



Private Enforcement of Competition Law

Prague, June 26-27, 2009

Title: The Ideal Model of Private Enforcement of Competition Law

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Abstract:

The American Antitrust Institute is writing a book that compares the various private enforcement regimes around the world. (Title: The International Handbook on Private Enforcement of Competition Law.) We begin with the regime in which there is the most experience, the US. From US experience we can identify certain functions that apparently must be fulfilled for any system of private enforcement to work well. This does not, we stress, suggest that any other system should model itself after the US. Rather, each must find its own way to implement the functions identified.

Indeed, the title of this talk is a come-on. Expanding the role of private enforcement within the 100+ jurisdictions that have competition law is clearly very important. The paper explains why there can be no ideal model, why one size cannot fit all.

On the other hand, model-building can be useful. It can force us to focus on what assumptions are necessary and sufficient to make a system workable. This paper discusses five questions about private antitrust enforcement, comparing US experience with alternative

approaches. It offers five generalizations about what is needed in a successful private enforcement regime.

1. Whether the principal goal of private enforcement is deterrence, compensation, or some combination will dramatically affect the characteristics of the system.
2. If compensation is a goal, there must be a method of aggregating claims, so that end-use consumers will not be left out. Such a process has a better chance of succeeding if the default position is for class members to opt-out rather than opt-in.
3. A maximal system will permit private remedies, including both damages and injunctive relief, for antitrust injury caused by any violation, whether or not the government has investigated and found liability.
4. If stand-alone cases are permitted, there must be some method of formalized information gathering, appropriate to the stage of the proceeding and supervised more or less directly by the court.
5. If compensation is a goal, the remedies must be sufficiently meaningful to motivate plaintiffs to come forward and in one way or another must be associated with a mechanism that will make it possible to pay plaintiffs' attorneys.

The Ideal Model for Private Enforcement of Competition Law

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Introduction: The Ideal Model is a Come-on

My assignment is to present the *ideal model* of private enforcement of competition law. This would, perhaps, be a simple task for Plato: the great philosopher would look at the underlying reality of the various manifestations of private enforcement around the world and pronounce the true essence of private enforcement-ness. But we should beware of Greeks bearing such gifts. There are only two problems. One is that there are few manifestations of private enforcement to observe. More importantly, perhaps, such a model is absolutely useless in the absence of a jurisdictional anchor. The ideal model of private enforcement-- for where?

For the United States of America, where there is a common law tradition, over one hundred years of evolved experience with antitrust as a regulator of free markets, a tradition of relatively weak respect for government and strong reliance on litigation? For China, a Communist society characterized by many state owned enterprises, just beginning to rely on markets, with no real history of antitrust? For France, with a long civil law tradition and great respect for civil service as a reference model whose norms and values mirror and perhaps are superior to those of society at large?

You get my point. As long as nations are sovereign, there is and can be no ideal model for private enforcement. One size will not fit all. Perhaps this is obvious, but it is nevertheless worth stopping to ask why it is true. After all, there are certain laws we can pretty much all agree on: unjustifiable homicide is, for example, considered a crime in virtually all jurisdictions. But even with homicide, what types of killing are justifiable? There are differences as to whether an adult who comes upon his or her spouse in bed with another person is justified in slaying either of the unfortunate couple on the spot. There may be agreement that killing of soldiers in a just war is acceptable, but what war is not seen by its proponents as essentially just? And even in the context of war there are rules and standards but these are not universally agreed upon. And there are still bitter disagreements on whether a convicted cold-blooded murderer should ever be put to death. No philosopher king can pronounce an answer to these questions that will be equally fitting in all societies. But let us return our focus to less deadly forms of combat.

With respect to private enforcement of competition law, five factors help us understand why one size cannot fit all:

1. **Differing Cultural and Moral Values** lead to different perceptions of what is just and what is proper. For example, different cultures are reflected in attitudes of greater or lesser trust or distrust toward government officials, judges, and business executives, and these attitudes help determine whether a people will be more comfortable with private litigation or government decision-making.
2. **Different Political Values** lead to different perceptions of where authority should lie. For example, in many civil law jurisdictions there is a sense that because government should play the dominant role in economic life, decisions affecting how the economy

operates should be for the most part left to government officials. In other jurisdictions, the US being one, popular sympathies seem to lie much more with private actors; the less interference by government, the better. This attitude tends to favor the availability of stand-alone litigation initiated privately and resolved through the courts rather than requiring that all private cases begin as follow-on's to a successful government prosecution.

3. **Legal Contexts** vary. The distinction between common and civil law may of course be significant in our thinking about private enforcement, but let's also take into account whether the purpose of competition law is seen as purely compensatory, as deterrent, or as both; and as another example, we must be aware when recommending collective recovery of antitrust damages whether collective actions are widely available in the legal system or would be unique for antitrust and perhaps be perceived as a dangerous precedent for the rest of the legal system.

4. **Economic Contexts** also vary. As Prof. Michal Gal has elaborated, competition policy for small market economies (the title of her excellent book) may be different than in larger market economies.¹ This could have an impact on a nation's thinking about private enforcement. E.g., a nation whose most pressing competition concerns involve monopolies and tight oligopolies may have less need to be concerned about cartel overcharges, which are frequently the cause of consumer-based efforts to recover damages, and more concerned about retaining control over remedies in the hands of government officials.

5. Finally, each nation has its own **Institutional Capabilities** at any given point in time. A regime that has only recently adopted competition policy might well decide to limit or even exclude private remedies for a period while its institutions (enforcement authorities, judges, lawyers and economists, businesses, and media) adjust to a competition regime. A nation whose judges are inefficient, inexperienced in the economics of antitrust, and

¹ Michal S. Gal, *Competition Policy for Small Market Economies*, Harvard University Press (2003).

frequently corrupt may not have the quality of legal institutions that would facilitate a private enforcement that works fairly.

These five variables (cultural and moral values, political values, legal context, economic context, and institutional capabilities) go far in explaining why there can be no ideal model of private competition law for all nations. Each nation must evolve its own model in light of its own circumstances.

With the recent election of President Obama, the US appears to be emerging from a period in which its competition policy was beholden to a single philosophy, which is known domestically as The Chicago School and internationally as The Washington Consensus. The self-assurance of adherents of this philosophy that they had possession of a singular truth was reflected in various governmental statements that vigorously criticized decisions of foreign competition authorities and projected the Chicago Canon as the one and only truth. If I may offer a pun that might not work very well in translation, the Chicago Canon misfired. Today, it is no longer possible to imagine that there is a single ideal model for competition policy.

That said, however, there nonetheless can be great value in model building, because it forces us to articulate our assumptions about what factors are necessary and sufficient in explaining a phenomenon. To the extent that we can predict how these factors will interact, so much the better for the model.

Before taking this thought further, let me mention that The American Antitrust Institute is in the midst of writing a book to be titled “The International Handbook on Private Enforcement of Competition Law”. The first section is composed of chapters written by US antitrust plaintiffs’ attorneys. The chapters move through the process of developing and prosecuting a private antitrust case in the US, from the initial conversations with a potential client (touching on laws and ethical standards relating to solicitation of clients), to how information about the case is gathered, to how the lawyers are motivated (or less politely, compensated for their efforts), to the relations between private enforcement and public enforcement, and onward to what remedies are available if the plaintiff succeeds. We start with the US experience, in detail, not because we are like the drunk who first looks for the lost keys under the lamplight, but because this is where the most experience with private antitrust currently exists, although we hope to encourage the

adoption of private enforcement much more widely in the world. We next turn to approximately 20 jurisdictions, where competition experts write chapters about their own nations' experience with private enforcement. At the end, we will make our own recommendations for what is necessary if a country is to achieve a workable private enforcement system. It will not be an ideal model. The remainder of this paper can be considered part of an early first draft of the concluding chapter of our Handbook. It will be interesting to see how much it changes as we work closely with and learn from the various authors.

Because our time is limited here, I will focus on five functions which must be addressed in a country's private enforcement regime: (1) establishing the principal goals; (2) identifying the plaintiffs who may seek a private remedy; (3) articulating the wrongs for which remedies are available; (4) obtaining the information that is necessary to win a private suit; and (5) motivating the plaintiffs and their attorneys. As to each function, I will summarize the US experience and try to evaluate its relevance to other systems of private enforcement. While this will not yield an ideal model, it should be helpful in identifying the major components of a customized model for a particular jurisdiction.

Establishing the Principal Goals

The first question a nation must face is, for what purpose or purposes do we want private enforcement? Is it to recognize that antitrust violations cause damage to private persons and it is just for the causer of damage to compensate injured persons? Is it to supplement public enforcement of the competition laws, to which sufficient resources are perhaps not being allocated, so that there will be greater deterrence of violations? Or perhaps is it for some combination of compensation and deterrence? What is the relation between compensation and deterrence?

In the US, private antitrust enforcement has had both deterrence and compensation as goals. The law affirmatively supports decentralized private enforcement as an adjunct to centralized public enforcement. In addition to specifying that private remedies are available, the law provides for treble damages to the winner and does not require the plaintiff to take the risk of paying for the defendant's legal fees if the suit fails. This architecture was clearly designed to

encourage private enforcement and it has succeeded. It is usually estimated that over 90 percent of antitrust cases in the federal courts are privately initiated. Treble damages have variously been viewed as punitive, or as part of an intentional effort to motivate plaintiffs (and their attorneys) to bring cases, or as a recognition that only a portion of illegal schemes will be uncovered by anyone, so that optimal deterrence requires a multiple of the damage caused in those cases that get prosecuted. In the US, we often speak of plaintiffs' lawyers as "private attorneys general" in recognition that they are presumed to serve a public as well as private function. It has also been argued that damages won in cases rarely if ever truly amount to treble damages because in the US there is no prejudgment interest (i.e., interest from the date of infraction to the date of liability does not get included in damages) and other elements (e.g., deadweight loss) that might be deemed damages are excluded.²

Surprisingly little empirical information has been published about private enforcement. Because the vast majority of antitrust cases that result in damages are settled and, unlike court opinions, settlements rarely get published, it is difficult to obtain information about them. Recently, the AAI undertook a study of 40 large-scale private cases which were completed (most frequently by settlement) since 1990 and in which at least \$50 million was awarded to plaintiffs. We went back to the attorneys involved in the case and gained access through them to the case files. We found that the cumulative recovery for plaintiffs in just these 40 cases was in the range of \$18-19.6 billion.³ By way of comparison, the total of criminal antitrust fines imposed by the US Department of Justice since 1990 amounted to \$4.3 billion.⁴ As the authors note, "Measured this way, private litigation provides more than four times the deterrence of the criminal fines."⁵ The authors point out that there are many methodological assumptions packed into this analysis, but even after all adjustments are made, the conclusion remains that private enforcement adds

² Robert H. Lande, "Are Antitrust "Treble" Damages Really Single Damages? ", 54 Ohio St. L.J. 115 (1993). http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134822.

³ All of this was cash. See Robert H. Lande and Joshua P. Davis, Benefits from Private Antitrust Enforcement, 42 U. S.F. Law Rev. 676, 891 (2008)

⁴ Id., 893.

⁵ Id. 894.

quite substantially to the consequences that a firm must take into account when it considers violating the antitrust laws.

None of this is to suggest that a private enforcement regime must necessarily include an explicit goal of deterrence. Of course, one cannot institutionalize a compensation goal without also having a deterrent effect. As companies contemplate anticompetitive actions that may damage others in the marketplace, they must calculate that potential costs of an illegal course go up when liability to victims becomes a realistic consideration. Even with this, policymakers should consider whether private enforcement that is merely intended to be compensatory will, together with the public enforcement regime, provide adequate deterrence within the overall system: whether the amount of public enforcement is sufficient in terms of resources (human and financial) and whether the penalties that are in fact imposed are sufficient to deter most violations.

The EU's green and white papers on damages⁶ recognize these factors. They seem to visualize private enforcement as an aspect of decentralizing competition law as well as being a mechanism for improving the legal conditions for victims to exercise their right under the Treaty to reparation of all damage suffered as a result of a breach of the EC antitrust rules. Full compensation is, therefore, the first and foremost guiding principle. At the same time, it is recognized that more effective compensation mechanisms mean that the costs of antitrust infringements would be borne by the infringers, and not by the victims and law-abiding businesses. Further, effective remedies for private parties also increase the likelihood that a greater number of illegal restrictions of competition will be detected and that the infringers will be held liable. Improving compensatory justice would therefore inherently also produce beneficial effects in terms of deterrence of future infringements and greater compliance with EC antitrust rules.

⁶ Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COMP (2005) 672 final; White Paper on Damages Actions for breach of the EC antitrust rules, Brussels 2.4.2008, COM (2008) 165 final.

Interestingly, the green paper seemed to view private and public enforcement as substitutes, i.e. it would be possible to reduce public enforcement by the same amount that private enforcement emerges, to maintain the same quantity of deterrence. A substitution effect may exist when a system permits follow-on cases but not stand-alone cases, if a public fine is reduced and replaced by a private damages award. Assuming that there is a valid way to measure the optimal level of deterrence and that substitution is not an excuse for reducing deterrence, the concept of substitution rather than complementarity nevertheless ignores that public and private enforcement provide different qualities of deterrence. For example, the consequences to reputation seem to be much greater when a government finds illegality and institutes a fine.

Generalization: Whether the principal goal of private enforcement is deterrence, compensation, or some combination will dramatically affect the characteristics of the system.

Identifying the Plaintiffs Who May Seek a Remedy

Perhaps the next question to ask is, who gets to seek an antitrust remedy? Who is permitted to bring a private antitrust case? In the US, the law provides, “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue”⁷. Two procedural tests have come to play an important role: a standing test that considers the directness or remoteness of the plaintiff’s injury from the violation; and an antitrust injury test. We will discuss antitrust injury in the context of what kinds of wrongs may be righted.

With respect to standing, many antitrust cases are initiated by persons who are directly injured by a violation, such as customers, suppliers, or competitors. But often the injured party is an end-use consumer who is said to be indirectly injured because it was an intermediary who was directly in contact with the antitrust malefactor. Consumers usually have claims that are individually too small to warrant litigation, unless they can be aggregated into a class action.

⁷ 15 USC. §15.(Section 4 of the Clayton Act). Damage claims can be brought by private parties and by governments injured in their own business or property. A state can bring a treble damage action on behalf of its citizens in pursuant to Section 4C of the Clayton Act.

And when this is permitted, a separate question arises as to how to treat the different classes of direct and indirect purchasers that may both claim to have been injured.

In the US, class actions are not only recognized by the law⁸ but occur with frequency in state as well as federal courts, and can be based on a variety of claims apart from antitrust.⁹ A major event in a private antitrust case comes when the alleged class has to be certified.¹⁰ Typically, if the court refuses to certify the class, this usually ends the case. If the class does get certified, this often sets settlement negotiations into motion, because the risk factor facing the defendant is now great, especially if the defendant believes that a jury trial will ensue.

The problem of direct and indirect purchasers is damnably complicated.¹¹ The Supreme Court initially held that antitrust defendants may not use a pass-on defense, i.e. they may not argue that the direct purchaser was not harmed because the direct purchaser passed on overcharges to indirect purchasers.¹² In view of this holding, which was intended to rely on direct purchasers as the parties best situated to initiate antitrust cases, the Supreme Court later declared that indirect purchasers do not have standing to sue for damages in federal court.¹³ In effect, the Court felt it had to choose between the compensation goal and the deterrence goal of private enforcement—and it chose the latter. This ruling has disadvantaged end-use consumers, essentially taking away their ability to recover overcharges caused by collusive businesses. As it became obvious that direct purchasers who have passed on their loss to consumers do not in fact have much incentive to sue their suppliers, the Supreme Court’s mistake even as to deterrence

⁸ Federal Rules of Civ. P. 23. Class actions

⁹ A class action is defined as “any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by one or more representative persons as a class action.” 28 USC. §1332(d)(1)(B).

¹⁰ Federal Rules of Civ. P. 23. (a) Prerequisites.

¹¹ See Albert A. Foer, “An Indirect Question: The Problems Surrounding Indirect Purchaser Litigation in the United States,” *Competition Law Insight* 3 (Sept. 25, 2007), http://www.antitrustinstitute.org/Archives/indirect_purchaser.ashx

¹² *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 US 481, 88 S.Ct. 2224 (1968).

¹³ *Illinois Brick Co. v. Illinois*, 431 US 720, 97 S.Ct. 2061 (1977). Indirect purchasers may sue for injunctive relief, but this rarely occurs because class actions are virtually always brought by attorneys seeking contingent fees, and fees are not normally associated with injunctions.

became clear. While Congress has not yet acted to fix the problem, the states have their own laws that more or less replicate the federal antitrust laws, and many states passed so-called Illinois Repealer acts that grant standing to indirect purchasers (now roughly half the citizens of the US) in antitrust actions brought under state law.¹⁴

The EC's proposal is to protect indirect purchasers in anticompetitive civil suits for whom it is difficult to establish damages by creating a rebuttable presumption that the illegal overcharge was passed on to these purchasers in full.

A nation intent on providing compensatory remedies needs to have some form of collective action whereby small individual claims can be aggregated. In the absence of this, competition law is deprived of one of its strongest potential political supports, namely, organized consumers. An additional point in favor of collective action for antitrust remedies is that many aspects of antitrust cases (such as determining market definition or competitive effects) are most efficiently processed on a one-time market-wide basis.¹⁵

One approach to collective actions that has been used outside of the US is to vest within certified qualified entities such as consumer associations, state bodies, or trade associations the right to bring suits on behalf of a class.¹⁶ These entities would be designated in advance by Member States or certified on an ad hoc basis by a Member State for a particular competition law infringement.

Whether that class should be limited to members of the organization is debated. Also debated is what happens to the damages, if they are won? Must they be distributed to class members? Can some—or all-- be retained by the organization? Can a special corporation be set

¹⁴ *California v. ARC America Corp.*, 490 US 93 (1989) held that such statutes are not preempted by federal law.

¹⁵ Einer Elhauge and Damien Geradin, *Global Antitrust Law and Economics*, 23 (Foundation Press 2007).

¹⁶ See e.g., *Competition Act 1998*, 47B (U.K.). At this moment, the U.K. Consumers' Association is the only designated body under this procedure.

up that is permitted to purchase claims of injured plaintiffs, such that it can go into court for itself rather than for the class?¹⁷

All of this raises the critical question of whether individual plaintiffs must take the initiative to opt into a class, or to opt out of the class. The US experience has been with an opt-out system. This carries the risk that a consumer who is not informed or pays no attention to the fine print disclosure that will have been made or is simply lazy, is bound by the class result and cannot later bring a separate case. This risk has seemed worth taking, as compared to the likelihood that an opt-in rule would entail large up-front expenses for the promoters of the class action. The EC's White Paper takes a contrary position, recommending opt-in classes only.

Generalization: To compensate victims of antitrust conducts effectively, there should be a method of aggregating claims, so that end-use consumers will not be left out. Such a process has a better chance of succeeding if the default position is for class members to opt-out rather than opt-in.

Identifying the Wrongs for Which Remedies Are Available

¹⁷ A company "Cartel Damages Claims SA" (CDC) was founded in 2002 under Belgian law. One of the first activities of the company was to acquire and enforce individual damage claims against the participants of the German cement cartel. CDC offers various investment possibilities to third party investors, e.g. direct or indirect private equity contributions. Besides these cartel-specific investments, CDC is reportedly developing a model for the securitization of claims in cooperation with external partners. Securitized damage claims allow for specific investment in one of CDC's different fields of activity. CDC says it is a contact point and information broker for all possible participants in private antitrust law enforcement. CDC appears to be an interesting and creative new way of approaching the aggregation problem, but whether it will succeed and be replicable is an open question at this time.

An issue that occasionally arises in the US is what the court should do with funds that are left over after all reasonable efforts have been made to distribute them to qualified class members. See AAI Working Paper 07-11, Albert A. Foer, "Enhancing Competition through the Cy Pres Remedy."

What types of behavior by businesses are actionable? In the US, virtually any antitrust violation that the Department of Justice can prosecute (civilly or criminally) can be the subject of a private complaint.¹⁸ The most frequent complaint involves collusive horizontal behavior such as collusion to raise prices. But not every claim of harm will be recognized. The Supreme Court has held that there must be *antitrust injury*, “which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.”¹⁹

In addition to antitrust injury, plaintiffs must prove the alleged anticompetitive conduct was a material and proximate cause of the injury and must prove (at least in a rough way) the amount of damages.²⁰

Several questions must be answered by a nation contemplating private remedies. First, with respect to each type of behavior that may be illegal, should a private plaintiff be enabled to seek compensation for damages? Second, should a private plaintiff be enabled to seek injunctive relief and if so, how far may a court go? For example, could a court order a structural remedy such as breaking up a dominant firm that abused its position? Third, should a plaintiff be permitted to initiate a case at any time, or only if there has already been a determination of liability in a government-brought case?

A common misconception in the US is that private cases always follow-on after public cases have unearthed evidence and established liability. The Lande-Davis study found,

¹⁸ The FTC Act does not create a private cause of action. While mergers may be attacked by private parties, this is rare, particularly if the merger in question has been reviewed by the DOJ or FTC and was not stopped.

¹⁹ *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 US 477, 489 (1977).

²⁰ Einer Elhauge and Damien Geradin, *Global Antitrust Law and Economics*, 9-17 (Foundation Press 2007). Antitrust liability in US does not extend to certain conduct like state legislation or petitioning for governmental action. Also, certain federal statutes explicitly or implicitly exempt specific industries. For example, the McCarran-Ferguson Act exempts the state law-regulated “business of insurance” from federal antitrust laws. In addition, there must be some effect on interstate commerce to be liable for antitrust violation.

surprisingly, that almost half of the total amount recovered came from the fifteen cases that did not follow federal, State, or EU government enforcement actions.²¹

Generalization: A maximal system will permit private remedies, including both damages and injunctive relief, for antitrust injury caused by any violation, whether or not the government has investigated and found liability.

Obtaining the information that is necessary to win a private suit

If a private enforcement system is limited to follow-on cases, the plaintiff has little need to obtain information about the defendant or the defendant's illegal actions, because this could be furnished (at least for the most part) by the government in its legal documents. If, on the other hand, stand-alone cases are permitted or the government does not routinely make sufficient information available, it is necessary to have a system that makes it realistically possible for the plaintiff to build a case.

In the US, the system is known as "discovery," which is authorized by the Federal Rules of Civil Procedure. But even before getting to discovery, it is necessary for a plaintiff to obtain sufficient information to fulfill the requirements of notice pleading. That is, although in the US a complaint is only required to put the defense on notice of what claims are being presented to the court, the Supreme Court's opinion in *Twombly*²² in 2007 declared that it is not enough in an antitrust case to plead that a conspiracy exists. The plaintiff must also provide enough factual matter (taken as true) to suggest that an agreement was made. This newly articulated "plausible on its face" standard is potentially quite troubling, because it is applied on a motion to dismiss, which takes place before discovery has begun. Indeed, a purpose of the raised standard is to

²¹ Id. 897. The interplay between private and public actions is complex. It is not always possible to ascertain who initiated a case. Additionally, Lande and Davis conclude: "It could well be the case that private victories or losses in one type of case (e.g., bundled rebate cases or predatory pricing cases) affect similar or related government cases in different industries, or vice versa. For this reason, it is possible that curtailing private litigation might undermine antitrust enforcement in ways that would be extremely difficult to predict." Id. 899.

²² *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955 (2007).

require a reasonable expectation that discovery will reveal evidence of illegal agreement. Our courts have plainly become concerned about the time and expense of discovery.

The other side of the story, of course, is that when one talks about a secret conspiracy, it usually takes discovery, supported by the court, to find the factual material needed to draft a specific complaint. We can't yet be sure how much specificity will be required by courts or how far beyond conspiracy allegations the reach of *Twombly* will go.²³ *Twombly* motions to dismiss not only antitrust cases but other types of cases as well are now a dime a dozen and constitute one more procedural obstacle for any plaintiff. For an antitrust case, the pre-discovery plaintiff may obtain information in a variety of voluntary ways, including from persons who believe they were hurt by the defendants, newspapers and trade press, informants and whistleblowers, and others either in the industry or who are expert observers of the industry.

If a plaintiff survives the motion to dismiss, discovery then proceeds. In the US this is generally unsupervised and may include demands for documents, written interrogatories, and oral interrogations. Disputes often arise and are taken to the court for resolution. The process of discovery in an antitrust case is usually expensive. It can involve review of millions of documents and computerized data (e.g., e-mail), costs of duplication, months of attorney and paralegal time, and administrative costs such as the court's time for resolving disputes.

If a case is a class action, the next landmark after somewhat limited discovery, is the determination by the court of whether the class will be certified. The standards are set out in the Federal Rules of Civil Procedure: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law of fact common to the class; (3) the claims or defences of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.²⁴

Once the class has been certified, additional discovery will generally be permitted, up until the next milestone, which is usually the defendant's motion for summary judgment. In this part of the process, each side tells its own story, as documented by the facts produced in

²³ A very recent Supreme Court opinion holds that the *Twombly* pleading standard applies to all civil actions. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009).

²⁴ Federal Rules of Civ. P. 23. (a).

discovery. The court looks at the material uncontested facts and determines whether the plaintiff's facts, if taken as true, sufficiently state a legally viable claim. If critical facts are contested, a trial is necessary. In most antitrust cases, if the defense motion for summary judgment is not granted, a negotiated settlement will be attempted. In the absence of a settlement, the play moves on to trial, and in the US either party has the right to demand trial by jury, although this can be waived.

If the government obtains a judgment after hearing testimony, then that judgment has preclusive effect in subsequent private lawsuits, unless the judgment constitutes a consent decree entered before testimony was obtained.²⁵ The statute of limitations for private suits is suspended pending the government suit.²⁶

This discussion highlights the importance of the policymaker's decision whether to permit stand-alone cases. I've mentioned some of the costs of discovery. The costs of not permitting stand-alone cases are also substantial: if all efforts to enforce against competition law violations must be initiated by the government, (1) the entire cost of enforcement must be borne by taxpayers, (2) society will be at risk of government being captured by a particular interest group or narrow philosophy, (3) deterrence will likely be inadequate and the optimal amount of competition may not be realized, and (4) persons damaged by violations will not be able to obtain compensation. If there are no stand-alone cases permitted, much depends on whether private parties may complain directly to the government, what the government is required to do in response, and what it in fact does.

It should be possible to have a discovery system under the immediate control of the court, which is refined for competition cases, without going to the extremes sometimes found in the US system. The EC White Paper attempts to balance the need for disclosure in antitrust cases against the risks inherent in broad, burdensome discovery. To reach this balance, claimants would be obliged to produce to the court all facts showing that they were harmed, and would be entitled to request only precise categories of evidence that are necessary and proportional to their claim..

²⁵ Einer Elhauge and Damien Geradin, *Global Antitrust Law and Economics*, 21 (Foundation Press 2007).

²⁶ *Id.*

Access to evidence would be based upon “fact-based pleading” and would be under strict judicial control. The operative word is not “discovery” but “disclosure” by a party, which could be compelled, subject to its relevance, necessity, and “proportionality.”

The recommendations leave a great deal of **discretion to national judges** for implementation. While the flexibility provided by this discretion may be desirable for achieving an appropriate balance between the need for evidence and the danger of overbroad discovery obligations, such flexibility sacrifices predictability and certainty. Thus, depending on how national judges interpret the Commission’s recommendations, European litigants may notice little change or may experience something approaching American-style pre-trial discovery.

In fact, the differences between proposed European and current American discovery do not appear to be terribly large, in that US courts have the authority to exercise strict controls and although they do not tend to get deeply involved until there are signs that the parties cannot work out problems themselves, if they sense abuse they are likely to intervene. Perhaps the main difference will be that European judges are more intimately involved from the beginning, whereas US courts effectively delegate discovery to the parties themselves until there is a demonstrated need for more detailed supervision.

Generalization: If stand-alone cases are permitted, there must be some method of formalized information gathering, appropriate to the stage of the proceeding and supervised more or less directly by the court.

Motivating Plaintiffs and Their Attorneys

Any workable private enforcement system has to provide remedies that are substantial enough to motivate plaintiffs to step forward. And there must be something in it for the attorneys.

In the US, we have a variety of incentives designed to motivate private enforcement. Best known is the requirement that treble damages (plus litigation costs) goes to the successful plaintiff. Because of the difficulty of comparing what actually happened to a but-for-world that never occurred, the law has developed that proof of damages can be more

uncertain in an antitrust case than in other cases. The trebling of damages has been explained in terms of providing encouragement to plaintiffs and of making it uneconomic for a violator (who knows there is only a small chance, perhaps one-third, of being caught) to figure, "I'll take my chances on not getting caught, and if I do get caught I can pay damages out of the illegal profits." It turns out, probably by coincidence, that most contingent fee cases are based on one-third of the damages collected. I say this is by coincidence because contingent fee attorneys for other private damage actions, such as torts, also tend to charge one-third of the fees.

So we also have contingent fees for plaintiffs' attorneys playing a special role in antitrust litigation. The plaintiff is often not in a position to pay substantial fees based on hourly rates, either because the violation has been especially damaging ("My life's business was destroyed") or because the damages are low ("My vitamins were overpriced for the past three years"). In effect, the attorney has to take the case based on a cost/benefit analysis that includes shouldering the potentially great expenses of going forward, putting in untold and hard to predict hours of labor that might otherwise be compensated in other types of cases (i.e., the opportunity costs), taking the risk that the facts will turn out different or that the legal theory may not persuade the court, and understanding that pay day, if it arrives at all, may be five or ten years in the future, within a remedy system that does not recognize prejudgment interest.

Plaintiffs' attorneys in the US function much like syndications of venture capitalists. Typically, they diversify their portfolio in the expectation that most cases they take will lose but that the winning cases will pay off in a big way. Thirty percent, if that happens to be the number agreed upon, of an antitrust remedy can make for a very satisfying payday. The portfolio, in any event, is diversified because it is common for a number of plaintiffs' firms to come together in a single case, each agreeing to pay a fraction of the expenses, take on a fraction of the work, and receive a fraction of the eventual recovery. They share the investment and the reward. Like a venture capital syndicate, before reaching a decision of whether to take on a contingent fee case, the participants spend time in examining the various claims that potential clients bring to them, learning as much as they can about the facts and the law. They have to be picky.

Three other aspects of US practice need to be mentioned. First, the losing plaintiff is not responsible for the defendant's legal expenses, whereas the losing defendant does have responsibility for the plaintiff's legal expenses. Second, liability in an antitrust case is joint and

several (i.e., plaintiffs have the option of suing one or some of conspirators), which gives bargaining power to plaintiffs. And third, there is no right of contribution (i.e., the defendant cannot seek contribution from its co-conspirators for their share of the damages caused²⁷), which creates an incentive for some jointly liable defendants to settle early for less payment of damages award.

There are complaints coming from the defense side that US antitrust laws encourage plaintiffs to make outrageous claims and then coerce the defendants into settling out of fear of having to go before a jury that they suspect will be prejudiced in favor of the little guy.²⁸ When you consider the cost/benefit analysis that must be made by plaintiffs' attorneys before taking on an antitrust case, these complaints seem odd, or at least greatly exaggerated. The plaintiffs' expenses are probably no less than the defendants', with the difference that the plaintiffs' attorneys must personally take the risk of losing whereas the defense attorneys can be assured of payment by the hour (an encouragement to stall). We have in fact seen very little evidence of so-called strike suits in antitrust.

If private enforcement is to be effective, both prospective plaintiffs and their attorneys need to have a way to finance litigation. The contingent fee based on treble the actual damages has been a successful mechanism in the US, as reflected in the fact that more than 90 percent of antitrust cases are private. The contingent fee provides a screening device and a way to finance injured parties who cannot otherwise afford to litigate.

In the White Paper, the EC avoids authorizing "reasonable attorney's fees" in private damage actions as an incentive to bring an antitrust damage action. Indeed, the current European rule that the "loser pays all costs" is a distinct disincentive for small- and medium-sized enterprises to bring damage actions. The Commission does foresee that a court could reduce the loser's cost burden to avoid paying unreasonable or excessive costs of defense.

²⁷ *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 US 630, 101 S.Ct. 2061 (1981).

²⁸ The complaints are articulated in the Antitrust Modernization Commission Report and Recommendations 241-264 (2007) but the Commission rejected reform proposals except with regard to joint and several liability and contribution. The American Antitrust Institute, *The Next Antitrust Agenda* 219-246 (2008), opposes all of the reform proposals.

While Europeans seem to bristle at the idea of contingent fees, increasing efforts are being made to achieve the same kind of result under different labels. A growing number of EU member states permit risk agreements, including “no-win-no-pay” rules (typically not tied to a percentage of the awards or only partially tied to the awards), and limited contingency fee arrangements that could promote private litigation. Estonia, Hungary and Latvia currently permit unrestricted contingency fee agreements, while Greece caps such agreements at 20 percent of the recovery, and the Czech Republic, Finland, France, Lithuania, Slovakia and Sweden permit limited forms of contingency fee agreements.²⁹ France permits fees based partially on a percentage of the award, while Sweden only permits risk agreements in the class action context. Ireland, Malta and the United Kingdom permit “no-win-no-pay” agreements not tied to a percentage of award recoveries. Other member states such as Germany, the Netherlands and Italy have rejected such fee agreements.

Generalization: If compensation is a goal, the remedies must be sufficiently meaningful to motivate plaintiffs to come forward and in one way or another must be associated with a mechanism that will make it possible to pay plaintiffs’ attorneys.

Conclusions

We have discussed five questions about private antitrust enforcement, comparing US experience with alternative approaches. We have arrived at five generalizations about what is needed in a successful private enforcement regime.

- Whether the selected goal of private enforcement is deterrence, compensation, or some combination will dramatically affect the characteristics of the system.
- If compensation is a goal, then it seems that there must be a method of aggregating claims, so that end-use consumers will not be left out. Such a process has a better chance of succeeding if the default position is for class members to opt-out rather than opt-in.

²⁹ See Europe, Comparative Report prepared by Ashurst for the Competition Directorate General, 103-104 (Aug. 31, 2004).

- A maximal system will permit private remedies, including both damages and injunctive relief, for antitrust injury caused by any violation, whether or not the government has investigated and found liability.
- If stand-alone cases are permitted, there must be some method of formalized information gathering, appropriate to the stage of the proceeding and supervised more or less directly by the court.
- If compensation is a goal, the remedies must be sufficiently meaningful to motivate plaintiffs to come forward and in one way or another must be associated with a mechanism that will make it possible to pay plaintiffs' attorneys.