

Cartel class actions and immunity programmes

Edward M. Iacobucci*

The existence of class actions within a jurisdiction's competition law regime has significant implications for other legal and enforcement issues. This article focuses on the interaction between class actions for damages and immunity programmes pursuant to which cartel whistle-blowers may escape criminal punishment, but may remain vulnerable to class actions. The article challenges a simplistic conclusion that class actions undermine the incentives to report a cartel pursuant to an immunity programme. The threat of independent detection of the cartel, and a corresponding obligation to pay damages in any event, at least mitigates the potentially negative effect of class actions on immunity programmes. Moreover, other considerations, for example, the fact that class actions may increase the probability of the cartel's detection, suggest that class actions for damages may make immunity programmes more effective. If positive but lowered penalties are optimal for whistle-blowers, class actions also allow competition agencies to provide a bright-line, and thus more credible, commitment to zero public punishment for whistle-blowers, while maintaining a positive penalty overall because of private actions for damages. In light of this analysis, the article considers the question of standing of indirect purchasers to sue for damages from a cartel. There are competing considerations: indirect standing may mitigate concerns about reluctant direct purchaser plaintiffs, and about foreign cartels, but may increase concerns about attorney agency problems.

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Introduction

There is a large literature on the wisdom, or lack thereof, of private enforcement of antitrust law.¹ An important feature of any private enforcement

* Faculty of Law, University of Toronto, Toronto, Canada. Email: edward.iacobucci@utoronto.ca. Thanks to Anthony Niblett, Michael Trebilcock and participants at the Oxford Conference on Antitrust Enforcement for helpful comments on previous drafts. Thanks also to Andrew Clark for research assistance, and to the Osler Chair in Business Law for financial support.

¹ See eg Kent Roach and Michael Trebilcock, 'Private Enforcement of Competition Laws' (1996) 34 *Osgoode Hall LJ* 461; Daniel Crane, 'Optimizing Private Antitrust Enforcement' (2010) 63 *Vand L Rev* 675; Spencer Weber Waller, 'Towards a Constructive Public-Private Partnership to Enforce Competition Law' (2006) 29 *W Comp* 367; Wouter Wils, 'Should Private Antitrust Enforcement Be Encouraged in Europe?' (2003) 26 *W*

scheme is whether class actions are permissible in a particular jurisdiction.² Without class actions, of course, many private suits that might otherwise exist will be deterred: where the costs of anticompetitive conduct are spread among a large number of victims, which is common, no individual victim may have incentives to sue given the costs of doing so. Class actions have the potential to coordinate these smaller victims, overcoming collective action problems and encouraging private actions.

Less discussed in the literature are the implications of class actions for other legal and policy questions that confront a competition policy regime. Two recent cases in Canada,³ both of which were heard by the Supreme Court of Canada in October 2012 (but have not yet been decided), motivate this chapter by highlighting questions that assume much greater significance in the presence of class actions. While having competition laws on the books since 1889, Canada did not provide for the possibility of a private action for damages for most of its history and instead relied exclusively on public enforcement. However, with amendments to the *Combines Investigation Act* in 1976 (now the *Competition Act 1986*), section 36 of the *Act* provides that any person who has suffered loss or damage as a result of a violation of the criminal prohibitions in the *Act*, most prominently the conspiracy provisions, may sue for and recover from the person who engaged in the conduct an amount equal to the loss or damage suffered. Private actions under this provision were relatively rare, however, in large part owing to impermissibility of class actions in the Canadian litigation landscape.

This has changed. Class actions, which are a provincial matter, were permitted first in Quebec in 1978, and the next province to allow them was Ontario in 1992. Since then other provinces have followed suit and class actions are now available in all provinces. Now that the class action is established legally, and the plaintiffs bar has had a chance to develop, legal questions that have heretofore been of marginal importance have become very significant, which illustrates the interaction of class action procedures with other legal questions. For example, in Canada it is not clear whether defendants to an antitrust action can invoke the ‘passing on’ defence, an issue that was decided in the negative in *Hanover Shoe* in the USA.⁴ The passing on defence would allow a price-fixer to disclaim or at least limit damages to direct buyers on the basis that the buyers in turn would have

Comp 473. Early contributions to the literature include Gary Becker and George Stigler, ‘Law Enforcement, Malfeasances and Compensation of Enforcers’ (1974) 3 JLS 247; William Landes and Richard Posner, ‘The Private Enforcement of Law’ (1975) 4 JLS 1.

² For background on the law and economics of class actions, see John Coffee, Jr, ‘Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working’ (1983) 42 Md L Rev 215.

³ The cases were decided concurrently by the British Columbia Court of Appeal. The citations for the appellate decisions are, *Pro-Sys Consultants Ltd v Microsoft Corporation* 2011 BCCA 186; and *Sun-Rype Products Ltd v Archer Daniels Midland Company* 2011 BCCA 187.

⁴ *Hanover Shoe Inc v United Shoe Machinery Corp.* (1968) 392 US 481.

passed on antitrust overcharges to buyers that were further downstream. Moreover, the standing of buyers who bought the cartelized product from a non-conspirator middleman, the class of 'indirect purchasers', is also unclear. Canada is only now deciding the *Illinois Brick* question.⁵

Both the importance and urgency of these questions is affected by the presence of a robust class action environment. For example, *Illinois Brick* is clearly more important in the presence of class actions than without them. Indirect purchasers, especially end-consumers, are likely to be more numerous than direct purchasers. This implies that private actions from indirect purchasers are less likely to materialize in the absence of class actions.⁶ With class actions available, lawsuits from indirect purchasers become feasible.⁷ Conversely, without class actions, indirect purchasers are unlikely to bring private actions in any event and the *Illinois Brick* question is much less important.

It is no coincidence, then, that the maturation of class actions in Canada has been followed by the *Sun-Rype* and *Microsoft* cases recently before the Supreme Court of Canada. Both cases involve disputes over the certification of price-fixing class actions by indirect purchasers. Both cases also involve the passing on defence.

The significance of the passing on defence, and the standing of indirect purchasers, are only two of the many knock-on implications of class actions. Class actions may also affect substantive antitrust law. Kovacic, for example, suggests that the perceived threat of settlements in the face of class actions has led to a defensive reaction by American courts when establishing substantive doctrine.⁸ In particular, courts, fearful of excessive litigation, have whittled down the scope of substantive liability. Similarly, Weber Waller invokes *Trinko*, in which the Supreme Court denied a private suit over access to a telecommunications network, as an example of an outcome that is consistent with a hostile atmosphere to private actions in the USA.⁹

Other interactions between class actions and substantive law include the question of whether conduct is governed by a *per se* rule or the rule of reason. Litigation costs will be higher where the rule of reason applies, which will tend to deter class actions. Private enforcement through class actions would

⁵ *Illinois Brick Co v Illinois* (1977) 431 US 720.

⁶ William Landes and Richard Posner, 'Should Indirect Purchasers have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule in *Illinois Brick*' (1979) U Ch L Rev 602 (hereinafter, 'Landes and Posner'), eg concludes that indirect purchasers would generally sue only through class actions.

⁷ Note, however, that indirect purchasers are often sufficiently diffuse that remedies will often be granted on a *cy pres* basis, with payments to charities or other good causes rather than the individual plaintiffs.

⁸ William E Kovacic, 'The Intellectual DNA of Modern US Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix' (2007) Colum Bus L Rev 1.

⁹ Weber Waller, above n 1.

therefore be predictably greater in the face of *per se* rules than the rule of reason.¹⁰

Class actions also interact with the nature of the remedy that is available for a particular antitrust wrong. If injunctive remedies alone are available, it is less likely that a class action would materialize. Class actions are typically financed through contingent fees, which of course would not work well in the context of an injunctive remedy.

While each of these aspects of the relationship between class actions and other competition policy questions would be a worthy subject of greater discussion, I focus in this article on a narrower subset of issues. In particular, I focus on investigating the relationship between private class actions and leniency programmes for cartels.

Pursuant to leniency programmes, members of a cartel may receive immunity, or leniency, with respect to publicly imposed penalties such as civil fines or criminal convictions, for coming forward to the antitrust authority with information about a cartel. In Canada, for example, the Competition Bureau has adopted a policy of granting immunity to the first member of a cartel to come forward with information about a price-fixing conspiracy.¹¹ The cartel members, both corporate and individuals, will be given immunity if the informant is the first to inform, and if either the Competition Bureau was unaware of the conspiracy, or did not have sufficient information to convict. In cases where the informant is not first to inform but provides the Bureau with helpful information, the Bureau makes no commitments in its policy, but does indicate that it will consider recommending leniency to the Department of Public Prosecutions.

While such immunity programmes may lead to full immunity from fines or imprisonment, they do not necessarily preclude class actions and private remedies that include damages. As a consequence, the threat of class actions for damages for price-fixing has significant implications for immunity programmes. This is an important matter since such programmes have become crucial in the regulation of cartels.¹² As I discuss, class actions could undermine leniency by deterring informants fearful of becoming defendants in private actions, but could also complement these programmes: the fear of damages from a future discovery of the cartel may make conspirators more

¹⁰ Though see Robert Lande and Joshua Davis 'Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases' (2008) 42 USF L Rev 879, which reports finds that 14 of 40 of significant recent US private cases involved rule of reason, while the others were either dependent on *per se* rules in whole or in part. As a demonstration of the significance of class actions in private enforcement, 34 of the 40 cases were class actions.

¹¹ See <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03248.html>>.

¹² See eg Cecile Aubert, Patrick Rey and William Kovacic, 'The Impact of Leniency and Whistleblowing Programs on Cartels' (2006) 24 Int J Industrial Organization 1241. As an illustrative fact, Scott Hammond reports that 90 per cent of the fines imposed for *Sherman Act* violations in the USA since 1996 can be traced to investigations assisted by leniency applications: Scott Hammond, 'The Evolution of Criminal Enforcement Over the Last Two Decades', Speech at the 24th Annual National Institute on White Collar Crime (25 February 2010), at 3 <<http://www.justice.gov/atr/public/speeches/255515.pdf>>.

tempted to cheat on the cartel and inform on their co-conspirators, which destabilizes the cartel. The second section focuses on these issues.

The *Sun-Rype* and *Microsoft* matters, which call for decisions on *Illinois Brick* and *Hanover Shoe* questions in Canada, motivate this article in two senses. First, they call attention to the interaction between class actions and other competition policy questions, which is a focus here. Second, the specific substantive questions at stake in these appeals, including especially the standing of indirect purchasers, have important implications for class actions in Canada, and in turn important implications for immunity and leniency programmes. The third section canvasses certain factors that relate to the wisdom of indirect purchaser actions, factors that assume greater importance if class actions are viewed as useful complements to immunity programmes.

The interaction between class actions for damages and immunity and leniency programmes

The existence of class actions for damages clearly has the potential to undermine immunity and leniency programmes (which I will generally refer to for convenience as immunity programmes). The incentive to inform on a cartel arises under an immunity programme because it assures the conspirator that it will not be punished by the public authorities for its part in a conspiracy. If the informant avoids public penalties by informing, but then faces significant private penalties in private lawsuits, the carrot of immunity may be too weak to induce conspirators to come forward. Concern about the negative effect of class actions on immunity programmes has been expressed in the academic literature on immunity programmes,¹³ and is understood by policy makers; for example, the American Antitrust Modernization Commission, when discussing actions for damages accruing outside the USA, noted the concern that private actions may undermine immunity programmes.¹⁴ American law itself is sensitive to the disincentives to inform in the face of severe private remedies, with the *Antitrust Criminal Penalty Enhancement and Reform Act of 2004* providing that conspirators who cooperate both with federal authorities and private parties bringing actions against the conspiracy will be subject only to actual damages, not treble damages as is the norm in the USA.

In this section I explore ways in which class actions and immunity programmes are complementary. First, I review precisely why, and under what conditions, immunity programmes create incentives for conspirators to

¹³ See eg Giancarlo Spagnolo, 'Leniency and Whistleblowers in Antitrust' in Paolo I Buccirossi (ed), *Handbook of Antitrust Economics* (MIT 2008), online <<http://www.gianca.org/PapersHomepage/Ch.%207%20Handbook%20of%20Antitrust%20Economics,%20MIT%20Press%202008,%20pp.%20259-304.pdf>>; Weber Waller, above n 1.

¹⁴ Antitrust Modernization Commission, *Report and Recommendations* (April 2007) online: <http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm> at 229.

come forward to the authorities. Second, given the conditions for their success, I explore what positive effects class actions may have on immunity programmes.¹⁵

The incentive effects of immunity programmes

For simplicity, in this section I focus on the benchmark case of immunity for the first reporter of a cartel; I also set aside the implications of class actions for the moment. It is tempting to conclude that the carrot of a promise to avoid antitrust penalties will destabilize a conspiracy and encourage informants to defect from their price-fixing agreements. But such a conclusion is too simple.¹⁶ As Ellis and Wilson state:

The argument commonly presented is that firms in a cartel will each anticipate that others will ‘run to the courthouse’ and, thus will attempt to get there first. The basic intuition being that leniency policy places the cartel firms in a prisoners dilemma. *This is not the case*, every firm in the cartel is actually better off if no one runs to the courthouse, *including the firm that runs*. The argument put forth for leniency policy can only work under conditions of unwarranted mutual distrust.¹⁷

To elaborate, an immunity programme on its own would not seem to generate strong incentives to report. Suppose, to take a limiting case, that the probability of independent detection by the public authorities is zero; the authorities rely on the immunity programme exclusively for enforcement, and the only chance of detection arises if an informant comes forward. In the absence of immunity, it is apparent that no cartel member would come forward: doing so would lead to the punishment of other cartel members, but also would lead to its own punishment. But even with immunity, it is not clear why a conspirator would come forward. The cartel would have emerged in the first place because the gains from long run cooperation in the cartel were greater than the short run gains from defecting on the cartel by undercutting the fixed price in order to gain profitable market share. An immunity programme adds nothing to the gains to the conspirator from defecting relative to the no-immunity-programme case, nor does it affect the cost of defecting (on the presumably safe assumption that one conspirator’s cooperation with the antitrust authorities will lead other members to impose whatever punishment would have applied to merely cheating on the price). Thus, if a cartel has an

¹⁵ I refer to the benefits of class actions as opposed to private actions generally on the premise that without class actions, many private suits would not be brought.

¹⁶ See eg Spagnolo (n 13); Christopher J Ellis and Wesley W Wilson, ‘Cartels, Price-Fixing, and Corporate Leniency Policy: What Doesn’t Kill Us Makes Us Stronger’ (2003), unpublished manuscript <https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=IIOC2008&paper_id=339>; Massimo Motta and Michele Polo, ‘Leniency Programs and Cartel Prosecution’ (2003) 21(3) Int J Industrial Organization 347.

¹⁷ Ellis and Wilson (ibid) 4.

incentive to form, and if the threat of public punishment is zero, the immunity programme will not necessarily have an impact on cartel stability.¹⁸

This analysis highlights an important feature of immunity programmes: they are not stand-alone tools for uncovering cartels. They generally require additional, complementary features to create incentives to defect and report on a cartel. One such complementary feature of the enforcement regime is a positive probability of detection independent of the immunity programme.¹⁹ Suppose that even absent an immunity application there is a positive probability of detection of the cartel, and consequential fines for the cartel members. Let the probability of detection in each period that the cartel operates be p , and the penalty be F . In each period, the expected gains from cooperating with the conspiracy are reduced by pF —for simplicity, I assume that the cartel continues even after detection and punishment.²⁰ This itself helps reduce the incentives to conspire given that cartels will have negative expected profits if the probability of detection and fine is high enough. This is a basic result in the law and economics of deterrence.²¹

Immunity programmes become effective in the presence of a positive expected fine because they increase the gains from defecting on the cartel. In particular, an immunity programme changes the choice facing a cartel member considering cheating: rather than simply cheating on the cartel, the immunity applicant may simultaneously cheat and report on the cartel. Doing so increases the attractiveness of cheating relative to cooperating.²² To put it in simple formal terms, suppose that a cartel adopts grim trigger strategies in which cheating is punished with reversion to competitive conditions. For simplicity, suppose the cartel is selling homogenous goods and competes over price; in this case, the competitive outcome is zero profits. Ignoring the risk of fines, a cartel will not be stable if the short run gains from cheating, call this the market's monopoly profits, π^m , exceed the long run gains from cooperating (assume that cooperation requires some illegal communication and agreement between conspirators), which is the present value of the future stream of profits each period from charging the fixed price, call this $\frac{\pi^{coop}}{1-\delta}$, where π^{coop} are the profits each period from cooperating, and δ is the discount factor. That is, a cartel will be stable if, $\frac{\pi^{coop}}{1-\delta} > \pi^m$.

Now consider the threat of being caught and fined (but leave private actions aside for the moment). Cheating on the cartel results in competitive profits of zero going forward, so the cheater is best off if it cheats and simultaneously informs. The profits from cooperating, on the other hand, are reduced each

¹⁸ See also, Aubert and others (n 12).

¹⁹ See eg Spagnolo (n 13); Aubert and others (n 12).

²⁰ See Aubert and others (n 12) for a similar assumption. I discuss the implications of this assumption for my analysis below.

²¹ The classic article on this point is Gary Becker, 'Crime and Punishment: An Economic Approach' (1968) 169 J Pol Econ 169.

²² Spagnolo (n 13); Aubert and others (n 12).

period by expected penalties. The cartel will be stable in the shadow of expected fines and an immunity programme if, $\frac{\pi^{coop} - pF}{1 - \delta} > \pi^m$. This condition is harder to meet than the stability condition in the absence of fines and immunity.²³ The combination of fines and immunity destabilizes the cartel.

It is apparent that deterring a cartel is in many respects easier than deterring unilateral criminal conduct. The public authorities can take advantage of the intrinsically unstable nature of a cartel, and indeed aggravate the instability.²⁴ If, in contrast, the conspirators could enter into binding agreements which would render the cartel analogous to a single actor, then expected fines each period would have to be large enough to render the expected profits from a stable cartel each period unprofitable for each firm; that is, $pF > \pi^{coop}$. Instead, given the tendency of the conspirators to turn on each other, the expected fine need only be large enough to make cheating on the cartel attractive; that is, $\frac{pF}{1 - \delta} > \frac{\pi^{coop}}{1 - \delta} - \pi^m$. Put another way, a cartel will not be stable so long as the expected fine meets the following condition: $pF > \pi^{coop} - \pi^m(1 - \delta)$. Immunity programmes take advantage of the instability of a conspiracy.

The interaction of immunity programmes and class actions for damages

Observers have suggested that class actions for damages interact with immunity programmes in potentially harmful ways. Private class actions for damages are available even if a cartel member qualifies for immunity from public enforcement because of its reporting of the conspiracy. The concern is that the threat of damages will deter an informant from coming forward. The Antitrust Modernization Commission in the USA, for example, expressed concern that the existence of actions by foreign purchasers from an international cartel could undermine the incentives to inform on a cartel otherwise generated by immunity programmes.²⁵

It is true that class actions could undermine immunity programmes, but the interaction is more subtle than it may first appear. The threat of an action for damages as a consequence of informing on a cartel may dampen the incentives to come forward. But the threat of an action for damages if the cartel member does *not* come forward yet the cartel is detected dampens the incentives to continue to cooperate within a cartel; that is, the threat of damages lowers the expected profits from cooperating. The threat of a class action does not necessarily weaken the incentives to inform relative to the no-class action case given this offsetting effect.

²³ It is also harder to meet than the immunity program in presence of fines but without immunity, which would imply the following stability condition: $\frac{\pi^{coop} - pF}{1 - \delta} > \pi^m - pF$.

²⁴ Spagnolo (n 13).

²⁵ Antitrust Modernization Commission (n 14).

The argument that follows resonates with a report from the International Competition Network (ICN) on the experience of national competition authorities' experience with leniency programmes in the shadow of potential private actions for damages.²⁶ The ICN report states:

As the predominant experiences of the [national authorities] show, leniency applicants will decide to make their application in the knowledge that the risk of fines and/or criminal sanctions can be reduced or eliminated, whilst the risk of a damage claim will in any event exist. The applicant knows, in a cartel case, that there is always the possibility that another cartel member will make the application for leniency, leaving the other cartel members exposed both to the risk of public penalties as well as compensation of damages without the benefit. Hence, several [authorities] also referred to the race between cartel members as an incentive to seek a leniency application.²⁷

The key observation in this passage is that the applicant knows that if it does not report, it is vulnerable to paying damages in the future in any event, whether because of defection by a co-conspirator (which the ICN emphasizes) or because of independent third-party detection of the cartel. This threat of paying damages in any event offsets the disincentive to report that private damages might otherwise create.

To elaborate on this offsetting effect, suppose for simplicity (and only for the moment) that an action for damages can take place for each period in which the cartel operates, but that the action will only be for damages that period. Suppose, for example, that there are limitations periods that cap retrospective damages, or that evidence does not survive long enough to allow actions for damages beyond one period. If found to have participated in a cartel, the defendant pays D for the period in which it was caught. Continue to assume a fine of F is imposed on any firm that is discovered to be a member of a cartel. The probability of detection is p , though if the informant reports the cartel, the probability of class action damages rises considerably; for simplicity, suppose that the informant and other members of the cartel can expect to pay damages D with certainty.²⁸ The profits associated with cheating and reporting on the cartel, which brings the cartel to an end under the assumption of grim trigger strategies, are lower than the profits associated with cheating and reporting when there are no class actions. The cheater expects to realize $\pi^m - D$, which is smaller than π^m that the cheater expects in the absence of class actions. This effect suggests that class actions weaken the incentives to inform relative to no class actions.

²⁶ International Competition Network: Cartels Working Group, 'Interaction of Public and Private Enforcement in Cartel Cases' *Report to the ICN Annual Conference* (Moscow, May 2007) <<http://www.internationalcompetitionnetwork.org/uploads/library/doc349.pdf>>.

²⁷ *ibid* 44.

²⁸ Underlying the assumption of constant damages D across cartel members is an assumption that cartel members are symmetrically positioned with respect to damages, perhaps because of a joint and several liability requirement. Expected damages for each member may not be identical in practice, perhaps because one defendant may be more attractive to plaintiffs than another. I relax this assumption below.

But there is an offsetting effect: the threat of paying damages in a class action lowers the expected profits from cooperating each period. Each period, the firm expects to realize the following from cooperating: $\pi^{coop} - pF - pD$. The profits from cooperation each period are lower as a consequence of class actions. The expected profits from cooperation are the present value of profits each period, $\frac{\pi^{coop} - pF - pD}{1 - \delta}$. The threat of damages for each period in which the cartel operates suggests that class actions increase the incentives to defect from the cartel: defecting and reporting avoids the threat of paying future damages.

Both sides of the cartel stability condition are affected by the threat of damages. A cartel will be stable in the shadow of class action damages, fines and an immunity programme if $\pi^m - D < \frac{\pi^{coop} - pF - pD}{1 - \delta}$. Comparing this condition with the condition set out above in the absence of class actions, it is apparent that the cartel will be *less* stable in the presence of class actions if the threat of damages absent defection from the cartel is sufficiently great compared to the damages in a single period that are payable with certainty following defection. That is, the cartel is *less* stable in the presence of class actions if $D < \frac{pD}{1 - \delta}$, which arises where the stream of expected damages as the cartel operates over time dominates the certainty of only paying damages once when defecting. Put another way, the incentives to defect will be stronger with class actions if the probability of detection is relatively high, and the discount factor relatively high (ie the future matters more to the would-be conspirators): the cartel will be less stable with class actions if $p > 1 - \delta$.

Note that I have assumed for simplicity that the cartel continues to operate after detection in the same manner as it did prior to detection. The analysis changes if detection affects the payoffs from conspiracy, perhaps by increasing the probability of detection in the future. But the qualitative point holds as long as there is the possibility of the cartel continuing into the future post-detection.²⁹ In any case, the concern that conspirators will have about paying damages in the future will, all things equal, may make them more likely to defect and report initially.

To be sure, there is ambiguity: certain damages when cheating and informing may or may not dominate the threat of damages going forward. Which offsetting effect dominates will depend on the circumstances. Moreover, the assumptions about the working of the cartel in this example, such as the assumption of grim trigger strategies, are far from universally true. But the example shows that class actions do not necessarily undermine immunity programmes relative to no class actions. Under reasonable assumptions, the opposite could be true.

²⁹ If eg the probability of a cartel continuing after a period of operation is k (which will depend on whether it is caught, and whether the cartel continues after being caught), then the availability of a class action for damages will destabilize the cartel if $p > 1 - k\delta$. As long as the probability of detection is high enough, the probability of continuation even after the cartel is caught is strictly positive and high enough, and the discount factor is high enough (that is, the future matters enough), this condition may be met.

A clarifying point is in order. I have compared the incentives to cheat and report on a cartel with and without class actions,³⁰ showing that the presence of class actions does not necessarily undermine the incentives to defect created by immunity programmes. Thus, it is not necessarily the case that immunity programmes in a jurisdiction without class actions will be more effective than those in a jurisdiction with class actions, all other things equal. I have not, however, compared the effectiveness of immunity programmes where defection and reporting earns not only immunity from criminal charges and fines, but also from class actions for damages. The USA, for example, leans in this direction with a rule that federal damages are only actual damages, not the usual treble damages, for the first firm to report a cartel to the authorities. In such a case, class actions are more likely to support reporting under immunity programmes by increasing expected profits from cheating on a cartel and reporting, while simultaneously lowering the future profits from cooperating.³¹ On the other hand, too much of a whistle-blowing benefit might encourage the cartel in the first place, and thus damages may be optimal; I discuss this possibility below. The point of the above analysis is simply to show that even if damages are available against the informant, class actions may nevertheless enhance immunity programmes.

The analysis to this point of the interaction between class action damages has made a number of simplifying assumptions. In the following subsections I discuss the implications of relaxing certain assumptions, showing that there are additional reasons to suppose that class actions may strengthen the cartel-destabilizing incentives of immunity programmes. In the discussion I consider another possible objection to the analysis. I have not identified to this point any advantage of private class actions *per se*, as opposed to some modified public system of fines rather than damages. As I discuss, even independent of questions of compensation to victims that class actions may engender, there are reasons from a strictly deterrence perspective to see public and private enforcement as complements to one another. Incentives will predictably be different, and perhaps better from society's perspective for reasons that I outline, where class actions and public enforcement co-exist.

Varying the probability of detection

The incentives for a cartel member to inform on a cartel in the presence of an immunity programme are stronger the higher is the probability of detection. If the cartel members perceive a significant risk that they will be found out if they

³⁰ Strictly speaking, it is the availability of private actions that is crucial, but private actions will be rare in this setting in the absence of class actions.

³¹ See eg Douglas Ginsburg, 'Costs and Benefits of Private and Public Antitrust Enforcement: An American Perspective' in Abel M Mateus and Teresa Moreira (eds), *Competition Law and Economics: Advances in Competition Policy Enforcement in the EU and North America* (Edward Elgar Publishing Inc 2010). See also Wouter Wils, 'Leniency in Antitrust Enforcement: Theory and Practice' (2007) 30 *W Comp* 64.

continue to cooperate with the conspiracy, they will have lower expected profits from cooperating with the conspiracy. The profits from cheating and informing on the cartel, on the other hand, are invariant with the probability of detection. Thus, increasing the probability of detection increases the incentives to inform on the cartel.

Commentary often dismisses class actions as merely following on public enforcement against a cartel and therefore adding little to the probability of detection. To be sure, such follow on class actions are common, though may still serve to complement immunity programmes by making informing relatively more profitable, as explained above. But these are not the only kinds of class actions. Crane observes that there are ten private federal cases for every case by the Department of Justice or Federal Trade Commission in the USA.³² In an examination of 40 significant private class actions for damages from antitrust violations (not just cartels) in the USA, Lande and Davis observe that fifteen did not follow on government enforcement.³³ In some cases government enforcement followed private initiative, which made determination of what came first difficult, but focusing only on the clear cases, Lande and Fisher identify fifteen cases that resulted from private action, and another six that were the mixed result of public and private action.³⁴ Even in Canada, where class actions are much less common than in the USA, Sanderson and Trebilcock provided data for class actions up to 2004 that indicate that of the 14 private actions against conspiracies to that point, 5 were initiated by private action, and 3 of those actions followed on public enforcement in the USA.³⁵ They concluded that private actions in Canada have not served in practice as a serious alternative to public enforcement. In my view, however, the fact that over half the time private actions were initiated without public enforcement in Canada is significant.³⁶

Class actions are likely to increase the probability of a cartel's detection, all things equal. Buyers, or indirect buyers, may have distinct market information that makes them relatively well-suited to suspect and uncover a cartel. Moreover, the promise of contingency fees also induces lawyers to be on the lookout for possible conspiracies. The possibility of a class action for damages increases the number of parties financially interested in uncovering conspiracies

³² Crane (n 1).

³³ Lande and Davis (n 10) 898. In other work, Lande and Davis compare the efficacy of public and private enforcement efforts, and conclude that private enforcers have contributed significantly to the deterrence of anticompetitive conduct in the USA: see, Robert Lande and Joshua Davis, 'Comparative Deterrence from Private Enforcement and Criminal Enforcement of the US Antitrust Laws' (2011) *BYU L Rev* 315. For a sceptical response, see Gregory Werden, Scott Hammond and Belinda Barnett, 'Deterrence and Detection of Cartels: Using All the Tools and Sanctions' (2011) 56 *Antitrust Bull* 207.

³⁴ Lande and Davis (n 10) 909.

³⁵ Margaret Sanderson and Michael Trebilcock, 'Competition Class Actions: An Evaluation of Deterrence and Compensation Rationales' in Stephen Pitel (ed), *Litigating Conspiracy: An Analysis of Competition Class Actions* (Irwin Law 2006).

³⁶ Edward Iacobucci, 'Imperfect Information and Conspiracy Class Actions' in Stephen Pitel (ed), *Litigating Conspiracy: An Analysis of Competition Class Actions* (Irwin Law 2006).

beyond the public authorities, and thus is likely to increase the probability of detection.

Because the probability of detection is higher in the presence of class actions, there is a further complementarity between immunity programmes and class actions that was not identified in the above analysis of cartel stability conditions. In the above analysis, the probability of detection, p , was held equal when comparing the incentives of immunity programmes with and without the threat of class actions. To assess whether class actions would make the immunity programmes stronger, I compared the cartel stability conditions when class actions are not available and when they are available and asked which is more easily met; that is, I compared $\frac{\pi^{coop} - pF}{1 - \delta} > \pi^m$ with $\frac{\pi^{coop} - pF - pD}{1 - \delta} > \pi^m - D$. But the probability of detection in the class action context (the second condition) will likely be higher than the probability of detection in the no-class action context. As p increases, it is less probable that the stability condition will be satisfied, so the presence of class actions makes cartels less likely to be stable, all things equal.³⁷

Equal damages for all cartel members

In the analysis I have assumed that the damages payable by each member of the discovered cartel is D . That is, each member of the cartel pays an equal amount of damages. This may not be true, and this in turn may undermine the role of class actions in supplementing the incentives provided by immunity programmes to provide incentives to conspirators to inform on the cartel. In particular, it is predictable that the informant would inform just as it was also cheating on the cartel agreement. Cheating on the cartel agreement results where the member undercuts its co-conspirators and thereby gains market share at a price just below the cartel price. This implies that the cheater would predictably, all things equal, have a larger market share than its co-conspirators in the period when it defects. If class action damages are based on the sales of the cartel members, then the assumption underlying the above analysis of equal damages whether one is a defector or whether one is simply a member of a cartel that is caught by the authorities is inaccurate. Larger damages for the defector and informant would tend to undermine the incentives to seek immunity. Recall the cartel stability condition: $\frac{\pi^{coop} - pF - pD}{1 - \delta} > \pi^m - D$. If damages D on the right-hand side, which reduce the profits from cheating, are greater than the damages D on the left-hand side, which reduce the profits from cooperating, then this will tend to stabilize the cartel.

This analysis suggests that, from the perspective of enhancing the immunity programme and consequential deterrence, a class action regime ought to treat the conspirator identically with a non-conspirator regardless of market share.

³⁷ I discuss the risk of frivolous suits in the context of agency problems in class actions below.

This provides support for the joint and several liability approach to damages for conspiracy adopted in the USA: each conspirator, if identically situated in all respects but market share, faces the same damages in expectation regardless of market share. The Antitrust Modernization Commission called for changes to the joint and several liability rule, concluding that it was unfair.³⁸ A member of the Commission, Dennis Carlton, dissented on this point, stating that he did not see why the joint and several rule undermined deterrence.³⁹ The interaction between the immunity programmes and damages suggests that there is good reason to maintain the rule: without it, the incentives to inform on the cartel are diminished.⁴⁰

Damages for one period only

The analysis has assumed to this point that damages are imposed only for one period. This may not be realistic. Class action plaintiffs may seek damages retrospectively on top of damages for the period in which the cartel member defects and informs. If this is true, the existence of class actions has the potential to be especially useful in promoting defections under the immunity programme. For every period in which the cartel continues to exist, the conspirators are at risk of damages not only for the current period, but for past periods as well. On the other hand, a conspirator early in the life of the cartel may limit its potential for paying retrospective damages in the future, as well as enhance its short run profits, by cheating on the cartel and informing. That is, when contemplating cooperation with the cartel early in the life of the conspiracy, the short run gains from immediate defection are made more attractive where cooperation risks ever-increasing damages going into the future.

To take an extreme benchmark case, suppose that damages force the conspiracy as a whole to disgorge all the present and past profits from the conspiracy. Such an outcome does not necessarily force the cheater/informant to disgorge completely its profits in expectation given its larger short run market share from cheating and the rule of joint and several liability, which implies that all conspirators face similar expected damages regardless of market share. But if conspirators are similarly situated, if all conspirators choose not to defect from the price-fixing agreement, at some point the profits from the conspiracy will become zero: even if p is small, over an infinite horizon, the cartel will be caught and all profits disgorged (and a fine paid). On the other hand, the short-run profits from cheating on the cartel and paying only a single

³⁸ Antitrust Modernization Commission (n 14) Recommendation 46.

³⁹ Antitrust Modernization Commission (n 14) 400.

⁴⁰ This is similar to the argument of Spagnolo (n 13) that contracts awarded on a rigged bid should nevertheless be enforced if the bid-rigging was exposed by one of the bidders in an immunity program. This is so because it enhances the incentives to cheat on the cartel and inform, which of course destabilizes the cartel *ex ante*.

conspirator's share of damages (and no fine) may be positive. Retrospective damages provide further reason to suppose that class actions may effectively supplement immunity programmes: cheating now limits the cheater's future damages payable.

To relate the analysis to the cartel stability conditions outlined above, suppose that a cartel, if caught, is liable to pay damages reflecting profits from the current and a past period (assuming that there had not been detection and damages paid in the past period). In the absence of retrospective damages, when the cartel is starting up, the cartel stability condition requires that $\frac{\pi^{coop} - pF - pD}{1 - \delta} > \pi^m - D$. With retrospective damages, the right-hand side does not change: cheating and informing in the first period of the cartel eliminates the threat of retrospective damages. On the other hand, the left-hand side becomes smaller. Profits each period are lowered by the prospect of damages not only for the current period, but also for the past period. In the first two periods without retrospective damages, for example, expected profits from cooperating are, $\pi^{coop} - pF - pD + \delta(\pi^{coop} - pF - pD)$. With retrospective damages, on the other hand, expected profits in the first two periods are, $\pi^{coop} - pF - pD + \delta(\pi^{coop} - pF - 2p(1 - p)D - p^2D) = \pi^{coop} - pF - pD + \delta(\pi^{coop} - pF - (2 - p)pD)$, which is less than expected profits without retrospective damages. Retrospective damages increase the temptation to cheat and inform early in the life of the cartel by limiting the cheater/informant's potential damages to one period.⁴¹

Alternative enforcement mechanisms

A critic of class actions might concede the potential benefits to immunity programmes that I have identified, but might object that there are better means of achieving these results. Ultimately, the efficacy of class actions in supporting immunity programmes is empirical. I consider next, however, some theoretical arguments about the particular role that class actions but not alternatives can play in supporting the immunity programme.

Why not higher fines?

Class actions support immunity programmes in part by increasing the expected penalties associated with cooperating with a cartel, and making cheating and defection consequently relatively more profitable. But, it might be argued, similar effects could be achieved at lower social cost simply by raising the fine associated with cartels. Given that the expected fine is the product of the

⁴¹ Note that if the cartel were already in existence for a period of time, then retrospective damages could serve to stabilize the cartel: the cheater only realizes one period's profit, but would have to pay a fine and multiple periods' damages. My conclusions are predicated on the proposition that if a cartel is unstable early in its life, there is less need to be concerned about later periods.

probability of detection and the fine, and that the former consumes social resources and the latter does not, the optimal policy could be to keep the probability of detection low and the fine high.⁴²

Such an argument is not an argument against class actions *per se*, but rather an argument in favour of low probabilities of detection and high fines, which would if accepted undermine the advantage of class actions in increasing the probability of detection outlined above. There are, however, arguments why increasing fines creates its own economic costs, all other things equal.⁴³ Risk aversion on the part of accused persons who may be improperly convicted,⁴⁴ moral concerns about disproportionate punishment, concerns that courts may be reluctant to convict in the shadow of harsh punishment, and the possibility of judgment-proof defendants are all disadvantages of higher fines. Moreover, for any given probability of detection, the 'high fine' argument does not indicate whether detection should be confined to public enforcement only, or whether private class actions should also be in the mix. I turn next to reasons to conclude that the latter might be appropriate.

The distinctive advantages of private class actions

Accepting that there are principled and pragmatic limits on the level of fines that can be imposed, there is social merit in having a non-trivial, positive probability of detection of cartels. A critic of class actions would argue that the appropriate instrument for achieving any given level of detection is for public enforcers to invest in detection, and not to have private actions. Wils, for example, argues that private enforcers do not have the public interest as a motivation and thus may bring socially undesirable actions.⁴⁵ Moreover, as Landes and Posner point out, there is the danger that having more potential plaintiffs will lead to overinvestment overall in detection.⁴⁶

While there are potential shortcomings associated with private actions, there are a number of reasons why class actions may serve as a useful supplement to public enforcement in achieving a certain level of detection. Roach and Trebilcock, for example, review several relative strengths of private enforcement.⁴⁷ Private actors may, perhaps because of participation in relevant markets, have lower costs of obtaining information than public enforcers. Moreover, private litigants may have stronger incentives to divulge information in proceedings from which they directly benefit.⁴⁸ Private enforcers are also not

⁴² See Becker (n 21).

⁴³ See eg Michael Block and J Gregory Sidak, 'The Cost of Antitrust Deterrence: Why Not Hang a Price Fixer Now and Then?' (1980) 68 Geo LJ 1131.

⁴⁴ *ibid.*

⁴⁵ Wils, above n 1.

⁴⁶ Landes and Posner (n 6) make the argument in the context of indirect purchasers, but the basic observation about the risk of duplicative investigation would apply to the existence of class actions at all.

⁴⁷ Roach and Trebilcock (n 1).

⁴⁸ See eg Iacobucci (n 36).

subject to the same political, and potentially socially destructive, influences as public enforcers and can therefore serve as a useful check on public authorities.

Less discussed in the literature are problems of hidden information that might invite private enforcement as a supplement to public enforcement. Competition agencies will generally operate within a certain budget allocated to them by the government of the day. Such a fixed budget makes sense where the government would have a difficult time determining whether prosecuting any given case is socially desirable or not. Instead of case by case budgeting, the government will allocate a fixed amount to the agency and count on the agency to determine how best to allocate those resources. It is possible within such a framework that socially positive enforcement actions will not be brought. On the other hand, especially given the role of contingency fees in motivating plaintiffs lawyers, private enforcers will tend to pursue positive net present value actions without a fixed budget constraint.

Another problem of hidden information concerns the probability of detection. Public authorities have an incentive to exaggerate the probability of detection: to the extent that potential wrongdoers perceive a probability of enforcement that is greater than it actually is, the enforcer gets deterrence without public expenditure. It would be difficult for observers to infer from case outcomes precisely what efforts the enforcer put toward. It could be, for example, that there was little enforcement activity because of little cartel activity. Private enforcement, on the other hand, results from largely publicly available information about the costs and benefits of lawsuits and the incentives that they provide to private actors to pursue class actions. At the very least, it does not depend on obscure efforts by public enforcers to detect cartels. The threat of a class action may be credible in a way that a higher probability of detection on the part of public enforcers is not.

Another credibility problem also suggests that class actions can be complementary to immunity programmes. There is a key initial premise to this argument which may or may not hold, but if it does, there is a justification for retaining class actions even in the presence of public enforcement actions. The premise is that the optimal reward for whistle-blowing on a cartel is a financial amount that is greater than zero but less than what the total financial penalty (including public and private outlays) would be in the absence of whistle-blowing. That is, whistle-blowing members of a cartel optimally have their financial penalties mitigated, but not reduced to zero. The economic reason for adopting such a premise is that zero fines for whistle-blowers, or net financial rewards (ie negative fines), may not provide a sufficient disincentive to enter into cartels in the first place.⁴⁹ Independent of economic considerations, it

⁴⁹ See eg Motta and Polo (n 16); Spagnolo (n 13); Joseph Harrington, 'Optimal Corporate Leniency Programs' (2008) 56 *J Industrial Econ* 215. On the other hand, it is possible that zero fines, or positive rewards, for whistleblowing might optimally destabilize a cartel. See eg Aubert and others (n 12); Spagnolo (n 13); Harrington, this note.

could be that for political reasons, antitrust authorities would like to grant leniency to cartel members that first report the cartel, but do not want to grant full immunity. That is, for political reasons mitigated but positive penalties may be the preference of the antitrust authorities.

If it is the case that positive, but reduced, fines are optimal (or politically preferred), class actions complement public enforcement because of a credibility problem confronting public enforcers. Once the whistle-blower has revealed its information, public enforcers may have an incentive to renege on any pre-announced leniency programme. This incentive might exist for political reasons such as appeasing public outrage at a price-fixing conspiracy, or to raise fines and the budget and/or profile of the enforcer. The incentive might also arise simply to reinforce the seriousness of cartel penalties to future would-be price-fixers. Anticipating this commitment problem on the part of the enforcer, prospective informants may be wary of whistle-blowing.

Class actions help the enforcement regime commit to a credible leniency programme while maintaining positive financial penalties for whistle-blowers. To show this, begin by assuming that there is only public enforcement, and that the optimal reward for an informant is to reduce its financial penalty by 50 per cent. A public enforcer therefore announces that it will reduce the fines for the whistle-blower by 50 per cent relative to the fines that it would otherwise have imposed. The question, of course, is what the fines that the informant would otherwise have faced would be. An enforcer seeking to renege on its leniency programme might be inclined to decide that the fines it would otherwise have levied are twice what they in fact otherwise would be. This tendency on the part of the enforcer could undermine the leniency programme.

Of course, enforcers have reputations, and may seek to protect the integrity of the leniency programme by not behaving opportunistically. The difficulty is that knowing the counterfactual, that is, what the fine would have been in the absence of the leniency programme, is far from straightforward, making it difficult for observers to know whether the public enforcer has been opportunistic or not. This weakens the force of reputational constraints on the enforcer's opportunism.

On the other hand, if the enforcer can commit to a bright line approach to leniency, reputational constraints, or even legal constraints through pre-announced terms, become much more significant. As Spagnolo puts it, 'Codification is actually instrumental to both generality and publicity. It helps reducing uncertainty and discretionality [*sic*], two aspects that greatly discourage self-reports.'⁵⁰ A leniency programme that promises immunity for the whistle-blower is such a bright line approach: it is observable, and is not contingent on other decisions of the enforcer. Such an advantage has been

⁵⁰ Spagnolo (n 13) 263.

noted by practitioners, as the following excerpt from a Latham and Watkins White Paper illustrates:

One of the virtues of the leniency program, and the reason for its success, is the element of certainty it provides to corporations that want to resolve their criminal liability. If a corporation meets the requirements of the Leniency Program, the Antitrust Division has virtually no discretion to deny the request. The Antitrust Division has developed an almost two-decade-long record of honoring leniency agreements, which provides comfort to potential applicants. There is only one reported instance in which the Antitrust Division tried to rescind a leniency agreement.⁵¹

The paper goes on to note that earlier programmes were not successful in part because of uncertainty about the exercise of discretion on the part of government officials.

It is a short step from these observations to reach the conclusion that class actions may be complementary to immunity programmes. The government can pre-announce a credible, bright line commitment to complete immunity for public penalties, yet the whistle-blower will nevertheless anticipate positive penalties (which anticipation is optimal by hypothesis) from class actions. By delegating part of the enforcement regime to third parties, private plaintiffs, that are not part of the immunity programme, the public enforcers can credibly commit to immunity from public penalties while not letting the informants off without paying penalties at all. It achieves structurally a systematically non-zero, but mitigated penalty for informants. This is not to say that the system achieves the first best in all cases—it could be that private damages facing the informant are too high or too low from a social perspective—but the system may provide a kind of rough optimality by keeping damages positive while allowing zero public penalties for the informant.

Indirect purchaser actions and immunity programmes

I have shown that private class actions against conspiracies may be helpful complements to immunity programmes, which programmes have proven invaluable in enforcement against price-fixing. In this concluding section I consider how the analysis of the role of class actions in supporting immunity programmes should influence analysis of the standing of indirect purchasers to sue for damages from a price-fixing cartel. At the outset, I will assume in the following that a viable class action mechanism is indeed helpful to immunity programmes. This conclusion does not follow inexorably from the above

⁵¹ Niall Lynch, 'Immunity in Criminal Cartel Investigations: A US Perspective' Latham and Watkins White Paper (2011). For a discussion of failed whistleblowing programs because of prosecutorial discretion in the context of securities law, see Geoffrey Christopher Rapp, 'Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act' (2012) *BYU L Rev* 73 at 130.

analysis, but rather is simply a plausible conclusion in light of the analysis. If it were the case that class actions undermine the most potent weapon against price-fixing in the authorities' arsenal, then it would make sense to abolish such class actions altogether rather than tinker with standing rules to diminish their significance. The analysis that follows considers the appropriate approach to class actions on the premise that such actions are desirable in the first place.

Just as the question of whether class actions and immunity programmes are complementary is ultimately an empirical question, so too is the question of whether granting standing to indirect purchasers helps strengthen the role of class actions as a complement to immunity programmes. The following is not intended to be a comprehensive discussion of the pros and cons of indirect purchaser standing, but rather one that focuses on matters that are particularly relevant to the interaction between class actions and immunity programmes. In particular, a key question in determining the optimality of indirect purchaser lawsuits in supporting class actions and immunity programmes is whether they increase the probability (p in the above analysis) that an action for damages will be successfully prosecuted where there has in fact been a conspiracy. To the extent that indirect purchaser standing promotes successful suits where there has not been a conspiracy (through nuisance lawsuits seeking settlements, for example), or to the extent that such standing will not result in a successful action for damages where there has been a conspiracy, indirect purchaser suits are not socially desirable. Some considerations suggest that indirect purchaser standing will promote successful suits when such suits are called for; others suggest otherwise.

The reluctance of direct purchasers to sue

It is sometimes said that if direct purchasers simply pass on the costs of the cartel to indirect purchasers, they will not have incentives to sue since they suffer no losses from the cartel.⁵² This is unpersuasive on its own: if there is a predictable economic gain from a lawsuit, direct purchasers have an incentive to pursue it whether the gain is recompense for past losses or a windfall.⁵³ This is not a reason to grant standing to indirect purchasers.

⁵² In rejecting Landes' and Posner's argument that direct purchasers would have incentives to sue even if they pass on the overcharge, Robert Harris and Lawrence Sullivan, 'Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis' (1979) 128 U Pa L Rev 269 state at footnote 158a, 'The Landes-Posner analysis assumes that potential plaintiffs will treat every dollar of profit identically, whether earned by selling their products, recovering demonstrable losses (that is, monopoly overcharges not passed on), or windfall gains (that is, recovery of monopoly overcharges which had been passed on). We refuse to accept this characterization of managerial mentality in American society.' See also, Weber Waller, above n 1, who observes at 22, 'Direct purchasers cannot be counted on to stand in the shoes of consumers because they have different incentives. First, as customers of the manufacturers they have the incentive to remain on friendly terms with their suppliers which frequently cut against bringing suit for overcharges. Second, the overcharges often have been passed on in whole or in part leaving the direct purchaser indifferent to the consequences of the price fixing.'

⁵³ Landes and Posner (n 6).

Different considerations regarding the reluctance of direct purchasers to bring suit have more force. It has long been said that direct purchasers may be reluctant to sue a cartel member for fear of disrupting an otherwise healthy relationship with their suppliers.⁵⁴ Landes and Posner rejected this concern, noting that if a direct purchaser foregoes a positive net present value lawsuit against its supplier, the supplier must be giving up something of equal value in return.⁵⁵ Therefore, even in the absence of an action for damages against the cartel, value must pass from the supplier to the buyer that reflects the foregone value of the action.

There are good arguments that respond to Landes and Posner. In a world of incomplete, relational contracts, it is plausible that at any point in time, purchasers may be vulnerable to opportunistic behaviour by sellers seeking to appropriate quasi-rents resulting from past relationship-specific investments by buyers. While reputation or other relational constraints may deter such appropriations generally, sellers may be less reluctant to exploit these vulnerabilities in contexts where they have been sued by their buyers. It may be, for example, that sellers want a reputation for being opportunistic towards litigious buyers. In such a case, suing the seller may result in the buyer forgoing quasi-rents. Moreover, the rents that a buyer realizes from its relationship with a seller may be endogenous with the legal rule that governs indirect purchaser standing. Schinkel and others show that, in the presence of the *Illinois Brick* rule, sellers may effectively bribe direct purchasers not to sue for conspiracy by sharing the rents of any conspiracy with the purchasers.⁵⁶ This creates further concern that the *Illinois Brick* rule deters worthwhile lawsuits against conspirators, which in turn suggests that the rule may undermine immunity programmes.

International considerations

There is another important consideration that favours standing for indirect purchasers because of the increased probability of enforcement that it brings. The analysis to this point has not accounted for the international nature of many price-fixing conspiracies.⁵⁷ Consider Canada to illustrate the point. In

⁵⁴ See Harris and Sullivan (n 52); Weber Waller, above n 1.

⁵⁵ Landes and Posner (n 6).

⁵⁶ Maarten Schinkel, Jan Tuinstra and Jakob Ruggesberg, 'Illinois Walls: How Barring Indirect Purchaser Suits Facilitates Collusion' (2008) 39 RAND J Econ 683.

⁵⁷ For discussion of the prevalence and impact of international cartels, See eg John Connor and Yuliya Bolotova, 'Cartel Over-charges: Survey and Meta-Analysis' (2006) 24 Int J Industrial Organization 1109 (finding international cartels created greater overcharges than domestic cartels); John Connor, 'Price-Fixing Overcharges: Revised 2d Edition' (2010) ssrn: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1610262> (in survey of almost 600 empirical studies of cartel activity, Connor finds that international cartels had a median overcharge of 30 per cent, while median domestic cartel overcharge was 17 per cent); Margaret Levenstein and Valerie Suslow, 'Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy' (2004) 71 Antitrust LJ 801; SJ Everett, Margaret Levenstein and Valerie Suslow, 'International Cartel Enforcement: Lessons from the 1990s' (2001) 12 World Econ 1221.

some recent cases in Canada, *Microsoft*, for example, the alleged conspiracy took place outside Canada. Canada, like other antitrust jurisdictions, will apply its competition laws extraterritorially to the extent that foreign activity affects markets in Canada.⁵⁸ But if Canadian indirect purchasers do not have a right to sue, private enforcement against foreign cartels may be curtailed. If foreign conspiracies sell inputs to foreign direct purchasers, who in turn use the inputs to produce outputs that are sold into Canada, the *Illinois Brick* rule against standing for indirect purchasers may significantly nullify the impact of class actions for damages. The only Canadian actors affected by the cartel may be indirect purchasers who do not have standing. This obviously lessens the impact in Canada of class actions for damages against cartels.

There is a response to this concern. If the foreign cartel takes place in a jurisdiction such as the USA that adopts a rule against the passing on defence, then foreign direct purchasers may be able to sue for damages in that foreign jurisdiction even where the cartelized input was used to produce something sold in Canada. In this instance, the usual defence of the *Hanover Shoe/Illinois Brick* combination is available to justify the lack of standing for Canadian indirect purchasers: they will be protected through deterrence from US direct purchaser suits rather than ex post actions for damages.

Reliance on foreign direct purchaser suits may, however, be problematic for the jurisdiction that is home to the indirect purchasers, Canada in the example. First, as noted above, direct purchasers may be reluctant to sue. Second, courts in foreign jurisdictions may be reluctant to recognize damages on the part of local direct purchasers from a cartel whose ill effects are felt abroad, and that as a consequence may in fact be beneficial for the exporting country; for evidence of jurisdictions' parochial attitudes to exporting cartels, observe the common exemption for export cartels from conspiracy provisions.⁵⁹ Third, for reliance on direct purchaser class actions to have meaning, a country that adopts *Illinois Brick* and that also seeks to promote class actions as a useful complement to immunity programmes would have to rely on foreign class action regimes. But the home of the direct purchasers may not have a robust class action regime. For example, given the state of class actions in Europe, Canadian purchasers cannot rely on European class actions by direct purchasers to protect them from European conspiracies. For these reasons, again on the premise that viable class actions complement immunity programmes, international considerations tend to support the allowance of indirect purchaser suits.

⁵⁸ See eg Edward Iacobucci, 'Canada and International Antitrust Law and Policy' in Andrew Guzman (ed), *Cooperation, Comity and Competition Policy* (OUP 2010).

⁵⁹ In Canada, such an exemption is found directly in the conspiracy provision, s 45 of the *Competition Act*.

Agency problems

Class actions for damages are most likely to complement immunity programmes where they are initiated optimally, that is, where there is good reason to believe that a conspiracy has taken place, and are prosecuted optimally. Settlements, for example, will be reached in light of the evidence and the probability of a conviction at trial, with the parties economizing on trial costs and settling for the expected damages that would have arisen at trial. Class actions, however, are plagued by a number of problems that make this ideal outcome unrealistic.⁶⁰

Almost by definition, class actions concern claims by a large number of individual plaintiffs. They are represented by class counsel. As is well known, class counsel may have incentives that are neither well aligned with members of the class, nor with society more generally. They may launch suits not because of the merits of the claim, but rather because of the chance of a settlement. They may settle a claim on terms that are favourable to them as counsel, but are not favourable for the class members. There are mechanisms that limit agency problems, such as judicial oversight of the action, but agency problems will inevitably plague class actions.

There will be concern about agency problems with class actions in all contexts, but such potential problems are particularly acute in the case of class actions by indirect purchasers. The ultimate plaintiffs in these cases will often have very small financial stakes in the outcome. Consider, for example, the *Sun-Rype* case in Canada involving a cartelized ingredient in drinks and food: a consumer that has bought a few cans of soda has very little to gain financially from a lawsuit. Indeed, in many cases the financial stakes of the plaintiffs will be non-existent: given the cost of determining the precise damages of innumerable small purchasers of goods like containers of fruit juice, antitrust class actions often result in *cy pres* orders in which the defendant agrees to make a payment to some public or charitable purpose.

Cy pres orders may serve a useful social purpose. While they are inconsistent with compensation motivations for class actions, they are not intrinsically problematic from a deterrence perspective: as long as the defendant pays a penalty for price-fixing, there is the potential for improved deterrence. The problem, however, is that in a context where a *cy pres* order is likely to be the result of a successful action, agency problems will be particularly worrisome. The already attenuated incentives of individual plaintiffs to monitor class counsel will become effectively non-existent in such a context.

⁶⁰ See generally, Coffee (n 2). For expressions of concern about class actions in the competition context, See eg Crane (n 1); Edward Cavanagh, 'Antitrust Remedies Revisted' (2005) 84 Or L Rev 147; Christopher Leslie, 'De Facto Detrebling: The Rush to Settlement in an Antitrust Class Action Litigation' (2008) 50 Ariz L Rev 1009.

Given that class actions invite agency problems with class counsel, that indirect purchaser lawsuits will generally require class actions, and that indirect purchaser class actions are especially prone to agency problems, there is a reason to oppose standing for indirect purchasers. All things equal, direct purchasers, being fewer in number and with greater economic stakes than indirect purchasers are more likely to monitor the prosecution of the action for damages. Effective lawsuits by direct purchasers are more likely to be helpful complements to immunity programmes than ineffective lawsuits by indirect purchasers.

Conclusion

In conclusion, immunity programmes are the most important enforcement mechanism against cartels. It is essential, then, to determine the impact of class actions on this mechanism when considering whether to adopt class actions at all, as in Europe, or whether to restrict their scope by denying standing to indirect purchasers, which is a live issue before the Supreme Court of Canada. Ultimately, the question of whether class actions complement immunity programmes or undermine them is an empirical question, but there are a number of reasons to suppose that they serve a useful role; it is not a straightforward conclusion that they diminish the impact of immunity programmes. The presence of class actions and the threat of damages, along with immunity programmes, may destabilize the cartel by offering potential informants the chance to reap short run profits from defection, while paying damages but not fines, while avoiding being detected and paying fines and damages in the future in any event. Class actions have advantages over other enforcement mechanisms by providing a credible probability of detection of conspiracies by potentially better informed market actors that are insulated from political pressures, and by providing a credible commitment to mitigated but positive financial penalties for the informant, who realizes immunity from public penalties but not damages.

The analysis of standing for indirect purchasers ought to account for the effect of class actions on immunity programmes. There are competing considerations: standing for indirect purchasers may make class actions more probable given the potential reluctance of direct purchasers to sue, and avoids problems associated with foreign direct purchasers; but indirect purchaser lawsuits may be plagued by agency problems. Ultimately, the questions of whether class actions complement immunity programmes, and whether standing for indirect purchasers is a useful element of the class action regime, are empirical. There are, however, plausible reasons both for seeing class actions as supporting vital immunity programmes, and for seeing indirect purchaser suits as a welcome element of a class action regime.