case no. C-184-2008.

This ruling was affirmed by the Chilean Supreme Court in September 2012. Rol Nº 2578-2012, Farmacias Cruz Verde S. A. y Farmacias Salcobrand S. A.

[580] Sernac v. Farmacias Cruz Verde et al., C-1940-2013, 10º Juzgado Civil de Santiago.

[581] Ruling by 10° Civil Court of Santiago, "Sernac v. Farmacias Cruz Verde et al.", C-1940-2013, C. 52.

expert report provided by an extremely well-regarded economist, the court issued a judgment for damages:9

- For the first group (overcharges), the defendants were ordered to deposit money in the current account of the court to be distributed to consumers who agreed to exercise their rights in proportion to the value of the medicines they purchased: a total of $1,736,961,314, broken down as follows: Cruz Verde, CLP 638,024,281; SalcoBrand, CLP 374,710,804; and FASA CLP 724,226,229.

- For the second (diffuse harm), the defendants would have to deposit in the current account of the court amounts in favor of any consumer who came forward to prove, at a subsequent procedural stage, by any means of proof, their harm: a total of $284,916,956, broken down: Cruz Verde, for a total of $110,676,599, FASA, for the sum of $99,528,007 and SalcoBrand for the amount of $74,712,349.

After the ruling, the parties requested a stay of the proceedings for 90 days to discuss the possibility of settlement. In November 2020, an agreement was reached with Cruz Verde and Salcobrand that would pay CLP 1,182 million to around 53 thousand Chilean consumers with amounts determined using a formula that identified six categories of medications and took into account the severity of the diseases treated, frequency of use and lack of alternatives. In addition, an amount of CLP 205,577,413 would be paid for harm to the diffuse interest; however, given the difficulty of identifying these consumers, the amount would be paid to a *cy pres* recipient. Any unclaimed funds would also go to that recipient.[582]

FASA appealed the judgment of the court of first instance, which confirmed the judgment.[583] The Court of Appeal declared that FASA must compensate the first group, associated with collective interest, in the amount of CLP 1,810,694,265; and the second, associated with the diffuse interest, CLP $304,989,101. In addition, the Court of Appeal concluded that, under Article 53C of the LPC, FASA must pay compensation to these consumers without requiring them to appear. In addition, by application of article 27 LPC, the amounts to be paid will be readjusted by the CPI, between the month prior to the date of the infringement and the preceding month in which the compensation becomes effective. The case has been appealed further to the Supreme Court.

[582] *See* SERNAC, Farmacias deberán compensar a cerca de 53 mil consumidores y desembolsar casi $1.400 millones tras colusión de medicamentos (November 11, 2020) available at https://www.sernac.cl/portal/604/w3-article-60046.html.

[583] Supreme Court (2012), Case N° 2578-2012.

This case is interesting in a number of respects, including the ability to obtain damages to "diffuse interests" under the LPC for groups of consumers who were not able to obtain products due to increased prices. This is a harm that goes uncompensated in the US and many other systems. And it does suggest that the civil courts might be capable of handling complex consumer cases of this magnitude. However, it also highlights how slowly those cases move in the civil tribunal (which was one of the arguments in favor of handling these matters in the TDLC). More than eleven years after the case was filed, and almost 17 years since the unlawful conduct, the case against FASA remains pending. And even with the settlement, obtaining compensation for consumers took more than a decade.

***Papeles Collective Demand*.** Another major cartel during this period, the *papeles* cartel, involved tissue paper products, including facial tissue, napkins, toilet paper, and paper towels. The collusive conduct between CMPC Tissue and SCA Chile began around 2000 and lasted until at least December 2011. It came to light in March 2015 when CMPC disclosed its participation in the scheme under the FNE's recently implemented leniency program. SCA also subsequently acknowledged having participated in the conspiracy with CMPC after having been subject to a dawn raid in September. After the FNE filed its complaint in October 2015,[584] a report prepared by two economists that was presented to the TDLC estimated that CMPC and SCA had benefitted from the collusion on the order of US$225 million and US$448 million, respectively.

In November 2015, while the FNE's complaint was pending before the TDLC, CONADECUS, a consumer association, filed a lawsuit under the LPC in a Santiago civil tribunal.[585] Although the final judgment of the TDLC, CONADECUS took the position that because the defendants admitted their wrongdoing, there was certainty as to the and unlawful conduct, which would give rise to the right of consumers to demand reparations. It is important to remember, also, that this filing predated the 2016 reforms, which make explicit reference to allowing class actions under the LPC for antitrust infractions. The complaint identified two categories of affected persons: (1) the customers who made the purchases; and (2) household members of those consumers. those who live in the houses of each household. CONADECUS submitted two economic reports on damages, the first

[584] FNE's complaint against CMPC and SCA, filled on October 27, 2015, available at https://www.fne.gob.cl/fne-presenta-requerimiento-por-colusion-contra-cmpc-y-sca/#:~:text=Durante%20el%20curso%20de%20la,a%20SCA%20(ex%20Pisa). Given the leniency requests made by the defendants and their subsequent cooperation, the FNE asked that CMPC be exempted from fine and that the fine for SCA be reduced by 50 percent. The Supreme Court ultimately revoked the leniency benefit that had been granted to CMPC. *See* https://www.fne.gob.cl/corte-suprema-confirma-sentencia-del-tdlc-y-aplica-multa-maxima-a-farmacias-cruz-verde-s-a-y-salcobrand-s-a-por-caso-colusion/.

[585] Conadecus v. CMPC and SCA, C-29214-2015, 10th Civil Court of Santiago. Another consumer association, ODECU, and SERNAC became part of the CONADECUS trial in early-2017.

concluded the harm between 2000-2011 amounted to UF 14,436,510, with the second estimating damages of UF12,926,264 for the same period.[586]

In CMPC's response, the defendant raised the argument that, under the LPC (as discussed above) a contractual relationship was necessary to request compensation for damages in a class proceeding, and that actions on behalf of diffuse interest could not give rise to compensation, but only collective enforcement (e.g., fines, cessation and nullity). CMPC also maintained that it was not subject to the LPC since it did not market its products to end users and therefore was not a supplier.[587]

Sometime after the complaint had been filed, SERNAC convened a mediation in an effort to find a resolution to the matter. CONADECUS and another consumer association, OCEDU, were invited to attend. While CMPC agreed to participate, SCA did not. This effort, which was the first of its kind in Chile, resulted in the well-known "Compensation of CLP$7,000". CMPC agreed to return a lump sum of CLP$97,647 million pesos (roughly equivalent to US$150,000,000), an amount that was determined by reference to various models used in the economic reports that had been filed in the case. Compensation of CLP$7,000 was paid to all consumers at least 18 years old on the date on the settlement went into effect, and who had a Chilean identity card.

Because SCA was not part of the settlement, the litigation against the second participant in the conspiracy continued; however, event since the mediation have not gone as well for the plaintiffs, with the judgment in the court of first instance rejecting the consumer claims. The court concluded that because SCA did not have a contractual relationship with consumers, it therefore was not a supplier under the LPC. In addition, the court pointed to the limitations period, which at the time was six months under the LDPC. Finally, the court ruled that, under Article 30 of DL 211 at the time, a judgment by the TDLC was required to initiate a complaint in civil court, which had not been complied with. The judgment on appeal was confirmed, without further detail. The case is currently before the Supreme Court.[588]

While this case resulted in a very notable settlement and recovery on behalf of Chilean consumers, the decisions from the civil courts where it has been heard points to a serious potential issue with the current framework. If, in fact, class actions under the LPC require a direct contractual relationship, and are not available to indirect purchasers, the

[586] Complaint filed on November 19, 2015, folio 1, on case no. C-29214-2015, 10th Civil Court of Santiago, p. 17.

[587] CMPC's response to the complaint, December 29, 2016, folio 38, on case no. C-29214-2015, 10th Civil Court of Santiago.

[588] Rol 83994 – 2023.

ability of the system to fulfill its compensatory role will be significantly undermined.[589] And to date, this is not the only antitrust damages action in which a civil court has come to that conclusion.[590]

iii. Private Damages Actions Since 2016

With the enactment of Law No. 20.945 in 2016, and changes to the LPC, the TDLC was given jurisdiction over follow-on damages actions, including consumer class actions. The idea, as noted, was the take advantage not only of the Tribunal's expertise, but also familiarity with the underlying infringement case, to improve the handling of antitrust damages matters. As of the date of writing, twelve damages cases have been filed, which are set out in the following table:

Table 1

Case No.	Case	Date Filed	Subject Matter
CIP-1-2017	Sandra Fuentes Salazar y otros contra Empresa de Transporte Rurales Limitada y otros	14-12-2017	Competitor case based on *Buses* cartel involving (i) Servicios Pullman Bus Costa Central S.A. (ii) Transportes Cometa S.A.; (iii) Empresa de Transportes Rurales Limitada; y, (iv) Sociedad de Transportes y Turismo del Norte y Compañía Limitada (TDLC case no. C-223-2011) Status: terminated by withdrawal
CIP-2-2019	CONADECUS A.C y otro en contra de Agrosuper S.A. y otros	10-06-2019	Consumer class action based on *Pollos* cartel involving (i) Agrícola Agrosuper S.A.; (ii) Empresas Ariztía S.A.; (iii) Agrícola Don Pollo Limitada (TDLC case no. C-236-2011) Status: terminated by

[589] As noted earlier, however, not all commentators agree that such a relationship is needed.

[590] In another case, involving the *Pollos* cartel, that was filed in civil court by SERNAC against the companies that had been the subject of an infringement ruling by the TDLC, the court ruled that the defendants could not be considered suppliers under the LPC because their products were not purchased by consumers, but by intermediaries, sufficient reason to dismiss the action. The court also concluded that the claim would be inadmissible because on the date of filing there was no contractual link between consumers and the defendant. Finally, the court noted that the statute of limitations had already run. *Sernac v. Agrosuper et al.*, C-28470-2015, 29th Civil Court of Santiago.

			conciliation
CIP-3-2020	Papelera Cerrillos S.A. contra CMPC Tissue S.A. y otra.	06-04-2020	Competitor case based on *Tissue* cartel involving CMPC Tissue S.A. and SCA Chile S.A. (TDLC case no. C-299-2015) Status: action dismissed by TDLC. Ongoing appeal at the Supreme Court
CIP-5-2020	Agrecu contra Cencosud S.A. y otras	12-10-2020	Consumer class action based on *Supermercados* cartel, involving (i) Cencosud S.A.; (ii) SMU S.A.; y, and Walmart Chile S.A. (TDLC case no. C-304-2016) Status: Case was consolidated with TDLC cases no. CIP-7-2020, CIP-8-2020; CIP-9-2020; and CIP-10-2020. Conadecus and Sernac reached and agreement with SMU. Trial continues against Conadecus and Walmart,
CIP-6-2020	Arcam contra NYK y otras	25-11-2020	Consumer class action based on Navieras cartel, involving NYK, MOL, CSAV, CMC, Eukor y K-Line (TDLC case no. C-292-2015) Status: Arcam reached an agreement with CSAV (which has not yet been approved by the TDLC); the trial continues with the remaining defendants.
CIP-7-2020	SERNAC en contra de Cencosud S.A.	18-12-2020	Consumer class action based on *Supermercados* cartel, involving (i) Cencosud S.A.; (ii) SMU S.A.; y, and Walmart Chile S.A. (TDLC case no. C-304-2016) Status: TDLC cases no. CIP-7-2020, CIP-8-2020; CIP-9-2020; and CIP-10-2020 were consolidated with CIP-5-2020. Conadecus and Sernac reached an agreement with SMU. Trial continues against Walmart.

CIP-8-2021	Conadecus en contra de Walmart Chile S.A.	14-08-2021	Consumer class action based on *Supermercados* cartel, involving (i) Cencosud S.A.; (ii) SMU S.A.; y, and Walmart Chile S.A. (TDLC case no. C-304-2016). Status: TDLC cases no. CIP-7-2020, CIP-8-2020; CIP-9-2020; and CIP-10-2020 were consolidated with CIP-5-2020. Conadecus and Sernac reached an agreement with SMU. Trial continues against Walmart.
CIP-9-2021	Sernac en contra de SMU S.A. y Walmart Chile S.A.	14-08-2021	Consumer class action based on *Supermercados* cartel, involving (i) Cencosud S.A.; (ii) SMU S.A.; y, and Walmart Chile S.A. (TDLC case no. C-304-2016) Status: TDLC cases no. CIP-7-2020, CIP-8-2020; CIP-9-2020; and CIP-10-2020 were consolidated with CIP-5-2020. Conadecus and Sernac reached an agreement with SMU. Trial continues against Walmart.
CIP-10-2021	Conadecus en contra de SMU S.A.	16-08-2021	Consumer class action based on *Supermercados* cartel, involving (i) Cencosud S.A.; (ii) SMU S.A.; y, and Walmart Chile S.A. (TDLC case no. C-304-2016) Status: TDLC cases no. CIP-7-2020, CIP-8-2020; CIP-9-2020; and CIP-10-2020 were consolidated with CIP-5-2020. Conadecus and Sernac reached an agreement with SMU. Trial continues against Walmart.
CIP-11-2022	Banco Bice en contra de Banco del Estado.	05-12-2021	Competitor case based on abuse of dominant position saction against Banco del Estado de Chile. (TDLC case no. C-323-2017) Status: TDLC case no. CIP-13-2023 was consolidated with CIP-11-2022. Trial in evidentiary

			stage.
CIP-12-2022	Club Deportes Melipilla SADP en contra de Asociación Nacional de Fútbol Profesional	05-07-2023	Competitor case based on abuse of dominant position action against Asociación Nacional de Fútbol Profesional (ANFP) (TDLC case no. C-343-2018) Status: Trial in evidentiary stage.
CIP-13-2023	Scotiabank Chile contra Banco del Estado de Chile	05-10-2023	Competitor case based on abuse of dominant position action against Banco del Estado de Chile. (TDLC case no. C-323-2017) Status: Case was consolidated with case CIP-11-2022.

The 2016 reform did not lead to an immediate surge of new filings, which should not be surprising given that any damages action (at least before the TDLC) still requires an infringement decision. However, there have been a notable difference can be seen in the types of cases being filed versus in the earliest years, specifically in the number of consumer damages actions being pursued. More than half (seven of the twelve) are consumer cases, versus large individual claims. It is difficult to say whether the 2016 reforms were responsible for promoting the growth of consumer activity, since Chile was already seeing major class actions being brought in the wake of the consumer-facing cartel cases the FNE had been prosecuting. But it did eliminate any question whether the class procedures available under the LPC could be used to pursue antitrust damages claims.

Even after the 2016 reforms went into effect, some competition-related matters have been filed in civil courts rather than the TDLC. The known cases as of the date of writing are set out in the following table:

Table 2

Case No.	Case	Date Filed	Subject Matter
C-2901-2019, 17th Civil Court of Santiago	Odecu c/ Empresa de Transportes Rurales Tur Bus SpA and others	22-01-2019	Consumer class action based on *Buses* cartel involving (i) Servicios Pullman Bus Costa Central S.A. (ii) Transportes Cometa S.A.; (iii) Empresa de

			Transportes Rurales Limitada; y, (iv) Sociedad de Transportes y Turismo del Norte y Compañía Limitada (TDLC case no. C-223-2011) Status: case dismissed for lack of jurisdiction. Appeals Court confirmed the civil court's decision.
C-7320-2023, 22nd Civil Court of Santiago	Odecu c/ Importadora y Distribuidora Alameda SpA et al.	03-05-2023	Consumer class action based on Navieras cartel, involving NYK, MOL, CSAV, CMC, Eukor y K-Line (TDLC case no. C-292-2015) Status: case dismissed for lack of jurisdiction. Appeals Court revoked the civil court's decision, so the trial continues.

These two cases provide some important insights as to when competition-related damages actions on behalf of consumers could be pursued in civil court following the 2016 reforms. In the first, ***Odecu c/ Empresa de Transportes Rurales Tur Bus SpA and others***,[591] a consumer association filed a lawsuit seeking damages against four bus companies that had been found to have engaged in collusion by the TDLC. The court, however, declared ex officio that it lacked absolute jurisdiction to hear the case since the claim was based on a previous judgment of the TDLC, a decision that was upheld by the Court of Appeal, but with a minority opinion suggesting that the TDLC ruling was merely a precedent, not the only legal basis for the claim. When ODECU appealed to the Supreme Court, that appeal was rejected, with the court stating that the claim was undeniably based on the TDLC ruling. Based on this ruling, damages claims before the civil courts might be permissible when they were not based on a judgments by the TDLC but only the prior ruling as an antecedent of the claim.[592]

In the second case, ***Odecu c/ Importadora y Distribuidora Alameda SpA et al.***,[593] the Court of Appeal recently issued a ruling suggesting the same outcome. This complaint is related to the *Navieras* (Ro/Ro shipping) cartel involving transportation of new vehicles

[591] C-2901-2019, 17th Civil Court of Santiago.

[592] But see Javier Maturana Baeza, "La acción de indemnización de perjuicios por ilícitos anticompetitivos desde la perspectiva procesal" (julio, 2020), p. 5 (disagreeing with this position).

[593] C-7320-2023, 22nd Civil Court of Santiago.

into Chile. The lawsuit, however, was not filed against the shipping companied that had been the subject of the infringement ruling in the TDLC, but rather the importers who are accused of passing on the overcharge from the shippers to the final consumers. It is important to note that the plaintiff alleged that this passing on constituted an infringement of the supplier's duty of care established in the LPC (article 25), so the ground of the lawsuit was a violation of the LPC and not of DL 211.[594] The court of first instance declared itself incompetent to hear Odecu's damages action based on its conclusion that the TDLC judgment of the was a necessary precedent for the lawsuit.[595] The Court of Appeal of Santiago, however, overturned the decision stating that the court of first instance did not have jurisdiction to hear ODECU's lawsuit, based on the fact that its subject matter was an alleged infringement by the importers of the LPC (which, in itself, is a different conduct from the collusion of the shipping companies previously sanctioned by the TDLC).[596] Based on these decisions, it is possible that the TDLC might end up not being the venue for damages actions that have some overlap with competition matters, even after the 2016 reforms.

Returning to damages actions filed with the TDLC, to date there has only been one ruling on the merits, in ***Papelera Cerrillos S.A. contra CMPC Tissue S.A. y otra***.[597] That case based on the *Papeles* cartel discussed in the previous section. However, unlike the consumer case, which involved purchasers harmed by the unlawful cartel, this was a competitor case in which the plaintiff, a paper producer that had gone out of business, alleged that CMPC and SCA's high market shares during the time they were colluding, were due to their implementation of measures that harmed their competitors. Papelera Cerrillos asserted that its poor financial results were caused by these activities by its competitors. *The TDLC, however, rejected the complaint in its entirety, on the basis that many of the facts on which Papelera Cerrillos based its damages claim were not the subject of the TDLC's infringement decision or in the Supreme Court's ruling.*[598] This decision thus confirmed an important principle, that Article 30 only allows true follow-on cases.[599]

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[594] See CentroCompetencia UAI's note "Demanda de ODECU contra automotoras por traspaso de sobreprecios: ¿cuál es el tribunal competente?" (October 2023), at https://centrocompetencia.com/demanda-odecu-automotoras-traspaso-sobreprecios-tribunal-competente/.

[595] Resolution of September 28, 2023, folio 108, on case no. C-7320-2023, 22nd Civil Court of Santiago.

[596] Rol15768-2023, Court of Appeals of Santiago, C. 2°.

[597] CIP-3-2020.

[598] Resolution No. 188/2023, C. 49°.

[599] For a more detailed discussion of the Papelera Cerrillos case, see CentroCompetencia UAI's note: "TDLC rechaza demanda de indemnización de perjuicios de Papelera Cerrillos contra CMPC y SCA" (December, 2023). Available at https://centrocompetencia.com/tdlc-rechaza-demanda-indemnizacion-perjuicios-papelera-cerrillos-cmpc-sca/.

Potential claimants will therefore either need to live with whatever limitations come out of an infringement action litigated by others, or become actively involved in the underlying proceeding.

One other case, ***Sandra Fuentes Salazar y otros contra Empresa de Transporte Rurales Limitada y otros***, CIP-1-2017, has also ended, not though a judgment by the TDLC but by being withdrawn, which could indicate a private resolution of the matter.[600] The plaintiffs were owners and managers of the company, Línea Azul, who were seeking damages against Tur Bus, Pullman and Transportes Cometa, which had been blocking access to intercity bus terminals in the northern regions of the country.[601] The plaintiffs claimed that this prevented Línea Azul from effectively being able to enter the market and develop an optimal network of arrival and departure points in the region. One interesting question raised in this case, which was the first damages action brought under the new system, was whether the TDLC had jurisdiction since the infringement had been found before the enactment of Law No. 20,945. Those kinds of transitional issues, of course, will become less relevant over time.

CONADECUS A.C y otro en contra de Agrosuper S.A. y otros. The first consumer case brought under the new system, which was the second overall, was based on the "*Pollos*" (poultry) case, the largest of the consumer-facing cartels that had been prosecuted by the FNE. In late-2011, the FNE filed a complaint with the TDLC accusing three of Chile's largest poultry producers, Agrosuper, Ariztía and Don Pollo of having colluded over at least the past decade to set poultry production quotas with the goal of maintaining prices.[602] In its investigation, the FNE concluded that cartel members had been sharing, through its trade association, the APA, detailed and sensitive strategic and business information among the three companies. The APA was also in charge of monitoring the operation of the agreement.[603]

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[600] For a more detailed discussion of this case, see CentroCompetencia UAI's note: "¿En qué están las demandas de indemnización de perjuicios presentadas ante el TDLC?" (January, 2023). Available at https://centrocompetencia.com/en-que-estan-las-demandas-de-indemnizacion-de-perjuicios-presentadas-ante-el-tdlc/.

[601] Resolution No. 3, Judgment No. 134/2014 of the TDLC, on case no. C-223-2022.

[602] FNE's complaint against Agrícola Agrosuper S.A., Empresas Ariztía S.A. and Agrícola Don Pollo Limitada, filled on November 30, 2011, available at https://www.fne.gob.cl/wp-content/uploads/2011/12/requ_007_2011.pdf. Also, see CeCo's case summary "FNE c. Agrosuper y otras por colusión pollos", available at https://centrocompetencia.com/jurisprudencia/fne-c-agrosuper-y-otras-por-colusion-pollos-2015/.

[603] FNE's complaint against Agrícola Agrosuper S.A., Empresas Ariztía S.A. and Agrícola Don Pollo Limitada, filled on November 30, 2011, available at https://www.fne.gob.cl/wp-content/uploads/2011/12/requ_007_2011.pdf.

The consumer harms caused by this long-running cartel, which involved a staple protein in the Chilean diet, were enormous. During the proceedings before the TDLC, the presented a report that estimated total overcharges from 1996-2010 of 33.3 million UF (approximately US$1,400 million).[604] In its judgment, the Tribunal noted that, withstanding the difficulties in calculating the overcharges, even under a very conservative estimate, the unlawful gains obtained by the two largest defendants, Agrosuper and Artiztía, vastly exceeded the maximum available fines at the time.[605] In fact, the total fines imposed (after a reduction by the Supreme Court of the fines imposed by the TDLC) ended up being just three percent of the amount of the unlawful benefits calculated by the economic report presented during the infringement proceeding.[606]

In June 2019, CONADECUS and another consumer organization, Formadores de Organizaciones Juveniles de Consumidores y Consumidoras (FOJUCC) filed a damages claim before the TDLC against the three poultry producers.[607] As in the other consumers cases discussed earlier, the complaint was brought to protect a collective interest, those who purchased poultry and supracompetitive prices, and a different interest, those who stopped purchasing the product due to the price increase and the reduction in supply. The lawsuit sought full reparation for the damages suffered for the duration of the unlawful collusion from 1996-2010, which they estimated with respect to overcharges to be almost US$800 million.

The complaint was the first indirect purchaser action filed with the TDLC.[608] The defendants, not surprisingly, raised the same arguments about the lack of a contractual relationship and standing that had been asserted in the earlier consumer cases filed in civil

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[604] See CentroCompetencia UAI's case summary "FNE c. Agrosuper y otras por colusión pollos", available at https://centrocompetencia.com/jurisprudencia/fne-c-agrosuper-y-otras-por-colusion-pollos-2015/.

[605] Since then, reforms enacted in 2016 allow for maximum fines of up to 30% of the infringer's sales of the product or service line relating to the infringement during the period of the unlawful conduct, or up to twice the economic benefit obtained.

[606] See CentroCompetencia UAI's case summary "FNE c. Agrosuper y otras por colusión pollos", available at https://centrocompetencia.com/jurisprudencia/fne-c-agrosuper-y-otras-por-colusion-pollos-2015/

[607] Demanda de CONADECUS A.C y otro en contra de Agrosuper S.A. y otros, CIP-2-2019 (June 10, 2019).

[608] The following year, another indirect purchaser case, Arcam contra NYK y otras, CIP-6-2020 (November 25, 2020), was filed. Because I have acted in a consulting capacity on behalf of Arcam, I am not going to comment about the case other than to note that it is a follow-on to judgments by the TDLC (TDLC Judgment No. 171/2019) and the Supreme Court (No. 15.005-2019) in the *Navieras* case relating to the allocation of zone or market shares by "deep sea" maritime transport service providers for vehicles destined for Chile from the Americas, Europe and Asia. The plaintff claims that the conduct led to an increase in transportation prices, which was passed on throughout the motor vehicle supply chain. For additional detail about this case, see CentroCompetencia UAI's note "¿En qué están las demandas de indemnización de perjuicios presentadas ante el TDLC? (January, 2023), available at https://centrocompetencia.com/en-que-estan-las-demandas-de-indemnizacion-de-perjuicios-presentadas-ante-el-tdlc/.

court.[609] The complaint faced an additional defense, however, in that another case involving the Pollos cartel had previously and been brought by SERNAC and rejected in its entirety by the court of first instance.[610]

As noted earlier, in December 2022, the TDLC approved an agreement between the consumer associations, Agrosuper and Don Pollo, which required the settling defendants to make cy pres distributions to 23 non-profit foundations. Agrosuper is required to pay CLP$18,541 million (approximately US$22 million) and Don Pollo CLP$2,430 million (about US$2.9 million). The settlements were the subject of harsh criticism from some, in part because of the total value of the deal and because individual consumers would receive nothing.[611] Comparing the settlement amounts to the estimates in the economic report presented before the TDLC, they represent 2.6% in the case of Agrosuper, and 2.57% in the case of Don Pollo.[612] On the other hand, the consumer associations faced some significant litigation risks that need to be taken into account.[613]

One important takeaway from the settlement with two of the three defendants is the TDLC's willingness to consider cy pres remedies as part of a settlement. Article 50 of the LPC allows for collective proceedings to be brought on behalf of diffuse interests, such as consumers who were unable to purchase a product because of a price increase. That is almost certainly an indeterminable group. In this instance, the TDLC viewed a cy pres distribution as "one of the forms of compensation for the damage caused to the so-called

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[609] In addition, the *also noted that the claim for "moral damages" was not available since the LPC at the time of the unlawful conduct (prior to the enactment of Law 21.081) did not provide for such damages*.

[610] *Sernac v. Agrosuper et al.*, C-28470-2015, 29th Civil Court of Santiago. *See* discussion *supra*.

[611] *See supra*.

[612] Comparing the values to the estimates in the complaint, they represent 4.5% in the case of Agrosuper, and 4.3% in the case of Don Pollo.

[613] Without expressing any opinion on the merits of the settlement, it is important to remember that the decision to settle a case involves an assessment of the risks of continued litigation in light of the uncertainties involved. In this case, for instance, there were obvious difficulties from the start in even calculating the overcharges by the poultry producers. This is compounded by difficulties estimating the degree to which these overcharges were passed through to end consumers over a range of different kinds of products and through different distribution channels. In addition, until the TDLC rules on an indirect purchaser action, whether those consumers can even pursue a collective damages proceeding remains an open question. And this is leaving aside any procedural obstacles resulting from SERNAC's unsuccessful proceeding in civil court.

SERNAC had requested that the TDLC explain the grounds and reasoning for approving the agreement. As for the reasons discussed elsewhere in this and other sections, it would probably be beneficial to the overall system if the settling parties were required to provide sufficient information for the TDLC to determine whether the settlement (to borrow the standard used in the US) is fair, reasonable and adequate to the class, taking into account all of the risks associated with continued litigation.

diffuse interest[.]"[614] If used appropriately, a cy pres component could be a useful mechanism for providing indirect compensation for damages that in many other systems, like the US, go uncompensated. Moreover, even if not the primary purpose, these payments will enhance overall deterrence by increasing the costs to defendants of an infringement.

One final groups of damages actions worth discussing are the ***"Supermercados" cases,*** five complaints filed by SERNAC and consumer organizations against three of Chile's largest supermarket chains, Cencosud S.A., SMU S.A., and Walmart Chile S.A. In February 2019, the TDLC, in a proceeding initiated by the FNE, found that the three defendants had engaged in a concerted practice from 2008-11 to fix the sale price for fresh poultry at or greater than wholesale list prices. The defendants did not communicate directly with one another but rather, using a "hub and spoke"-like arrangement, communicated through their common suppliers.

Following the judgment of the TDLC (and subsequent affirmation by the Supreme Court), SERNAC, using a provision under the LPC,[615] initiated three collective voluntary proceedings (one with each of the condemned companies) in an effort to obtain compensation for consumers without the need for litigation. When these failed, SERNAC, CONADECUS and AGRECU went to the TDLC to file various lawsuits (five in total) against Cencosud, SMU and Walmart.[616] In August 2022, the cases were joined in a single process[617]—an advantage of having antitrust damages actions venued the same forum where this can be done, for the sake of efficiency and consistency.

One of the more interesting aspects of this case is that, in addition to the collective and diffuse interests being pursued in the other consumer cases already discussed, SERNAC and the consumer associations are seeking recovery on behalf consumers affected by the "umbrella effect". Since the non-colluding retailers also experienced a rise in their prices, the defendants' arrangement would also have affected consumers who purchased poultry from others. As with consumers who bought from the defendants, the "umbrella damages" would consist of the overcharge paid versus a competitive price.[618] As

[614] *See* TDLC resolution, recital 11.

[615] LPC, Art. 54 H.

[616] Agrecu contra Cencosud S.A. y otras, CIP-5-2020; Conadecus en contra de SMU S.A., CIP-10-2021; Demanda de Sernac en contra de SMU S.A. y Walmart Chile S.A., CIP-9-2021; Conadecus en contra de Walmart Chile S.A., CIP-8-2021; and Demanda de SERNAC en contra de Cencosud S.A., CIP-7-2020.

[617] For a more thorough discussion of these cases and SERNAC's efforts at finding a voluntary resolution, *see* CeCo's note "La conciliación parcial en la indemnización del "Caso Supermercados": La doctrina cy près y el consumidor hipervulnerable" (January, 2024), available at https://centrocompetencia.com/conciliacion-indemnizacion-caso-supermercados-doctrina-cy-pres/.

[618] In addition, the plaintiffs are also seeking compensation under Article 51 (2) of the LPC for the moral damage suffered by consumers due to the impact on human dignity suffered as a result of the defendants' conduct.

with the diffuse interest in dead weight losses that plaintiffs have been pursuing, these umbrella damages are real harms that would otherwise go uncompensated if just the overcharges paid by consumers at the defendants' supermarkets were being sought. The TDLC has not yet ruled on the viability of this theory.

g. Conclusions

After more than seven years under the new regime, there are reason for optimism that the Chilean system is well-positioned to handle damages claims, especially as counsel representing consumer plaintiffs gain additional experience in these matters. To a large degree, the success of private damages actions in the Chilean system as presently constituted will depend largely on how the TDLC addresses some outstanding questions. For instance, it remains to be seen how demanding the TDLC will be in terms of precision required in damages calculations put forward by plaintiffs, especially in class cases. However, given the composition of the Tribunal it seems quite likely that they will understand. Similarly, it remains an open question whether claimants will consistently and reliably receive access to the information needed to establish their claims under whatever standards the TLDC adopts. Again, however, the tribunal does seem to be sensitive to those needs.

The Chilean model provides some real advantages in terms of facilitating private damages actions—at least in follow-on matters—while also maintaining the balance of the overall system between public and private enforcement. The existence of a single expert body dedicated to deciding competition-related matters, whether brought by the FNE or private litigants, allows for consistency to be maintained in the substantive law. Moreover, requiring a finding of liability before a damages action can be brought likely provides at least somewhat of a deterrent to private litigation being used in an abusive manner.

To date, however the Chilean system has been more successful at incentivizing certain types of private actions, including damages actions, and less at others. A very significant percentage of private litigation in Chile is between competitors or companies in vertical relationships, and the earlier damages actions were of this type. More recently, there have been follow-on consumer cases, which should be expected to continue. What Chile has not seen, though, are "stand alone" consumer cases brought without enforcement efforts by the FNE. Many, no doubt, will have no problem with that situation, viewing such efforts as the purview of public enforcement. However, the FNE, like almost all public agencies, is resource constrained and can only pursue a small percentage of potential matters that directly affect consumers. These are precisely the types of cases that could enhance the overall deterrent effect of the system. Moreover, they are cases that enhance the overall compensatory effectiveness of the Chilean system beyond what could be expected with follow-on cases alone. Part of the reason such cases have not been seen is likely due to there being a small number of lawyers in the country to date who work on behalf of consumer plaintiffs in competition matters. Over time, however, those might also become a reality.

II. PERÚ

While Chile's experience with competition law and policy stretches back almost 65 years, in Peru these are more recent developments. The first competition law in Peru was introduced in 1991, and its current law, the Law for the Repression of Anticompetitive Conduct, Legislative Decree 1034 (Competition Act), was enacted in 2008.[619] Unlike Chile's bifurcated judicial model, with cases brought before a specialized competition tribunal, Peru follows an administrative approach more akin to many European jurisdictions, and private enforcement there has played only a marginal role. While "follow-on" private damages actions are available under Peruvian law, few have been attempted, and it does not appear that any have yet been successfully pursued.[620]

Nevertheless, Peru's competition authority, the *Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual* (INDECOPI), has recently sought to facilitate damages actions seeking compensation for consumers negatively affected by anticompetitive conduct. To that end, in August 2021, the agency published the final version of its Guidelines on Compensation to Consumers for Anticompetitive Conduct.[621] These guidelines set out the criteria that the Commission will use to determine when consumer actions by the Commission should be brought.[622] They also, however, provide non-binding recommendations and guidance to the civil tribunals that Peruvian judges could take into account when resolving damages actions, and particularly consumer damages actions.[623]

The guidelines—which draw heavily from the EU damages directive, the US experience with consumer class actions, and recent developments in neighboring Chile—generally look well-tailored to fostering damages actions on behalf of Peruvian consumers, with one glaring exception. The Indecopi guidelines opt for pursuing consumer class actions only on behalf of direct purchasers, while leaving indirect purchasers the option of pursuing their cases individually.[624] For reasons discussed elsewhere, such a rule would

[619] *See* Alfredo Bullard and Alejandro Falla, Perú, in The International Handbook on Private Enforcement of Competition Law ("AAI Handbook"), p. 462.

[620] *See* OECD (2018), OECD-IDB Peer Reviews of Competition Law and Policy: Perú, p. 51 ("Despite this provision in the Law, no private actions have been filed since 2008.") At least three cases have been attempted. Two are mentioned in Bullard & Falla, Perú, AAI Handbook, p. 466-67. Another, which appears to be the first (and perhaps only) consumer class proceeding, is discussed briefly below.

[621] Indecopi, Lineamientos sobre resarcimiento a consumidores por conductas anticompetitivas (August 25, 2021), available at: https://www.gob.pe/institucion/indecopi/informes-publicaciones/2115578-lineamientos-sobre-resarcimiento-a-consumidores-por-conductas-anticompetitivas.

[622] *Id*., p.4.

[623] *Id*.

[624] Guidelines, §2.4.2, p. 16-18.

mean that consumer recovery, at least when pursued by Indecopi itself, is practically impossible. Indeed, Indecopi's position undercuts one of the only consumer antitrust damages actions that has been filed to date in Peru, involving the tissue paper cartel.[625] If followed by the courts, the agency's position also would prevent collective damages actions in other cases involving basic consumer product that impact broad swaths of the population—situations like the Peruvian *pollos* cartel.[626]

Even if indirect consumer damages actions are possible, damages actions in Peru are unlikely to become common occurrences any time soon. As alluded to above, Article 52 only allows private parties to seek damages after an infringement determination in an Indecopi administrative proceeding becomes final, including any appeals. No private right of action exists, as in Chile, to initiate an infringement proceeding. Moreover, any "follow-on" damages action still needs to be brought in the civil courts, which, unlike the TDLC in Chile, will be unfamiliar with the factual basis of the liability ruling, and most likely not as versed in the types of proof generally utilized in damages actions. Finally, Peru's civil courts tend to move quite slowly, which further disincentivizes private actions.

The Indecopi guidelines observe that civil liability in the Peruvian system "does not only play a compensatory function, but also a preventive one."[627] The deterrent effects provided by damages actions—whether by Indecopi, consumer associations or individual plaintiffs— could improve those from public enforcement efforts undertaken by a resource-constrained agency. Given the structure of the Peruvian system, which will be discussed below, that ability is constrained to begin with. By taking indirect consumer actions off the table, at least for actions brought by Indecopi, the potential deterrent effect that civil liability can provide in Peru is even further constrained.

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[625] *See* Fiorella Montaño, El cartel del papel: millonaria demanda contra Kimberly Clark y Protisa por concertar precios, Ojo Público (February 19, 2023), https://ojo-publico.com/sala-del-poder/una-millonaria-demanda-contra-kimberly-clark-y-protisa-por-colusion.

[626] Alejandro Falla, "Pollo a la brasa: Investigación y sanción del cartel de la industria avícola por INDECOPI (1996/1997)" CentroCompetencia UAI (January 17, 2024), available at: https://centrocompetencia.com/pollo-brasa-investigacion-sancion-cartel-industria-avicola-indecopi-1996-1997/.

[627] Guidelines, p.5. The guidelines state:

> "This has been recognized both in the United States of America and in the European Union, identifying, on the one hand, the compensatory function referred to guaranteeing adequate compensation in favor of the injured individuals and, on the other hand, the preventive function or deterrence, referred to inducing agents to modify their potentially harmful behavior to prevent harmful events from occurring in the future. Following this line, the Peruvian system has also recognized these functions."

a. The Peruvian Institutional Framework

The Peruvian Competition Act, DL 1034, establishes the basic competition rules for the country. The law identifies three main categories of anticompetitive conduct: (a) abuse of a dominant position,[628] (b) horizontal collusive practices,[629] and (c) vertical collusive practices,[630] and sets out examples of practices that could constitute infringements of these prohibitions. The law applies to natural or legal persons that participate in the market as buyers or sellers, as well as those who manage or represent those entities to the extent they participated in an offense.[631] The Competition Act applies not only to conduct that takes place in Peru, but also conduct that produces anticompetitive effects domestically, even if it took place abroad.[632]

As noted above, Peru prioritizes public over private enforcement of its competition laws. Indecopi, which was established in 1992 by DL 25868,[633] is the authority tasked with enforcing legal norms aimed at protecting market competition and intellectual property rights in the country and is set up as an integrated administrative and judicial agency. Indecopi is the agency in charge of enforcing the Competition Act, DL 1034.

Indecopi operates with two main branches: the functional branch and the administrative branch. The functional branch, which is more relevant for present purposes, is responsible for law enforcement through quasi-jurisdictional bodies. At the first instance, it consists of nine administrative bodies called Commissions, each dedicated to specific areas within Indecopi's mandate, including competition. Investigations of possible competition law infringements are handled initially by the Directorate for the Investigation and Promotion of Free Competition (Directorate), which may decide to present them to the

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[628] *See* DL 1034, Art. 10. Article 10.1 provides: "Se considera que existe abuso cuando un agente económico que ostenta posición dominante en el mercado relevante utiliza esta posición para restringir de manera indebida la competencia, obteniendo beneficios y perjudicando a competidores reales o potenciales, directos o indirectos, que no hubiera sido posible de no ostentar dicha posición."

[629] *See* DL 1034, Art. 11. Article 11.1 provides, in part: "Se entiende por prácticas colusorias horizontales los acuerdos, decisiones, recomendaciones o prácticas concertadas realizadas por agentes económicos competidores entre sí que tengan por objeto o efecto restringir, impedir o falsear la libre competencia[.]"

[630] *See* DL 1034, Art. 12. Article 12.1 provides: "Se entiende por prácticas colusorias verticales los acuerdos, decisiones, recomendaciones o prácticas concertadas realizados por agentes económicos que operan en planos distintos de la cadena de producción, distribución o comercialización, que tengan por objeto o efecto restringir, impedir o falsear la libre competencia."

[631] DL 1034, Art. 2.

[632] DL 1034, Art. 4.

[633] Ley de Organización y Funciones del Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual, DL 25868, available at: https://www2.congreso.gob.pe/sicr/cendocbib/con4_uibd.nsf/0FEC7D67117C823305257BA4005F2BE1/$FILE/dl25868.pdf.

Commission for the Defense of Free Competition (Commission). The Commission then decides whether actions constitute anticompetitive practices, and imposes sanctions if necessary.

Appeals from Commission decisions are handled by the Specialized Chamber for the Defense of Competition.[634] If dissatisfied, parties can file contentious-administrative applications with the judiciary. Initially, these applications are heard by the Contentious-Administrative Chamber of the Superior Court. Decisions of this Chamber can be further appealed to the Civil Chamber of the Supreme Court, and finally, to the Constitutional and Social Chamber of the Supreme Court through cassation.

The Commission, particularly through its Directorate, determines case prioritization and enforcement activities based on various factors, including the significance of the goods or services involved and the impact on consumers and the market. Prioritization may also consider complaints received from businesses, consumers, and other entities.[635]

Indecopi has the authority to commence proceedings concerning alleged abuses of a dominant position, horizontal collusive practices, and vertical practices, either *ex oficio* or in response to a complaint brought to the agency.[636] When a complaint is lodged, the Directorate evaluates its admissibility, which includes an assessment the preliminary evidence be presented by the complainant.[637] The Directorate can also may carry out a brief preliminary investigation in order to gather information or identify reasonable indications of anticompetitive conduct.[638] The Directorate will not initiate proceedings absent reasonable evidence of anticompetitive behavior.[639] Any dismissal of a complaint by

[634] DL 1034, Art. 40.

An April 2022 decision by the Commission in the *supermercados,* in which a fine of S/ 17.24 million (approximately US$ 4.65 million) was imposed against four supermarket chains for forming a "hub and spoke" cartel to fix the price of turkey, was recently overturned by the Tribunal. Mario Zúñiga, Main Developments in Competition Law and Policy 2023 – Perú, Kluwer Competition Law Blog (February 10, 2024), available at: https://competitionlawblog.kluwercompetitionlaw.com/2024/02/10/main-developments-in-competition-law-and-policy-2023-peru/.

[635] OECD 2018.

[636] DL 1034, Art. 18.1.

[637] DL 1034, Art. 19 ("La denuncia de parte que imputa la realización de conductas anticompetitivas, deberá contener: … b) Indicios razonables de la presunta existencia de una o más conductas anticompetitivas.").

[638] DL 1034, Art. 20. These preliminary investigations, however, must be completed within a short period. ("Estas actuaciones previas se desarrollarán en un plazo no mayor de cuarenta y cinco (45) días hábiles, contados desde la presentación de la denuncia, pudiendo extenderse por un plazo equivalente cuando la investigación lo amerite.").

[639] DL 1034, Art. 20 ("Presentada la denuncia de parte y con anterioridad a la resolución de inicio del procedimiento de identificación y sanción de conductas anticompetitivas, la Secretaría Técnica podrá realizar actuaciones previas con el fin de reunir información o identificar indicios razonables de la existencia

the Directorate requires a clear explanation. Dismissals can be appealed first to Indecopi's functional bodies and, if necessary, to the judiciary.[640] If the complaint is admitted, however, the complainant collaborates in the investigation procedure, although the Directorship directs the action.[641] In addition, other parties with legitimate interest in the matter can appear during the procedure to offer arguments and evidence.[642]

This institutional design, with all competition matters having to go through administrative procedures before Indecopi, limits the role private enforcement will play in Peru.[643] Although both Chile and Peru require infringement rulings before damages actions can be brought, private litigants in Chile can bring their own independent actions before the TDLC seeking such a ruling. This will tend to make the Chilean system better able to promote the compensatory goals of damages actions, since these actions are not constrained by the limited public enforcement resources of the country. Along the same lines, damages actions in Chile are likely to add far more to the overall level of deterrence in the system against anticompetitive conduct.

b. Damages Actions in the Peruvian System

Article 52 is the section that allows for compensation to be sought for harms caused by infringements of the Competition Act.[644] Once an administrative decision by Indecopi

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de conductas anticompetitivas. Estas actuaciones previas se desarrollarán en un plazo no mayor de cuarenta y cinco (45) días hábiles, contados desde la presentación de la denuncia, pudiendo extenderse por un plazo equivalente cuando la investigación lo amerite.").

[640] DL 1034, Art. 40.2(a).

[641] DL 1034, Art. 18.2

[642] DL 1034, Art. 22.2 ("otras partes con interés legítimo pueden apersonarse al procedimiento, expresando los argumentos y ofreciendo las pruebas que resulten relevantes, previo cumplimiento de los requisitos para formular una denuncia de parte.").

[643] *See* Bullard & Falla, Perú, AAI Handbook, p. 462 ("Private actions are restricted even within proceedings brought before INDECOPI. These proceedings are always initiated *ex officio*, whether or not a private party has filed a complaint.").

[644] Article 52 provides in full:

> "Una vez que la resolución administrativa declarando la existencia de una conducta anticompetitiva quedara firme, toda persona que haya sufrido daños como consecuencia de esta conducta, incluso cuando no haya sido parte en el proceso seguido ante INDECOPI, y siempre y cuando sea capaz de mostrar un nexo causal con la conducta declarada anticompetitiva, podrá demandar ante el Poder Judicial la pretensión civil de indemnización por daños y perjuicios.
>
> En el supuesto mencionado en el párrafo precedente, la Comisión, previo informe favorable de la Secretaría Técnica, se encuentra legitimada para iniciar, en defensa de los intereses difusos y de los intereses colectivos de los consumidores, un proceso judicial por indemnización por daños y perjuicios derivados de las conductas prohibidas por la presente norma, conforme a lo establecido por el artículo 82 del Código Procesal Civil, para lo cual

declaring an infringement has become final, article 52 allows anyone who has been injured as a result of that conduct to bring an action before the Peruvian civil judiciary.[645] It is not necessary to have been a party in the Indecopi proceedings in order to claim damages later. The claimant, who can be a natural or legal person, must simply be able to establish a causal relationship with the infringement.[646]

Indecopi. Since 2015 the Commission has also been able to bring consumer actions to recover damages resulting from anticompetitive conduct.[647] As in Chile, two types of consumers actions are recognized: those that protect diffuse interests, and those that protect collective interests. Diffuse interests are those that relate to an indeterminate group of consumers.[648] Collective interests, on the other hand, are those that concern a defined or definable group of consumers who share certain characteristics, such as being linked to the same supplier or can be groups within the same collective or class.[649] The Commission can bring actions on behalf of both types of consumer interests, provided a favorable recommendation is given by the Directorate to proceed.[650] Such actions must also be done in accordance with any limitation periods, rules, conditions or restrictions set out in Commission guidelines.[651]

Consumer associations. In addition, consumer associations can pursue claims on behalf of consumer interests. In Peru, consumer associations are not-for-profit organizations that established to protect, defend, inform and represent consumers and users.[652] Consumer associations recognized by Indecopi are entitled to file complaints before the agency on behalf of their members and in defense of the collective or diffuse interests of consumers.[653] They can participate in proceedings before Indecopi relating to

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deberá verificarse la existencia de los presupuestos procesales correspondientes. Sin perjuicio de ello, los plazos, reglas, condiciones o restricciones particulares necesarios para el ejercicio de esta acción, serán aprobados mediante lineamientos de la Comisión, a propuesta de la Secretaría Técnica."

[645] DL 1034, Art. 52.

[646] DL 1034, Art. 52.

[647] OECD 2018, at p.18.

[648] Consumer Protection Code, Art. 128(b).

[649] Consumer Protection Code, Art. 128(a).

[650] DL 1034, Art. 52. This last point was introduced in 2018 (by Legislative Decree 1396, 2018), because the original mechanism (Legislative Decree 1250, 2015) gave authority to Indecopi as an institution to bring a claim rather than any particular entity within the agency.

[651] DL 1034, Art. 52.

[652] Consumer Protection Code, Art. 153.1.

[653] Consumer Protection Code, Art. 153.2.

violations of the Competition Act.[654] Finally, they can pursue claims in judicial proceedings in defense of diffuse consumer interests,[655] or in defense of collective interests when Indecopi agrees to delegate its authority to an association that has adequate representation and recognized experience.[656]

The Consumer Protection Code includes an interesting mechanism for funding consumer associations, under which the organization can receive a percentage, up to 50 percent, of administrative fines imposed in proceedings promoted by an association.[657] Of the fund received, no more than five percent can go towards operational expenses of the association, with the remainder needing to be used for the purpose of implementing specific activities to promote and defend consumer interests.[658] The percentage received by an association in a particular case is based on several performance criteria set out in

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[654] *See* Bullard & Falla, Perú, AAI Handbook, pp. 468 n.21, citing Directive No. 001-2003-INDECOPI/DIR on Regulations for the Intervention of Consumer Associations in Administrative Procedures before the Consumer Protection Commission and other Functional Bodies of INDECOPI.

[655] Consumer Protection Code, Art. 153.3 provides, in relevant part: "En la vía judicial pueden promover procesos en defensa de los intereses difusos … de los consumidores, sujetándose a lo previsto en [el] artículos[] 130 …."

Article 130, in turn, provides in part: "Las asociaciones de consumidores debidamente reconocidas pueden promover tales procesos, sujetándose a lo dispuesto en el artículo 82 del Código Procesal Civil."

[656] Consumer Protection Code, Art. 153.3 provides, in relevant part: "En la vía judicial pueden promover procesos en defensa de los intereses … colectivos de los consumidores, sujetándose a lo previsto en [el] artículo[] … 131."

Article 131.1 provides that:

> "El Indecopi, previo acuerdo de su Consejo Directivo, está facultado para promover procesos en defensa de intereses colectivos de los consumidores, los cuales se tramitan en la vía sumarísima, siendo de aplicación, en cuanto fuera pertinente, lo establecido en el artículo 82 del Código Procesal Civil. Asimismo, el Indecopi, previo acuerdo de su Consejo Directivo, puede delegar la facultad señalada en el presente párrafo a las asociaciones de consumidores debidamente reconocidas, siempre que cuenten con la adecuada representatividad y reconocida trayectoria."

[657] *See* Consumer Protection Code, Art. 156. Article 156.1 provides:

> "El Indecopi y los organismos reguladores de los servicios públicos pueden celebrar convenios de cooperación institucional con asociaciones de consumidores reconocidas y debidamente inscritas en el registro especial. La firma del convenio de cooperación institucional otorga la posibilidad de que el Indecopi y los organismos reguladores de los servicios públicos puedan disponer que un porcentaje de las multas administrativas impuestas en los procesos promovidos por estas asociaciones de consumidores les sea entregado. En cada caso, dicho porcentaje no puede exceder el cincuenta por ciento (50%) de la multa impuesta y constituye fondos públicos."

[658] Consumer Protection Code, Art. 156.2.

the Consumer Protection Code.[659] As a result of these rules, consumer associations' business models are based on administrative litigation before Indecopi.[660] The provisions, however, refer specifically to administrative fines, not damages recoveries.

Restitution as a Corrective Measure? In addition to Article 52, one additional mechanism that has been suggested for obtaining compensation is through the imposition of corrective measures during administrative proceedings. Article 49 of the Competition Act provides that in addition to any sanctions imposed, the Commission may dictate corrective measures. These include not only measures aimed at restoring the competitive process or preventing recurrence of the anticompetitive conduct,[661] but also those aimed at reversing the direct and immediate harmful effects of the offending conduct.[662] The Commission has authority to issue guidelines specifying the scope of these provisions relating to corrective measures. By all accounts this is not something that has been used.[663]

***Nature of Damages Actions*.** Like with the US and Chile, Article 52 does not place any restriction on types of anticompetitive conduct for which damages may be sought.[664] Damages therefore are likely available for any of the categories of conduct prohibited by the Competition Act, namely abuses of a dominant position, horizontal collusive practices, and vertical collusive practices. The only precondition, as noted above, is that there be a final administrative resolution finding an infringement.[665] Article 52 also states that "anyone" ("toda persona") can bring a damages action, suggesting that, in the case of

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[659] Consumer Protection Code, Art. 157. Criteria to be considered include: (1) Labor de investigación desarrollada por la asociación de consumidores de forma previa a la presentación de la denuncia; (2) Participación de la asociación de consumidores durante el procedimiento iniciado; (3) Trascendencia en el mercado de la presunta conducta infractora denunciada, impacto económico de la misma y perjuicios causados en forma previa o que puedan ser causados de forma potencial a los consumidores con relación a la misma; and (4) Otros que se determinen en el análisis específico de cada procedimiento.

[660] UNCTAD, Voluntary peer review of consumer protection law and policy: Peru, TD/RBP/CONF.9/7 (May 14, 2020), p. 7, available at: https://unctad.org/system/files/official-document/tdrbpconf9d7_en.pdf.

[661] DL 1034, Art. 49.1.

[662] DL 1034, Art. 49.2 ("La Comisión también podrá dictar medidas correctivas dirigidas a revertir los efectos lesivos, directos e inmediatos, de la conducta infractora.")

[663] For a brief discussion of how corrective measures typically have been employed by Indecopi, *see* Bullard & Falla, Peru, AAI Handbook, p. 472-73.

[664] *See* DL 1034, Art. 52.

[665] Indecopi, in its guidelines, suggests that the finality required under article 52 refers to any resolution that can no longer be challenged either by administrative means through an administrative appeal, or by the contentious-administrative judicial process. Moreover, when there are multiple defendants, in the case of several persons responsible for the anticompetitive conduct, a damages claim can be brought when there is a final decision with respect to one or more of them. *See* Lineamientos, p.10.

damages sought by purchasers of products subject to price fixing or other collusive conduct, not only end consumers, but also firms or other legal persons that acquired such products can also seek damages.[666] However, as will be discussed below in the case of consumer collective actions, the answer may not be so clear cut.

Available Damages. The Competition Act does not specify the kinds of damages that might be available, and Peruvian courts have not decided any cases in which questions on the types of damages that might be recoverable are answered. Given the lack of any regulation otherwise, damages actions are treated as ordinary tort cases governed by civil liability rules.[667] To that end, compensation under the Peruvian Civil Code includes all consequences arising from the action or omission that caused the damage, including loss of profits, damage to the person and moral damage.[668] There must be, however, an adequate causal relationship between the event and the damage caused.[669] The determination of such a link will be made in accordance with the general principles set out in the Civil Code.[670]

Unlike in the US, then, there is no provision for treble damages or, in the case of Canada under tort theories, punitive damages. However, similar to Chile, available damages in Peru might encompass harms not available in the US, such as moral damage for deadweight losses. Indeed, while the guidelines prioritize damages of an economic nature, such as overcharges in cartels, they do not rule out the possibility of the Commission pursuing other harms in appropriate cases.[671]

In cases involving multiple defendants with shared responsibility, joint and several liability applies. On this point, Article 1983 of the Civil Code establishes that "[i]f several persons are responsible for the damage, they will be jointly and severally liable." This rule, which emanates from the Civil Code, is consistent with the treatment of cases involving multiple wrongdoers in the European Union and US, for instance. As pointed out in the Indecopi guidelines, this rule "is justified by the need for compensation claims brought by the Commission to be appropriate mechanisms to ensure compensation for the damages suffered by consumers as a result of anticompetitive conduct."[672]

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[666] *See* Lineamientos, p.4.

[667] Bullard & Falla, Perú, AAI Handbook, pp. 465-66.

[668] Código Civil, Art. 1985. Legal interest accrues from the date the damage occurred.

[669] *Id*.

[670] *See* Bullard & Falla, Peru, AAI Handbook, p. 467. These encompass Articles 1969 to 1988 of the Civil Code.

[671] Lineamientos, p. 11. Bullard and Falla, however, note that moral damages as part of compensation are admitted in "very limited cases." Bullard & Falla, Perú, AAI Handbook, p. 472.

[672] Lineamientos, p. 21.

***Limitations Periods*.** The Competition Act does not include any limitations period in which a damages claim must be brought. Instead, the limitations period is that for bringing a civil tort claim in Peru, two years.[673] That period begins to run when an action could be brought.[674] Presumably, this means two years from the date an administrative decision by Indecopi finding an infringement becomes final and a damages claim can be brought under Article 52. However, because there are no clear rules for how to calculate the running of this period,[675] and given potential ambiguity as to when a decision becomes "final," Indecopi has provided some guidance as to its interpretation both for purposes of the running of the statute of limitations and, as described above, for when a party can bring an action under Article 52—namely, once the resolution can no longer be challenged either by administrative means through an administrative appeal, or by the contentious-administrative judicial process.[676] Any ambiguity on this issue, though, could discourage the filing of damages actions.[677]

c. Consumer Class Actions Based on Competition Law Infringements

The handful of early damages actions in Peru involved individual claims. As in Chile, however, the Peruvian authorities have prosecuted some major cartels, such as *pollos* and *papel higiénico*, that had widespread effects on consumers, which put an increased focus on obtaining compensation in those types of cases. In 2015, Indecopi was given the authority to seek damages on behalf of consumers in competition matters. In April 2021, the Commission approved guidelines that would define when consumer damages actions would be pursued. The guidelines also provide non-binding guidance for the courts on numerous issues that will likely arise in consumer cases. This advice looked to experiences in the US and Chile in such actions, as well as the directives set out in the 2014 EU Damages Directive.

In promulgating the guidelines, Indecopi recognized the usefulness of class proceedings when pursuing damages on behalf of large numbers of claimants that all have been harmed by the same conduct. As discussed in previous sections, consumer damages are generally too small to incentivize individual actions given the size of the expected recovery compared to the expense of pursuing a claim. Thus, class actions, the guidelines note, "have become particularly relevant in redressing damages as a result of anticompetitive conduct that harms consumers" and are "a better tool than individual

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[673] Civil Code, Art. 2001(4).

[674] Civil Code, Art. 1993 ("La prescripción comienza a correr desde el día en que puede ejercitarse la acción y continúa contra los sucesores del titular del derecho.").

[675] *See* Bullard & Falla, Perú, AAI Handbook, p. 469.

[676] Lineamientos, p. 28-29.

[677] *See* Bullard & Falla, Perú, AAI Handbook, p. 469.

actions to address the claims of class members in the majority of cases."[678] While Article 52 allows claimants, and thereby the Commission, to seek damages for any kind of anticompetitive conduct, the guidelines emphasize that Indecopi will prioritize damages actions in cartel cases.[679]

Who can be compensated? While Article 52 empowers the Commission to bring damages actions in defense of both diffuse and collective consumers interests, the Competition Act does not define "consumers" for these purposes. The guidelines, however, generally limit consumers to "natural persons" who are end users of products or services that have been affected by anticompetitive conduct.[680] Indecopi imposes this limitation even though Peru's Consumer Protection Code includes microenterprises and legal entities involved in non-commercial or professional activities.[681] There does appear to be some room for analyzing on a case-by-case basis whether legal entities might be included in particular circumstances;[682] nevertheless, as a general matter, only natural persons will be included in an action brought by Indecopi. This means, of course, that actions brought by Indecopi could exclude large and important segments of end user "consumers."[683]

The guidelines further limit "consumers" to "direct" purchasers of the products or services that were subject to an antitrust infringement, thereby excluding "indirect" purchasers.[684] This leaves perhaps an even more significant gap in terms of the ability of

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[678] Lineamientos, p. 5-6.

[679] Lineamientos, p. 8.

[680] Lineamientos, pp. 14-16.

[681] The Peruvian Consumer Protection Code, Preliminary Title, Article IV (1) defines consumers as follows:

> "1.1 Las personas naturales o jurídicas que adquieren, utilizan o disfrutan como destinatarios finales productos o servicios materiales e inmateriales, en beneficio propio o de su grupo familiar o social, actuando así en un ámbito ajeno a una actividad empresarial o profesional. No se considera consumidor para efectos de este Código a quien adquiere, utiliza o disfruta de un producto o servicio normalmente destinado para los fines de su actividad como proveedor.
>
> 1.2 Los microempresarios que evidencien una situación de asimetría informativa con el proveedor respecto de aquellos productos o servicios que no formen parte del giro propio del negocio.
>
> 1.3 En caso de duda sobre el destino final de determinado."

[682] *See* Lineamientos, p. 16.

[683] In the *Microsoft* cases, for instance, a very substantial share of the software licenses involved were acquired by companies and other "legal person" end users. By excluding for-profit firms from the definition of "consumers", use of the definition from the Consumer Protection Code for purposes of Article 52 of the Competition Act in an action brought by Indecopi or a consumer association potentially means that compensation is not practicably available for many purchasers.

[684] Lineamientos, p. 16-18.

damages actions to provide compensation to Peruvian consumers given that in many, if not most, cases consumers are not dealing directly with cartel members. In this regard, the guidelines ignore the conclusions set out in the EU Damages Directive that allowing indirect purchaser recovery is essential for providing effective compensation, and instead following the United States. However, as discussed earlier, indirect purchasers in fact are allowed to pursue damages claims under state law in the majority of states. And other jurisdictions like Canada have declined to follow the US on this issue.

While the guidelines state that indirect consumers who are not included in an action brought by Indecopi can still pursue individual claims,[685] such actions are unlikely to be feasible without a collective mechanism. If indirect purchaser damages actions can still be pursued by consumer associations, that could alleviate these concerns. As discussed below, some of Indecopi's largest consumer-facing cartel cases, such as the *pollos* and *papel higiénico* cases, involve indirect purchaser consumers. These cases would fall outside of the Indecopi guidelines, although a consumer association has brought an action in the latter case.

***Opt-out Consumer Classes and Compensation Mechanisms*.** The guidelines indicate that collective proceedings will be brought by Indecopi on an opt-out basis.[686] In reaching this determination, the agency points to literature on the comparative experience with consumer class actions regarding the effectiveness of opt-out versus opt-in models, and concludes that the former is consistent with the purpose underlying Article 52.[687]

The guidelines also look at the comparative experience when proposes various compensation models that can be used once a damages judgment is obtained. The first, of course, is to compensate the consumers who were affected by the anticompetitive conduct. This could be done either by means of a claims-made process, generally through a claims administrator, or by means of automatic payments. An example of the latter that is described in the guidelines is the tissue case in Chile.[688] On the other hand, in cases where direct compensation is impossible to use due to high transaction costs, or when it might be impossible to identify the universe of affected consumers, the guidelines recognize that

[685] Lineamientos, p. 18.

[686] Lineamientos, p. 28. As in the US, Chile and elsewhere, where opt-out models are followed, in order to determine the class or group of consumers affected, it will be sufficient to identify them in a general manner. To that end, the guidelines provide as an example, "in the case of a horizontal cartel about price fixing, it will be sufficient to note that the class includes consumers who have purchased the cartel's product during the relevant period and to estimate the number of members who belong to that class on a reasonable and duly motivated basis, but without the need to provide strong evidence or exact calculations in that regard."

[687] Lineamientos, p. 33.

[688] Lineamientos, p. 37-40.

indirect compensation, or fluid recovery, may be appropriate.[689] However, given that these indirect methods to not fulfill the compensatory function as well, the guidelines prioritize direct compensation, while also recognizing that the two are not mutually exclusive (for instance, in dealing with the remainder of unclaimed funds).[690]

To the extent that these guidelines are followed by the courts in consumer damages proceedings—by Indecopi or consumer associations—the use of opt-out class proceedings with flexible compensation mechanisms will better fulfill the compensatory goals of Article 52 than the alternative. It could also strengthen the overall deterrent effect of the Competition Act. However, in either case, given the other limitations described in this section, the impact is likely to be minimal, at least in the short run.

d. Other Considerations

Because damages cases are heard in civil court, the general rules that apply to non-contractual tort cases will also be utilized in antitrust damages cases.[691] Given the similarities between the Peruvian and Chilean systems, the difficulties already discussed that claimants encountered in Chilean civil courts, before jurisdiction over antitrust damages claims was given to the TDLC, are also present in Peru, and serve as impediments to the development of a workable compensatory scheme there. Indecopi's guidelines provide recommendations to the judiciary for addressing some of these issues, at least in the context of consumer damages actions brought by the authority or consumer associations. As already noted, however, those are not binding and how effective those will be in influencing what has been described as a conservative judiciary remains uncertain.

i. Standard of Proof

A final infringement determination by Indecopi is binding in a follow-on damages action. This means that the court is limited to questions of whether the anticompetitive conduct injured the plaintiff, and the quantification of that harm.[692] The standard applicable to proving damages is set out in [CC – Peru].

Obviously cognizant of the difficulties that similar standards have presented to claimants in antitrust damages cases, Indecopi's guidelines set out some pragmatic recommendations to the judiciary for addressing these issues. With respect to

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[689] Lineamientos, p. 40-43.

[690] Lineamientos, p. 43.

[691] *See* Bullard & Falla, Perú, AAI Handbook, p. 469-470.

[692] *Id*., p. 466. *See also* DL 1034, Article 52 ("toda persona que haya sufrido daños como consecuencia de esta conducta, … y siempre y cuando sea capaz de mostrar un nexo causal con la conducta declarada anticompetitiva, podrá demandar ante el Poder Judicial la pretensión civil de indemnización por daños y perjuicios.").

quantification of harm in consumer cases, for instance, Indecopi cautions that "an exact quantification of damages arising from anticompetitive conduct cannot be required, and a reasonable estimate must be sufficient in light of the facts of the case and the information available."[693] In support of this recommendation, Indecopi draws heavily on comparative law, including a 2013 decision by the Spanish Supreme Court, article 7.1 of the 2014 EU Damages Directive, and in the Latin American region, guidelines issued in 2018 by the Secretariat for Productivity and Competition Advocacy of Brazil to estimate damages caused by cartels.[694] Of course, it remains to be seen whether civil courts in Peru will follow these non-binding recommendations on quantification of damages.[695]

ii. Access to Evidence

Once a final decision has been issued in the administrative proceeding, non-confidential versions of the resolution and the technical report of the Directorate are made public.[696] This information can be used by parties in order to prepare follow on claims. According to the OECD's 2018 Peer Review, "Indecopi considers that all the information necessary to prove the occurrence of the infraction – for example, the difference between the cartelized price and the competitive price in cartel cases, the number of transactions affected, etc. – is contained in the public file of the administrative procedure."[697] Whether the available information is sufficient for establishing damages and causation, not just the infraction itself, is difficult to assess and may be case specific.

Beyond what is available from the prior proceeding, access to evidence is limited. Peru does not have a discovery process, like in the US and Canada. Rather, disclosure is

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[693] Lineamientos, p. 13.

[694] Lineamientos, p. 13-14.

[695] Interestingly, the draft guidelines stated:

> "Regarding cartels, it is essential to note that section 17.2 of the Directive 2014/104/EU establishes a presumption that these conducts cause damages, which can be rebutted by the defendant. Likewise, it should be highlighted that this presumption is present in the transposition laws of all the Member States of the European Union. A Peruvian judge could also use this presumption, taking into account that horizontal agreements, such as price cartels, are subject to an absolute prohibition, and that at a comparative level they are recognized as the anticompetitive conducts that cause the most to consumers, as it was previously indicated. This does not imply, however, a presumption about the amount of the damage itself."

See Lineamientos (Draft), p. 10. That these paragraphs were not included in the final guidelines suggests Indecopi concluded, following input, that such an approach—as useful as it would have been—was not possible in Perú.

[696] DL 1034, Art. 34 (Acceso al expediente).

[697] OECD Peer Review, p. 51.

made by the parties through the court, and must be approved by the court.[698] Moreover, as discussed below, information obtained by Indecopi from leniency applicants is protected. Depending on the standards of proof imposed by the courts for proving harm and quantifying damages, these limitations are likely to stand in the way of providing effective compensation, especially in consumer cases where the informational asymmetries are greatest.

e. Relationship with Public Enforcement

Although Indecopi has recognized the important role that damages actions can play in enhancing the risk of infringing the competition laws and thereby enhance deterrence overall, to date private enforcement has not done so. Nevertheless, the agency has taken steps to facilitate damages actions – by private parties, consumer associations, and Indecopi itself – through "soft law" efforts in its guidelines to educate the courts that will be hearing these cases. What effect those will have remain to be seen; but they suggest a growing awareness of the importance of the issue.

The guidelines, though, seek to ensure that the prospect of a potential damages action, at least by Indecopi, does not undermine the agency's leniency program. Article 26.6 of the Competition Act allows for the reduction or total exemption from fines for firms that satisfy certain requirements. Peru's leniency law, however, does not eliminate, or even limit, the potential civil liability of a participant. The guidelines therefore state that, in order to "encourage the reporting of conduct that the authority has not yet detected," Indecopi will not initiate damages actions in "Type A" leniency cases—those in which Indecopi did not have an investigation underway at the time of the leniency applications and without which the agency likely would not have discovered the anticompetitive conduct.[699] This limitation, however, is without prejudice to the right of other plaintiffs to bring such actions.

Moreover, in terms of information provided by the leniency applicant, the guidelines state that, under no circumstances will confidential information be transferred by the Directorate and Commission for use in a possible damages claim.[700] This limitation, the guidelines clarify, does not apply to information contained in the file from the administrative proceeding or any information made public by the applicant. Moreover, it does not preclude the Commission from seeking damages in a proceeding provided that any confidential information supplied by the application is not used.[701] While it remains to be seen precisely how broadly Indecopi will interpret "confidential" information in this

[698] *See* Bullard & Falla, Perú, AAI Handbook, p. 470-71.

[699] Lineamientos, p. 23.

[700] Lineamientos, p. 23.

[701] Lineamientos, p. 23.

context, the protections offered by the agency appear to extend beyond those set out in the EU Damages Directive, and could hinder follow-on damages actions.

f. The *Farmacias* and *Tissue* Cartels and the Limits of Damages Actions in Perú

The challenges discussed above, and in particular those associated with pursuing claims before civil courts, have meant that few damages actions have been seen to date in Perú. There are, however, two consumer damages case currently pending that are worth watching. In October 2019, before the publication of Indecopi's guidelines, the agency filed a claim on behalf of Peruvian consumers against the companies that had been involved in the *farmacias* collusion. And then, in April 2022, a Peruvian consumer association, the International Association of Insurance Consumers and Users (Aincus), filed a consumer damages action seeking compensation for damages caused by the *papel higiéncio* cartel.[702] Unfortunately, few details are publicly available about either proceeding.

Indecopi's* Farmacias *complaint. Around the same time the major pharmacy chains in Chile were colluding on prices, their Peruvian counterparts were similarly engaged in price fixing. Between January 2008 and March 2009, five chains, Albis S.A., Farmacias Peruanas S.A., Eckerd Peru S.A., Mifarma S.A. and Nortfarma S.A.C, coordinated prices on 36 pharmaceutical and related products. At the time this conduct was taking place, private pharmacies accounted for about 88 percent of all medicines purchased in the country. The five pharmacy chains themselves accounted for 72 percent of pharmaceuticals sold in Peru. In 2016, the Commission imposed fines of almost 9 million soles (approximately US$2.64 million). In addition, the Commission required the companies to implement compliance programs for the next three years and imposed other measures.

In October 2019, Indecopi filed its first consumer damages claim under Article 52 against InRetail Pharma S.A., MiFarma S.A.C. and Albis S.A.C., seeking S/ 2,208,206.74 soles before the 33rd Civil Court of Lima.[703] The complaint reportedly was admitted and is still in process.[704] Because of the pandemic, which began only a few months after Indecopi filed its civil complaint, the proceeding apparently was suspended for some time, which perhaps explains in part the length of the case so far. While the complaint pre-dates Indecopi's guidelines, it does appear to be consistent with at least several of the provisions

[702] Fiorella Montaño, El cartel del papel: millonaria demanda contra Kimberly Clark y Protisa por concertar precios, Ojo Público (February 19, 2023), https://ojo-publico.com/sala-del-poder/una-millonaria-demanda-contra-kimberly-clark-y-protisa-por-colusion.

[703] Some of the original defendants were subsequently combined in a single company (Intercorp).

[704] *See* LP – Pasión por el Derecho, "Indecopi presenta la primera demanda por indemnización a favor de consumidores [contra farmacias que concertaron precios]" (October 30, 2019), available at: https://lpderecho.pe/indecopi-presenta-primera-demanda-indemnizacion-favor-consumidores/.

set out in the agency document. For instance, the case involved a cartel, which the guidelines prioritize. It also involves consumers who made purchases directly from the defendants. While little additional information is available publicly, it is worth noting that more than 15 years have now elapsed since the conduct at issue, without the affected consumers having received any compensation.

***Aincus'* Papel higiénco *damages action*.** The *papel higiénico* case is one of the higher profile cartels pursued by Indecopi in recent years. In 2014, Indecopi opened an investigation into suspected collusion between Kimberly Clark Perú S.R.L. and Productos Tissue del Perú S.A. (Protisa) involving toilet paper and other tissue products. The two companies, which accounted for almost 90 percent of the tissue markets in Peru,[705] had been agreeing on prices and other commercial conditions for nearly a decade, beginning in 2005.[706] Indecopi's investigation revealed that the cartel had been carried out through secret meetings in cafes and hotel rooms involving general manages and company employees.[707] During those meetings and in phone calls, the participants reached agreements on price increases for their products.[708] These prices increases imposed on distributors, wholesalers and supermarkets in some cases exceeded 20 percent. Indecopi found that these secret agreements not only had direct effects on competition in the markets for toilet paper and other tissue products, but also (at least on occasion) on retail prices paid by consumers.[709]

Three years later after Indecopi's investigation began, in 2017, the Commission dismantled the cartel and sanctioned the companies, imposing fines of S/171.7 million (approximately US$52.5 million) on Kimberly Clark, S/104.1 million (US$31.8 million) on Protisa and S/1.1 million (US$336,000) on 14 employees who participated in the collusion. However, because both companies sought leniency and obtained leniency under Article

[705] Kimberly Clark markets the Suave and Scott brands in Peru, while Protisa markets the Elite and Noble brands.

[706] *See* Indecopi, Press Release, "El Indecopi desarticuló y sancionó, en primera instancia, al cártel de papel higiénico conformado por las empresas Kimberly Clark Perú y Protisa" (April 5, 2017), available at: https://repositorio.indecopi.gob.pe/bitstream/handle/11724/5662/NP%20170405%20Resolución%20papel%20higienico.pdf?sequence=1&isAllowed=y.

[707] "The evidence identified by Indecopi during the investigation includes emails and electronic records obtained during inspection visits to the companies; testimonies acknowledging the infraction by the participants; a diary from the secretary of the former general manager of Protisa with records of calls and meetings; and invoices from hotels where they took place meetings." *Id.* (author's translation).

[708] *Id*.

[709] *Id*.

26, Kimberly Clark, as the first to enter the program, was exempted from fines, and Protisa received a 50 percent reduction in its fines.[710]

As with the *Papeles* case in Chile, the *Papel higiénico* case in Peru generated considerable public interest given the widespread effects the cartel would have had on consumers.[711] In late-2018, the Economic Studies Division (Gerencia de Estudios Económicos) of Indecopi subsequently calculated that, had the cartel continued past its unraveling in 2015, it could have caused Peruvian consumers an additional S/1,144.40 million (approximately US$343 million) in overcharges.[712]

Aincus filed its case against Kimberly Clark and Protisa in the Tercer Juzgado Civil Transitorio de la Corte Superior de Justicia de Lima. Few details are available about the complaint or status of the proceeding other than the fact that the complaint, according to one news account, was admitted in November 2022.[713] That same news source reports:

> According to estimates by [Aincus], during the 10 years of collusion between both companies, an overcharge of S/ 3,000,000,000 [approximately US$805 million] resulted, which was paid by consumers. In this context, the representative of this [consumer] organization, Uben Atoche Kong, maintains that [in addition to fines] the companies should also have compensated families for the economic harm. ...
>
> Aincus's intention is for the companies to pay compensation of S/6,000,000,000 to the affected households, in addition to paying the costs of the legal technical defense. This repair is divided into S/ 3,000,000,000 of overcharges corresponding to 10 years and S/ 3,000,000,000 for interest incurred.[714]

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[710] *Id*.

[711] *See, e.g.*, RPP, "Indecopi desarticuló el cártel de papel higiénico conformado por Kimberly Clark y Protisa," (April 5, 2017), available at: https://rpp.pe/economia/economia/indecopi-desarticulo-el-cartel-de-papel-higienico-conformado-por-kimberly-clark-y-protisa-noticia-1042011.

[712] *See* El Comercio, "Desactivación de cártel de papel higiénico implicó ahorro potencial de S/1.144 mlls" (Oct. 25, 2018), available at: https://elcomercio.pe/economia/peru/desactivacion-cartel-papel-higienico-implico-ahorro-potencial-s-1-144-mlls-noticia-571276-noticia/?ref=ecr.

[713] Multiple Peruvian lawyers have indicated to the author that these proceedings are generally not public.

[714] Ojo Público, El cartel del papel (author's translation).

The consumer association appears to be looking at the settlement ultimately reached in the Chilean *papeles* case as a model for compensating Peruvian consumers.[715] Little else is known about the case, however, including the basis for the claimed damages, whether access to documents or information from the Indecopi proceeding has been requested or granted, and a host of other questions. It is also not clear what kind of legal and economic resources have been marshalled by the consumer association in this case, or how any those resources are being financed. But given that this is, by all appearances, the first and perhaps only consumer damages action filed in Perú, the outcome (whenever that occurs) should be carefully analyzed, including any influence the Indecopi guidelines might have had on the court's consideration, substantively or procedurally, of the claims. This includes whether indirect consumers to seek and recover compensation. If not (as Indecopi's guidelines suggest) that will present serious obstacles to effective consumer compensation in Perú.

In addition, the case could provide some indication of whether consumer associations have the technical and legal capabilities to pursue large-scale damages actions. A recent UNCTAD peer review of consumer protection in Peru observed that the country's associations have tended to "rely heavily on the activism of persons committed to improving the well-being of their fellow citizens."[716] While noting that this can be a strength, the report also concluded that the current model was not well-suited for challenges over the long-term and that additional professionalization was needed.[717] This case, obviously, is just one data point. But if it is successful, and Peruvians consumers receive compensation like their Chilean counterparts, it would be cause for optimism.

[715] *Id*. ("La sanción de la justicia chilena también es tomada como referencia en la demanda interpuesta por Aincus contra Kimberly Clark y Protisa. Uben Atoche dijo que la indemnización debería ser repartida entre la población del país, tal como se realizó en el país vecino.")

[716] UNCTAD, p. 13.

[717] *Id*.

g. Conclusions

Notwithstanding the pending lawsuits in the *farmacias* and *papel higiénico* cases, antitrust damages actions in Peru are still more theoretical than real. The Indecopi guidelines are a step in the right direction, particularly if the civil tribunals follow the agency's recommendations on handling critical issues such as standards of proof and collective recoveries. But that is still a big unknown, and until there is more certainty on these issues, questions will remain about the viability of damages actions, particularly in consumer cases. The *papel higiénico* case might have been a good opportunity for Indecopi itself to have brought a test case, in a matter involving widespread effect on Peruvian consumers.

But the *papel higiénico* case points to another potential problem in the Peruvian system, namely the apparent inability of indirect purchaser consumers to have their claims pursued in a class proceeding. Indecopi, as discussed above, appears to believe that it does not have the ability to pursue cases on behalf of the collective interest of consumers who have not contracted directly with defendant. And while there is no definitive answer on this question for consumer associations, they may run into the same obstacles that their counterparts in Chile have encountered in the civil courts under a consumer protection law that has similar language. Without an ability to pursue the collective interests of indirect purchasers, the Peruvian system will be unable to fulfill its compensatory function. Compensation in cartels involving consumer products, like in the *papel higiénico* case, or *pollos*, will not be possible. And that in turn also undermines the deterrent effect of the system.

But even if indirect cases are possible, the design of the system makes recovery of damages a long process under the best circumstances. As two leading Peruvian competition lawyers have observed, one significant obstacle that makes it difficult for claimants to recover damages is:

> the failure to allow joint actions in single proceedings both to determine a breach of the [Competition Act] and to compensate for the antitrust injury … together with the lack of appropriate coordination between such proceedings …. Since damages actions can only be initiated once the administrative decisions are final, the system condemns antitrust victims to wait no less than three to five years before they can initiate an action for damages, and at least four to six additional years before they can receive compensation for the damage suffered. The waiting period for the victims can increase

> significantly if INDECOPI's decision is challenged before the judiciary.[718]

This issue is quite apparent in both of the pending damages actions, where more than a decade has elapsed since the conduct at issue.

While Chile's system similarly relies on a two-step process, requiring a liability determination before a damages action can be brought, the Chilean system has the benefit of being able to leverage more robust private enforcement during that initial stage. Private plaintiffs are able to bring actions before the TDLC without any involvement by the FNE. In Peru, by contrast, the institutional capacity of Indecopi, with its limited resources, will tend to restrict the number of actions that ultimately can be processed in the system.[719] Moreover, the damages actions themselves must then proceed in a different forum, before a civil tribunal that will be unfamiliar with the specifics of the particular case (unlike the TDLC in Chile, which will have already decided the underlying matter) and in a court system that itself has been characterized as being quite slow and not especially well-equipped to deal with the complexities involved. These extended proceedings will tend to undermine the incentive to pursue damages actions by private actors or consumer associations.

In short, the Peruvian system, as presently constituted, is not well-situated to provide effective compensation to those harmed by anticompetitive conduct, particularly Peruvian consumers. That said, Indecopi's guidelines, with the exception of focusing only on direct consumers, provide advances that could be built upon to further strengthen the system moving forward.

III. ECUADOR

Of the jurisdictions included in this study, Ecuador is the most recent to have implemented a competition law. The *Ley Orgánica de Regulación y Control del Poder de Mercado* (LORCPM)[720] was enacted in October 2011, and the *Reglamento a Ley Orgánica*

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[718] Bullard & Falla, Perú, AAI Handbook, pp. 466.

[719] These resource constraints appear to be a particularly important issue presently. *See* Mario Zúñiga, Main Developments in Competition Law and Policy 2023 – Perú, Kluwer Competition Law Blog (February 10, 2024) ("The long-standing Chief of the Directorate, Jesus Espinoza, and a handful of other experts left the Directorate in 2023, and INDECOPI is also facing some budget constraints due to the overall fiscal situation of the Peruvian State."), available at: https://competitionlawblog.kluwercompetitionlaw.com/2024/02/10/main-developments-in-competition-law-and-policy-2023-peru/

[720] Organic Law for the Regulation and Control of Market Power (LORCPM), available at https://www.planificacion.gob.ec/ley-organica-de-regulacion-y-control-del-poder-de-

de Regulación y Control del Poder Mercado (RLORCPM)[721] in May of the following year. Indeed, Ecuador was one of the last countries in the hemisphere to put in place a competition regulation.[722] While Article 71 of LORCPM specifically allows for private damages actions to be brought, there do not appear to be any cases to date that have been brought under that provision. Part of the explanation for that, of course, is likely due to LORCPM having been around for just over a decade now. The civil courts, where such cases would be brought, lack experience with competition matters, and specifically the types of issues raised in proving injury and measuring harm in antitrust damages actions. However, as will be discussed in this brief section, other impediments also exist, including (a) uncertainty whether damages actions are limited to follow-on cases, and if so, the extent to which an infringement ruling will assist the plaintiff; and (b) the lack of a clear mechanism that would allow consumer damages actions to be pursued.

a. The Ecuadorean Institutional Framework

Ecuador's competition law, LORCPM, addresses a wide range of anticompetitive conduct and unfair business practices. Provisions regarding abuse of dominance and market power are set out in Articles 7 to 9 of the law.[723] Article 11 defines various types of restrictive agreements.[724] Articles 25 to 27, meanwhile, set out a number of rules regarding unfair competition.[725] The law applies to anticompetitive conduct in Ecuador as well as extraterritorial conduct that has, or could have, negative effects on the Ecuadorean market.[726] Substantively, the provisions regarding abuse of dominance and restrictive agreements are closely modeled after EU and Spanish competition law.[727] Ecuadorian law

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[721] Available at https://www.presidencia.gob.ec/wp-content/uploads/2017/08/a2_REGLAMENTO_A_LEY_ORGANICA_DE_REGULACION_julio_2017.pdf.

[722] OECD (2021), OECD-IDB Peer Reviews of Competition Law and Policy: Ecuador ("OECD Ecuador Peer Review"), available at http://www.oecd.org/daf/competition/oecd-idb-peer-reviews-of-competition-law-and-policy-ecuador-2021.htm.

[723] *See* LORCPM, Arts. 7-9.

[724] *See* LORCPM, Art. 11.

[725] *See* LORCPM, Arts. 25-27.

[726] LORCPM, Art. 2 ("… en la medida en que sus actos, actividades o acuerdos produzcan o puedan producir efectos perjudiciales en el mercado nacional"). *See also* OECD Ecuador Peer Review, p. 52.

[727] *See* OECD Ecuador Peer Review, p. 25 ("The law, which is heavily based upon the Spanish legislation, prohibits cartels and abuses of a dominant position, has a notification system for merger operations, and includes provisions on unfair competition.").

only contemplates administrative, and not criminal, penalties for infringements of the LORCPM.[728]

Like its neighbors in Colombia and Peru, Ecuador has adopted an administrative enforcement model that prioritizes public enforcement. The Superintendence for Economic Competition (*Superintendencia de Control del Poder de Mercado* or "SCE") is the administrative agency in charge of enforcing the LORCPM. Investigations by the SCE can be initiated *ex oficio* or at the request of a complaint by an injured party or other person with a legitimate interest.[729] These are carried out by SCE directorates, using the various investigative powers set out in Articles 48 through 52 of LORCPM.[730] Following an investigation, decisions are issued by an administrative tribunal within the SCE known as the *Comisión de Resolución de Primera Instancia* (CRPI). If an infringement is found, the SCE can impose fines and order structural and behavioral remedies.[731] Fines can be imposed of up to 10-12 percent of a firm's gross annual turnover if an infraction is categorized as a "serious" or "very serious" breach.[732]

Article 87 requires that SCE decisions be made public, which must identify the name of the infringer, the nature of the infraction, and the sanctions imposed in the proceeding.[733] Article 2 of the RLORCPM further provides that these should be published on the SCE website, without prejudice to the agency's ability to withhold confidential or other

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[728] OECD Peer Review, p. 52.

[729] OECD Peer Review, p. 14. Article 54 of LORCPM provides that a valid complaint must provide the following information: the name of the complainant, identification of those responsible for the alleged infringement; the alleged infringement itself; the complainant's relationship with the alleged infringer; the goods or services affected; and any other evidence.

[730] *See* LORCPM, Arts. 48-52. These powers include, for instance, demanding that accounting data, correspondence, and similar records reasonably connected to the conduct being investigated be turned over, or that individuals to provide testimony. The agency can also conduct dawn raids to inspect the premises of the firms under investigation. All legal and natural persons are required to cooperate with the agency during the course of its investigation. *See also* OECD Ecuador Peer Review, p. 71 ("According to Article 48 of LORCPM, [SCE] may require economic operators to provide information, data or documents before beginning a case or at any time during the procedure. Information requests can be made to investigated parties, but also to third parties, both public and private.").

[731] *See* LORCPM, Arts. 73-88. Article 73 empowers the SCE to "issue corrective measures in order to re-establish the competitive process, prevent, impede, suspend, correct or revert conducts contrary to the LORCPM and prevent such conduct from happening again", and provides a non-exhaustive list of examples. Article 74 LORCPM provides the SCE with some discretion to order measures specific to a case, and notes that the ordering of corrective measures does not preclude fines from also being imposed.

[732] LORCPM, Arts. 78-79.

[733] LORCPM, Art. 87. ("Serán de conocimiento público y publicadas, en medios de amplia difusión, en la forma y condiciones que se prevea reglamentariamente, las sanciones en firme impuestas en aplicación de esta Ley, su cuantía, el nombre de los sujetos infractores y la infracción cometida.").

restricted information.[734] Nevertheless, according to the OECD's 2021 peer review of Ecuador's competition system, the SCE has not, in fact, consistently published these decisions. And even when they are published, they "may make broad statements but not provide the specific information that supports the findings, or only refer to undisclosed internal documents.[735] (This, as will be discussed below, can have an adverse effect on the ability of claimants to later pursue damages actions.)

Various avenues for appeal are available, including administrative appeals to the Superintendent of the SCE. Outside of the agency, appeals can be made to the regional Administrative and Contentious District Courts (the judicial bodies that hear administrative law claims), whose decision can, in turn, be appealed to the National Court of Justice (the highest court in Ecuador), and in some instances to the Constitutional Court.[736] The OECD's 2021 peer review of Ecuador's competition system identified two main challenges faced by the courts in Ecuador when dealing with antitrust issues: "delays in deciding on the cases and judges' lack of competition expertise." Ecuadorean civil judges, the review continued, "may not have specialized knowledge of competition law nor had an opportunity to gain this knowledge through studies or case experience in their career."[737]

Firms being investigated by the SCE are able to propose commitments to end investigations against them. The commitments entail ending the infringing conduct and paying some amount "to offset the damages caused."[738] According to the OECD peer

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[734] RLORCPM, Art. 2 ("Publicidad.- Las opiniones, lineamientos, guías, criterios técnicos y estudios de mercado de la Superintendencia de Control del Poder de Mercado, se publicarán en su página electrónica y podrán ser difundidos y compilados en cualquier otro medio, salvo por la información que tenga el carácter de reservada o confidencial de conformidad con la Constitución y la ley.

Las publicaciones a las que se refiere el presente artículo y la Disposición General Tercera de la Ley, se efectuarán sin incluir, en cada caso, los aspectos reservados y confidenciales de su contenido, con el fin de garantizar el derecho constitucional a la protección de la información.").

[735] OECD Ecuador Peer Review, p. 85.

[736] OECD Ecuador Peer Review, p. 34.

[737] OECD Ecuador Peer Review, p. 17.

[738] LORCPM, Art. 89. Article 89 provides:

> "Compromisos.- Hasta antes de la resolución de la Superintendencia de Control del Poder de Mercado , el o los operadores económicos investigados, relacionados o denunciados podrán presenter una propuesta de compromiso por medio del cual se comprometen en cesar la conducta objeto de la investigación y a subsanar, de ser el caso, los daños, perjuicios o efectos que hayan producido, que produzcan o que puedan producir en el mercado relevante y en los consumidores sus prácticas anticompetitivas."

See also OECD Ecuador Peer Review, p. 16.

review, such commitments have been offered, and accepted, quite frequently.[739] None, however, apparently have been used to provide compensation to consumers affected by anticompetitive conduct even though commitments can be offered in any kind of infringement investigation. While the use of the commitment mechanism has some advantages, "it also has downsides … [such as] imped[ing] –or delay[ing] – the development of legal precedents, which are crucial in a country with a relatively short history in competition law enforcement."[740] The use of this mechanism could also impede civil damages actions entirely (depending on a contested interpretation of Article 71).

b. Damages Actions in the Ecuadorian System

LORCPM explicitly allows for antitrust damages actions to be brought in civil court. Article 71 state that all "natural or legal persons who have suffered damages due to the commission of acts or conduct prohibited by this law, may bring an action for compensation for damages under the rules of common law".[741] Damage actions under Article 71 are to be brought in civil court and will be conducted in a summary proceeding in conformity with the general rules.[742] The language of the provision, and the absence of any other regulatory provisions in the RLORCPM, appears to allow for damages claims to be brought for any type of infringement of the competition laws, including not just cartels or other horizontal agreements.

Follow-on or stand alone? One important question that remains unresolved is whether damages actions under Article 71 are limited to follow-on claims (as in Peru) or whether stand-alone actions are possible (as in Colombia). Both Article 71 of the LORCPM and Article 79 of the RLORCPM seem to contemplate a prior decision of the Ecuadorean

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[739] OECD Ecuador Peer Review, p. 16 ("From 2014 to 2019, 56 commitments were submitted and 35 were accepted.").

[740] *Id*.

[741] LORCPM, Article 71. The article states in whole:

> "Responsabilidad civil.- Las personas naturales o jurídicas que hubieren sufrido perjuicio por la comisión de actos o conductas prohibidas por esta Ley, podrán ejercer la acción de resarcimiento de daños y perjuicios conforme las normas del derecho común. La acción de indemnización de daños y perjuicios será tramitada en vía verbal sumaria, ante el juez de lo civil y de conformidad con las reglas generales y prescribirá en cinco años contados desde la ejecutoria de la resolución que impuso la respective sanción."

[742] *Id*. As noted earlier, there do not appear to be any antitrust damages claims brought under the LORCPM. There apparently is one unresolved case for unfair competition brought in 2012 under the old Intellectual Property Law, but by all accounts it has limited relevance for this discussion.

competition authority before a damages action can be brought.[743] Nevertheless, there is some ambiguity in the law, which has led to disagreement on this question.[744]

As will be discussed shortly, follow-on actions might receive some (though not necessarily enough) benefit from prior administrative rulings, which could encourage damages actions to an extent. Stand-alone actions are likely to be extremely difficult for the foreseeable future given limitations on discovery. That said, it is the ability of private actors to bring stand-alone actions that could supplement the limited enforcement resources of the SCE. By limiting damages actions to follow-on matters, as in Peru, the resource limitations of the public authority would be a bottleneck, and likely limit the effectiveness of damages actions in terms of providing compensation to those harmed by anticompetitive conduct and adding to the overall deterrent effect of the system.

Civil damages actions. Because antitrust damages actions in Ecuador are considered under the general regime applicable to extra-contractual civil liability, a claimant will be required to establish four elements: (1) an unlawful act by the defendant; (2) culpability or willful misconduct; (3) damages; and (4) a causal connection between the unlawful conduct and the harm.[745] If stand-alone actions are allowed, a claimant would have to establish all of these elements. Given the non-existence of pre-trial discovery in Ecuador, prevailing in a stand-alone case, given the information asymmetries that typically characterize such actions, is likely to be a challenge.

Because Ecuador does not have any specific rules regarding compensation in antitrust damages actions, recoverable damages are likely to be limited to those in typical extra-contractual matters, namely actual loss, loss of profits and moral damages. Punitive damages are not available.[746] While the Canadian experience (and developments in Europe) suggest the ability to recover actual damages alone is not an obstacle to private damages actions, there must still be some confidence that such recoveries are realistic.

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[743] Article 71 of the LORCPM, for instance, establishes a limitations period of five years "contados desde la ejecutoria de la resolución que impuso la respectiva sanción."

Article 79 of the RLORCPM states: "Responsabilidad civil.- El juez que dictamine sobre las acciones civiles previstas en el artículo 71 de la Ley, *fundamentará su fallo en los hechos y calificación jurídica ya establecidos en la resolución que la Superintendencia de Control del Poder de Mercado emita* respecto a los asuntos que hubiere conocido." (emphasis added).

[744] Competition law specialists the author has discussed this question with have indicated that there are no stand-alone actions in Ecuador. However, according to the OECD peer review, "[d]ecisions by the agency are not a requisite for lodging a damages action. This is in line with OECD Council's Recommendation concerning Effective Action against Hard Core Cartel, which advises that private enforcement actions that do not follow on infringement decisions be allowed." *See* OECD Ecuador Peer Review, p. 93.

[745] Supreme Court of Justice, First Civil and Mercantile Chamber, Case No. 229-2002, C. 20.

[746] Civil Code, art. 1572.

And on that, there are questions of how receptive civil courts in Ecuador will be to the types of evidence used to prove damages in an antitrust case—and the inherent limitations of that evidence.[747]

c. Impediments to Consumer Damages Actions

The discussion above has focused on challenges for bringing damages actions generally. However, as seen in Chile and elsewhere, it is possible for certain types of damages actions—such as competitor claims involving large individual damages—to be feasible whereas others are not. As covered elsewhere, consumer damages actions face particular challenges given the coordination problems associated with small individual (but large aggregate) damages combined with information asymmetries. And a system that does not provide mechanisms that allow for consumer actions to be pursued is unlikely to fulfill its compensatory function well.

As an initial matter, it is not entirely certain whether indirect purchasers can pursue claims under Ecuadorian law. It can be expected that in Ecuador, as elsewhere, many cartels or other anticompetitive activities will affect consumers who never dealt directly with the infringers. Indeed, in the mid-2010's, Ecuadorean consumers learned that, like their counterparts in neighboring countries, they had been victims of a price fixing cartel in tissue paper products.[748] Without indirect purchaser standing, these consumers would have no mechanism to seek redress themselves. While Article 71 of the LORCPM does not differentiate between direct and indirect purchasers, neither does the US Clayton Act, where indirect purchaser actions at the federal level are not allowed.

Even if indirect consumers have standing, however, they still lack effective procedural mechanisms for bringing consumer actions, namely opt-out collective proceedings. As noted elsewhere, opt-out mechanisms are essential for being able to pursue many consumer claims. Class actions, however, are simply not available in Ecuador. While collective actions are available under Article 30 of the *Código Orgánico*

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[747] The Supreme Court of Justice has stated that the damage:

> "only occurs when certain indispensable characteristics in detriment or impairment of the injured party are met. The damage is legal and, as such, it will be reparable when it is certain. The certainty of its existence is an indispensable presupposition since the damage for the purposes of liability is that whose existence has been fully proven. Hypothetical or eventual damages are not compensable. In matters of damages, it is insufficient to allege damage in abstract or a mere possibility; it is necessary to prove the real and effectively suffered damage."

Supreme Court of Justice, First Civil and Mercantile Chamber, Case No. 229-2002, published in R.O. No. 43 of March 19, 2003.

[748] *See* OECD Ecuador Peer Review, p. 105-06 (discussing Kimberly-Clark case).

General de Procesos,[749] this provision appears to only allow for "opt-in" collectives of identifiable individuals jointly pursuing their claims. And unlike its neighbors, consumer associations in Ecuador do not have standing to bring antitrust damages actions on behalf of consumers.

While the Spanish experience has shown that individual consumer actions are possible even without opt-out class mechanisms, such cases are likely to be limited to situations where individual damages are sufficiently large to make claims economically viable. Given the reliance in Article 71 on "summary proceedings" for follow-on damages actions, such claims might be feasible in Ecuador too. That, however, will depend on Ecuadorean civil courts being able to process such claims relatively expeditiously and without imposing burdens of proof that cannot realistically be met. Regardless, such cases are likely to represent only a fraction of all possible consumer cases. And even in those instances where cases are brought, they will likely represent only a small fraction of possible claimants. In short, without an opt-out mechanism, the Ecuadorean system will fall short in its compensatory function (and, by extension, its dissuasive effect).

d. Relationship with Public Enforcement.

As noted above, and similar to other jurisdictions, the RLORCPM provides that the SCE's administrative resolution will have some kind of preclusive effect in a follow-on damages case under Article 71. Article 79 of the RLORCPM provides that, in such actions, the judge "will base his/her ruling on the facts and legal qualification already established in the resolution that the Superintendence of Market Power Control has issued regarding the matters being heard."[750] In theory, this provision should mean that a follow-on plaintiff would only have to establish its injury and the causal relation between the harm suffered and the infraction. However, because extracontractual civil liability in the Ecuadorian legal system is subjective, meaning that "culpability" must be established, while cartel conduct, for instance, is objective and therefore does not, it may still be necessary for a follow-on

[749] Article 30 provides:

> Art. 30.- Las partes. El sujeto procesal que propone la demanda y aquel contra quien se la intenta son partes en el proceso. La primera se denomina actora y la segunda demandada. Las partes pueden ser:
>
> 1. Personas naturales.
>
> 2. Personas jurídicas,
>
> 3. Comunidades, pueblos, nacionalidades o colectivos.
>
> 4. La naturaleza.

[750] RLORCPM, Art. 79 ("Responsabilidad civil.- El juez que dictamine sobre las acciones civiles previstas en el artículo 71 de la Ley, fundamentará su fallo en los hechos y calificación jurídica ya establecidos en la resolución que la Superintendencia de Control del Poder de Mercado emita respecto a los asuntos que hubiere conocido.").

plaintiff to demonstrate the intention of the defendant to affect competition.[751] If that is the case, the usefulness of Article 79 of the RLCORCPM could be limited.

There are other areas as well in which public enforcement by the SCE does not appear to be providing potential follow-on plaintiffs with the kind of assistance that would be useful for promoting damages actions. For instance, the 2021 OECD peer review noted that infringement decisions issued by the SCE are lacking in the kind of probative value needed to be of assistance to follow on plaintiffs.[752] Similarly, the report concluded that the SCE appears to construe confidentiality of materials in the investigative file quite broadly, making access to necessary information by private plaintiffs difficult.[753]

e. Conclusions

While Ecuador's competition law, the LORCPM, prioritizes public enforcement by the SCE, it also envisions private damages actions complementing those efforts. "The two mechanisms," as one observer has written, "are complementary and are not substitutes for each other, and the competition regime's functioning properly depends on their synergy."[754] To date, however, that has not come to pass, for a variety of reasons discussed above.

The OECD peer review has recommended various measures that might encourage damages actions. These include, for instance, improving access to information in the SCE's investigative files (with protections for information provided by leniency applicants), and ensuring that the agency's final infringement decisions have adequate probative value.[755] It also suggested that Ecuador might consider creating specialized chambers in its Administrative and Contentious District Courts.[756] This latter recommendation, if these

[751] Patricio Pozo Vintimilla, La reclamación de daños derivados de un cartel en Ecuador: Un sistema de contradicciones, Lawyers EC Magazine, p. 76, available at: https://ssrn.com/abstract=4440571.

[752] OECD Ecuador Peer Review, p. 94.

[753] *Id*. Article 3 of the RLORCPM, for instance, states that information and documents obtained by the SCE during its investigations should be classified as confidential, either on the SCE's own initiative or upon request by the interested party. *See* RLORCPM, Art. 3 ("Confidencialidad de la información.- La información y documentos que haya obtenido la Superintendencia de Control del Poder de Mercado en la realización de sus investigaciones podrán ser calificados de reservados o confidenciales, de oficio o a solicitud de parte interesada. La Superintendencia establecerá el instructivo para su tratamiento en el marco de la Constitución y la ley.").

[754] Patricio Pozo Vintimilla, La reclamación de daños derivados de un cartel en Ecuador: Un sistema de contradicciones, Lawyers EC Magazine, available at: https://ssrn.com/abstract=4440571. *See also* OECD Peer Review, p. 93 ("The OECD received no information on any private damages actions. Ecuador should consider encouraging private enforcement to allow for the compensation of victims and boost the deterrent effect of competition law by increasing the potential cost of infringing competition law.").

[755] OECD Peer Review, p. 94.

[756] OECD Peer Review, p. 92.

specialized chambers—or similar chambers in other civil courts—could hear damages actions, could result in greater confidence in the system by potential plaintiffs.

Nevertheless, even if adopted, these recommendations would still leave consumer plaintiffs without adequate tools to pursue their claims. At a minimum, consumer redress will require some kind of opt-out procedural mechanism, whether the ability of individual consumers to bring class actions or consumer associations to pursue claims in a representative capacity. Without such a mechanism, private enforcement will be limited to large individual claims, meaning that its potential to provide compensation and enhance the overall deterrent effect of the competition laws will be limited.

IV. COLOMBIA

Colombia's competition system relies primarily on public enforcement by the *Superintendencia de Industria y Comercio* (SIC), the administrative agency charged with investigating and sanctioning anticompetitive practices. As in Peru, however, damages suffered by individuals, firms or others as a consequence of unlawful conduct cannot be determined during the administrative process. Instead, these are left to actions before the Colombian civil courts. Such claims can be pursued individuals or collectively, although to date they remain uncommon. Indeed, to date there does not appear to have been any case in Colombia in which damages have been awarded for an infringement of the country's competition laws.[757]

Many of the problems identified by the European Union's Directive 2014/104 on antitrust damages actions are applicable to Colombia's existing civil liability framework as well. So while that framework provides a foundation going forward, additional rules tailored to the specific needs of competition law and private damages claims would be useful. This section will briefly examine the Colombian system, identify some existing obstacles to damages actions, particularly to consumer damages actions. Finally, it will take a brief look at a recent, and unsuccessful, attempt by consumers to recover damages in a cartel case. While the reasons behind the plaintiffs' failure might hinge, at least in part, on how they litigated the matter, the decision nevertheless points to some potential obstacles going forward.

a. The Colombian Institutional Framework

Colombia's competition law sets out a variety of prohibitions relating to restrictive commercial practices, including anticompetitive agreements, anticompetitive acts, and abuses of dominant positions, among others. "Anticompetitive agreements"—which can

[757] *See* Felipe Serrano and Juan Felipe Traber, Colombia, Private Competition Enforcement Review.

be any kind of "contract, agreement, concerted or consciously parallel practice[758]—are set out in Article 47 of Decree 2153 of 1992 which include ten types, such as price fixing.[759] Article 46, in turn, sets out "anticompetitive acts," which include resale price maintenance.[760] Abuse of a dominant position is defined in Article 50 and includes seven types of conduct, like predatory pricing and price discrimination, among others.[761] These

[758] Decree 2153, Art. 45 1).

[759] ACUERDOS CONTRARIOS A LA LIBRE COMPETENCIA. Para el cumplimiento de las funciones a que se refiere el artículo 44 del presente Decreto se consideran contrarios a la libre competencia, entre otros, los siguientes acuerdos: 1. Los que tengan por objeto o tengan como efecto la fijación directa o indirecta de precios. 2. Los que tengan por objeto o tengan como efecto determinar condiciones de venta o comercialización discriminatoria para con terceros. 3. Los que tengan por objeto o tengan como efecto la repartición de mercados entre productores entre productores o entre distribuidores. 4. Los que tengan por objeto o tengan como efecto la asignación de cuotas de producción o de suministro. 5. Los que tengan por objeto o tengan como efecto la asignación, repartición o limitación de fuentes de abastecimiento de insumos productivos. 6. Los que tengan por objeto o tengan como efecto la limitación a los desarrollos técnicos. 7. Los que tengan por objeto o tengan como efecto subordinar el suministro de un producto a aceptación de obligaciones adicionales que por su naturaleza no constituían el objeto del negocio, sin perjuicio de lo establecido en otras disposiciones. 8. Los que tengan por objeto o tengan como efecto abstenerse de producir un bien o servicio o afectar sus niveles de producción. 9. Los que tengan por objeto la colusión en las licitaciones o concursos o los que tengan como efecto la distribución de adjudicaciones de contratos, distribución de concursos o fijación de términos de las propuestas. 10. Adicionado por el art. 16, Ley 590 de 2000, con el siguiente texto: Los que tengan por objeto o tengan como efecto impedir a terceros el acceso a los mercados o a los canales de comercialización.

[760] ACTOS CONTRARIOS A LA LIBRE COMPETENCIA Para el cumplimiento de las funciones a que se refiere el artículo 44 del presente Decreto, se consideran contrarios a la libre competencia los siguientes actos: 1. Infringir las normas sobre publicidad contenidas en el estatuto de protección al consumidor. 2. Influenciar a una empresa para que incremente los precios de sus productos o servicios o para desista de su intención de rebajar los precios. 3. Negarse a vender o prestar servicios a una empresa o discriminar en contra de la misma cuando ello pueda entenderse como una retaliación a su política de precios.

[761] ABUSO DE POSICIÓN DOMINANTE. Para el cumplimiento de las funciones a que refiere el artículo 44 del presente Decreto, se tendrá en cuenta que, cuando exista posición dominante, constituyen abuso de la misma las siguientes conductas: 1. La disminución de precios por debajo de los costos cuando tengan por objeto eliminar uno varios competidores o prevenir la entrada o expansión de éstos. 2. La aplicación de condiciones discriminatorias para operaciones equivalentes, que coloquen a un consumidor o proveedor en situación desventajosa frente a otro consumidor o proveedor de condiciones análogas. 3. Los que tengan por objeto o tengan como efecto subordinar el suministro de un producto a al aceptación de obligaciones adicionales, que por su naturaleza no constituían el objeto del negocio, sin perjuicio de lo establecido por otras disposiciones. 4. La venta a un comprador en condiciones diferentes de las que se ofrecen a otro comprador cuando sea con la intención de disminuir o eliminar la competencia en el mercado. 5. Vender o prestar servicios en alguna parte del territorio colombiano a un precio diferente de aquel al que se ofrece en otra parte del territorio colombiano, cuando la intención o el efecto de la práctica sea disminuir o eliminar la competencia en esa parte del país y el precio no corresponda a la estructura de costos de la transacción. 6. Adicionado por el art. 16, Ley 590 de 2000, con el siguiente texto: Obstruir o impedir a terceros, el acceso a los mercados o a los canales de comercialización. 7. El incumplimiento en la fecha pactada para el pago de una obligación dineraria por parte de cualquier contratista que tenga a su cargo la ejecución de un contrato estatal de, infraestructura de transporte, obras pC1blicas y construcción, con cualquiera de sus proveedores

regulations apply to anyone who carries out economic activity in Colombia or whose activities affect, or could affect, the Colombian market.[762]

As noted above, the SIC, an administrative agency within the Ministry of Commerce, Industry and Tourism, is the authority charged with protecting competition in Colombia.[763] Within the agency, the *Delegatura de la Promoción de la Competencia* has responsibility for carrying out investigations.[764] These investigations may be initiated *ex oficio* by the SIC or as the result of a complaint. When complaints are filled by private parties, the Deputy Superintendent reviews them to determine whether they are "significant" for maintaining competitive markets or promoting efficiency and consumer welfare.[765]

At the end of any investigation, the *Delegatura* prepares a report to the Superintendent that recommends closure of the investigation or the imposition of sanctions.[766] Then, the Superintendent makes the decision on the matter through a reasoned administrative act. The SIC can impose sanctions for violation of prohibitions against restrictive business practices.[767] In addition, the authority can impose fines of up to 100,000 SMLMV (minimum monthly wage) or up to 150% of the profit obtained from the unlawful conduct, whichever is higher.[768] Decisions imposing sanctions may be appealed for reconsideration, before the Superintendent. Once the administrative stage before the SIC has run its course, parties may subsequently seek judicial review.[769]

b. Damages Actions in the Colombian System

Because the SIC's mission is protecting a "public good" namely competition, it lacks authority to make any determination on damages suffered by individuals or firms

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que tenga la calidad de PYME o MYPYME, luego de contar con una factura debidamente aceptada por la entidad contratante.

[762] Law 1340, Art. 2.

[763] OECD, Colombia: Assessment of Competition Law and Policy ("OECD Colombia Accession Review"), p. 46.

[764] See investigation published by CeCo "Situación de los regímenes de libre competencia en Chile, Colombia, Ecuador y Perú (Garrigues)" (April, 2024) available at https://centrocompetencia.com/situacion-de-los-regimenes-de-libre-competencia-en-chile-colombia-ecuador-y-peru-garrigues/

[765] *See* Decree 4886 of 2011, Art. 1.3. *See also* OECD Colombia Accession Review, p. 51.

[766] *Id*.

[767] Decree 2153, Art. 2 ("La Superintendencia de Industria y Comercio ejercerá las siguientes funciones: ... 2. Imponer las sanciones pertinentes por violación de las normas sobre prácticas comerciales restrictivas y promoción de la competencia, así como por la inobservancia de las instrucciones que, en desarrollo de sus funciones imparta la Superintendencia.")

[768] Law 1340 of 2009, Art. 25.

[769] *See* OECD Colombia Accession Review, p. 67-78.

from anticompetitive conducts. Moreover, Colombia's competition law does not include any specific legal procedures for awarding damages for antitrust infringements. The absence of any reference to competition-related damages means that private litigants must rely on existing liability provisions under the Civil Code. And because, unlike in Peru, the Colombian competition law does not require an infringement determination before a civil action can be brought, ordinary civil courts could be called upon to apply the country's competition rules. Any damages action is likely to proceed in one of two manners: (1) as an individual action for civil liability, or (2) as a group action.

***Actions for civil liability*.** An action for civil liability based on an antitrust infringement might be premised either as a breach of contract or an extra-contractual tort, depending on the relationship between the parties.[770] In the latter case, article 2341 of the Civil Code provides that any person who commits an offense or has been at fault—such as by engaging in an anticompetitive practice—is liable for the harm that their actions cause to others.[771] In an action for civil liability, the plaintiff will have to establish all of the elements of a civil action, including (i) the wrongful act, (ii) culpability, (iii) damages, and (iv) causation. Civil actions are subject to a ten-year statute of limitations.

Because a civil action can be brought without a prior finding of an infringement from the public enforcers, a private litigant could theoretically pursue claims even in instances when the SIC has not. The ability to do so, as in the case of Chile and the North American jurisdictions discussed earlier, could augment the limited enforcement resources of the public authority and thereby enhance the overall deterrent effect of the system. However, in reality, the complexities of competition cases, the lack of experience with competition matters by civil judges, and the limited access to evidence, will likely make it challenging for antitrust plaintiffs to satisfy these burdens.[772] Indeed, even follow-on cases are likely to be challenging, for reasons discussed elsewhere.

***Group actions*.** While individual civil actions might be suitable for plaintiffs with large claims, small consumer claims generally require some kind of collective mechanism. Law No. 472 of 1998 allows for such group proceedings to seek damages.[773] These may be

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[770] *See* Serrano & Traber, *supra*, at 105.

[771] Código Civil, Art. 2341 ("El que ha cometido un delito o culpa, que ha inferido daño a otro, es obligado a la indemnización, sin perjuicio de la pena principal que la ley imponga por la culpa o el delito cometido.").

[772] *See* Garrigues, "Antitrust damages actions in Latin America: on the path to the European model?" (July 2023) ("[T]he judge has the authority to determine the occurrence of harm without needing to wait for a decision by the competition authority on the same case. However, in view of the difficulties to provide proof and the lack of expertise of a civil judge in competition matters, without a decisive ruling by the Industry and Trade Authority, it is quite unlikely that the harm alleged by the private party will be recognized.").

[773] *See* Law 472/199, Arts. 46 to 69. Law 472/1998 also establishes another type of action, the popular action, that seeks to protect collective rights. These generally are not intended to recover damages. But see Serrano & Traber, supra, at 107 (discussing the *Odebrecht* case in which, under the umbrella of "restoring things to

filled by any natural or legal person that have been suffered harm as a result of unlawful anticompetitive conduct.[774] The fact that legal persons can bring such cases is important, since limiting collective actions to individual consumers (as some neighboring jurisdictions appear to do, or at least limit them to microenterprises) means that significant numbers of "consumers" could be left without remedies. A group action in Colombia can be brought when there are at least twenty persons in the affected group.[775] Unlike with individual actions, group actions must be brought within two years since the date on which the injury occurred or the unlawful action that caused the harm ceased.[776]

At first appearance, group actions in Colombia seem to resemble an opt-out class. The complaint can identify the affected group, and affected persons (whether natural or legal) are not required to be part of the proceeding in order to eventually recover.[777] Moreover, the law provides that the judgment in a group action should set forth the collective damages and a mechanism for absent members of the collective to be able to claim their corresponding share.[778] However, the law also provides that any unclaimed amounts are to be returned to the defendant.[779] As discussed earlier, in other jurisdictions,

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their previous state," a private firm was ordered to repay overcharges to the state that were obtained through unlawful bid rigging).

[774] Law 472/1998, Art. 46 provides:

> "Las acciones de grupo son aquellas acciones interpuestas por un número plural o un conjunto de personas que reúnen condiciones uniformes respecto de una misma causa que originó perjuicios individuales para dichas personas. ... La acción de grupo se ejercerá exclusivamente para obtener el reconocimiento y pago de la indemnización de los perjuicios."

[775] Although Article 46 mentions twenty persons, the Constitutional Court, in Sentence C-116 of 2008, clarified that active standing in group actions does not require twenty people to file the claim, but rather that it is enough for a member of the group acting on behalf of the collective to establish in the application the criteria that allow for the identification of the affected group.

[776] Law 472/1998, Art. 47 ("Sin perjuicio de la acción individual que corresponda por la indemnización de perjuicios, la acción de grupo deberá promoverse dentro de los dos (2) años siguientes a la fecha en que se causó el daño o cesó la acción vulnerable causante del mismo.").

[777] *See* Law 472/1998, Art. 55: Quien no concurra al proceso ... podrá acogerse posteriormente, ... pero no podrá invocar daños extraordinarios o excepcionales para obtener una indemnización mayor y tampoco se beneficiará de la condena en costas.

[778] *See* Law 472/1998, Art. 65.

[779] Law 472/1998, Art. 65(3)(b) provides:

> "... Cuando el estimativo de integrantes del grupo o el monto de las indemnizaciones fuere inferior a las solicitudes presentadas, el Juez o el Magistrado podrá revisar, por una sola vez, la distribución del monto de la condena, dentro de los veinte (20) días siguientes contados a partir del fenecimiento del término consagrado para la integración al grupo de qué trata el artículo 61 de la presente Ley. *Los dineros restantes después de haber pagado todas las indemnizaciones serán devueltos al demandando*." (emphasis added).

unclaimed funds can be distributed to *cy pres* recipients as a means of providing "indirect" compensation. While not as good as direct payments to affected parties, these still help fulfill the compensatory function of the law. More importantly, they also increase the deterrent effect of a judgment. As a consequence, this will tend to undermine the effectiveness of collective proceedings in Colombia on both fronts.

The law provides a mechanism for compensating attorneys who successfully pursue group actions. Pursuant to article 65, the attorneys receive a fee equal to 10 per cent of the compensation obtained by group members who were not otherwise represented in proceeding.[780] This provision is crucial to prevent free riding by absent class members and to incentivize such actions. However, given that any "recovery" ultimately depends on how many members of the collective make claims (as opposed to the size of the judgment obtained), this could dampen the incentive for attorneys to make the investments needed to vigorously pursue collective actions.

c. *Cartel de los cuadernos* group action

In October 2023, the Fourth Civil Circuit Court issued one of the only judgments to date in an antitrust damages class action against Carvajal Educación S.A.S., Colombia Kimberly Colpapel S.A. and Scribe Colombia S.A.S. The action stemmed from an August 2016 resolution by SIC, which sanctioned the defendants for participating in a cartel from 2001 to 2014 involving writing notebooks in Colombia.[781]

The investigation by the SIC found that the cartel in which the defendants had participated fixed prices, increasing them frequently, and eliminated competition, which impacted Colombian consumers. The cartel was formed through conversations between the firms' executives, who agreed on practices to benefit themselves and weaken competitors. The SIC found evidence of multiple meetings in Colombia and Mexico, where they discussed, among other things, price increases for premium notebooks, not offering discounts to consumers, and inviting companies from neighboring countries to raise prices.[782] The investigation concluded that the defendants violated Article 1 of Law 155 of 1992, "by the agreements they reached directly to limit the supply and distribution of goods, resorting to procedures and systems that limited free competition to maintain and

[780] *See* Law 472/1998, Art. 65(6): "La liquidación de los honorarios del abogado coordinador, que corresponderá al diez por ciento (10%) de la indemnización que obtengan cada uno de los miembros del grupo que no hayan sido representado judicialmente."

[781] SIC Resolution No 544043 of August 18, 2016.

[782] *See* Juan Carlos García Sierra, "El cartel de los cuadernos, otro caso más de corrupción que se ha escrito en Colombia", Colombia.com (October 28, 2022), available at: https://www.colombia.com/actualidad/que-paso-con/el-cartel-de-los-cuadernos-otro-caso-mas-de-corrupcion-que-se-ha-escrito-en-colombia-371983.

determine the inequitable prices of notebooks for writing in Colombia."[783] The SIC fined Carvajal \$3.8 million, Scribe \$3 million, and Kimberly \$7.8 million.

In January 2019, four consumers, German Chaparro Ortega, Julián Rincón Cuero, María Teresa Bernal and Mercedes Camacho Romero, presented a complaint in the Fourth Civil Circuit Court (Colombia) asking that the defendants be ordered to pay all damages caused in Colombia by their unlawful cartel from 2001 to 2014.[784] The group action was admitted on January 15 and the Public Prosecutor's Office at the Centralized Public Registry of Popular Actions was notified pursuant to Article 80 of Law 472/1998. On October 31 of last year, the court issued its judgment, rejecting the plaintiffs' request for damages.

In its judgment, the court notes that the class action is "a judicial defense mechanism frequently used by a specific category or class of persons, who seek to obtain financial compensation for the damage caused by damage to their rights and interests."[785] The court further observes that the group action has its origins in the Constituent Assembly, and was seen as a means to allow the community to participate in the promotion of competition and the control of monopolistic practices. In addition, the court points to the recommendation made in the Constituent Assembly, in light of the asymmetry between consumers and producers, of a class mechanism that would allow affected consumers to bring actions that would not be viable if not pursued jointly. This discussion, the court notes, resulted in Article 88 of the Constitution, which provides that "the law shall regulate popular actions for the protection of collective rights and interests, related to (...) free economic competition. It will also regulate actions arising from damages caused to a plural number of people, without prejudice to the corresponding particular actions."[786]

Despite these pro-consumers policy rationales underlying group actions in Colombia, and the infringement decision by the SIC, the court nevertheless found that the plaintiffs had failed to satisfy their burden of proving that they had been injured by the defendants, or the amount of any injury from purchases of notebooks for their children. In explaining the plaintiffs' failure, the court stated that they had not provided evidence to prove (i) that they had children; (ii) whether the children were of school age during the time of the cartel; and (iii) that they actually purchased notebooks.[787]

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[783] *See* Sentencia Primera Instancia, 2018-00492, Juzgado Cuarto Civil del Circuito, October 31, 2023.

[784] *Id.*

[785] *Id.* (author's translation).

[786] *Id.*

[787] *Id.*

In dismissing the damages application, the court pointed out that the success of the claim and the consequent sanction imposed in the proceeding before the SIC are not enough, but that the requirements of ordinary civil proceedings must be met in order for compensation for damages to proceed.[788] From this, it is difficult to tell whether the plaintiffs had, in fact, produced any economic evidence in support of their claims, either from the SIC investigative files or from retained experts. If not, the dismissal might be warranted, and could signal nothing more than a failure by plaintiffs' counsel. On the other hand, some language in the judgment raises concerns that, even after a cartel has been sanctioned, the demands by a civil court for certainty regarding damages could undermine the compensatory objective of the group action.

d. Conclusions

As discussed above, damages actions in Colombia face some of the same hurdles that they faced in the European Union before the 2014 Damages Directive. However, the availability of group actions provides one important tool that could facilitate consumer damages actions going forward. The filing of a claim in the *cartel de los cuadernos* is encouraging in that regard, even if the outcome is not. It remains to be seen whether that is a case-specific outcome or if it points to some more fundamental hurdles that claimants will face with proof in Colombian civil courts.

[788] *Id*.