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An Empirical Perspective on Legal Process: Should Europe Introduce Private Antitrust Enforcement?

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I. Introduction

Empirical law and economics is a rapidly growing field worldwide, as evidenced by the increasing number of published articles with an empirical bent, by new journals such as the Journal of Empirical Legal Studies,[1] and by a growing number of conferences dedicated to empirical and institutional issues. One prominent subfield of law and economics that has witnessed extensive empirical work is the law and economics of legal process. In a forthcoming paper in the Handbook of Law and Economics, Dan Kessler and I survey that field in depth, along with the economics of the subjects of torts, property, and contracts.[2]

Quality empirical work necessitates a good knowledge of the relevant institutions, economic theory, and of course empirical tools. In this essay, I offer an application of those empirical methods that should be of interest to European scholars. Specifically, I comment on the question of whether there should be private antitrust enforcement in the European Union. The question has been

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1 Published by Blackwell.

2 KESSLER and RUBINFELD (forthcoming).

raised by Commissioner Neelie Kroes of the E.U. Competition Directorate. An in-depth analysis, which will presumably be available by the time this essay appears, is contained in the Competition Directorate's green paper on private enforcement.[3]

The goal of this essay is a narrow one; I hope to ask constructive questions and to offer useful perspectives. While I do see significant advantages associate with an appropriately designed private enforcement system, I do not attempt to fully evaluate the costs and benefits in this exploratory essay.

II. Issues Raised by Private Enforcement

Putting into place a program of private enforcement raises a host of policy issues, whose answers depend crucially on our empirical knowledge of the legal process. Among the issues that come immediately to mind are the following:

1. Who should have standing to sue? Should standing be given only to direct purchasers, or should indirect purchasers also be given standing?
2. What are the appropriate forums in which suit can be brought, the EU, member states, or both?
3. How extensive should the discovery process be? In the U.S. discovery in private cases can often be a long, complex process. Should the EU put into effect a more limited discovery process?
4. Should the EU allow class actions? Class actions are seen by the plaintiffs' bar as the only means by which large number of individual purchasers can obtain relief, whereas the defense bar sees it as unusually costly, leading to overdeterrence.
5. Should the EU follow the U.S. treble damages model, or should it moderate its penalties, by, for example, applying double damages for Article 81 violations and single damages otherwise?
6. What are the appropriate burdens of proof and persuasion that should be placed on the parties?

[3] See http://europa.eu.int/comm/competition/antitrust/others/private_enforcement/index_en.html, accessed October, 2005.

III. The Benefits and Costs of Private Enforcement

The claimed benefits of private enforcement are numerous. Private enforcement can generate increased deterrence that cannot readily be achieved by public enforcement whose scope and remedy authority may be limited. In the process, a well-designed private enforcement system can create incentives for efficient discovery. More generally, put in place in the context of a loser-pays system, private enforcement has the potential to generate substantial benefits by providing the right incentives to litigants. Finally, a private enforcement system provides a direct means by which victims can be compensated.

Of course, there is no free lunch. Along with these potentially substantial benefits comes the cost of litigation. Litigation costs include not only direct out-of-pocket costs, but also the opportunity costs associated with the inefficient use of legal resources, and the potential for over-deterrence that arise from an inefficiently designed enforcement system.

IV. The Theoretical Framework

The appropriate starting point for an empirical analysis of private antitrust enforcement is the theoretical framework. The relevant theoretical structure is provided in a review essay co-authored with my colleague Robert Cooter.[4]

There are seven chronological stages associated with the litigation process, beginning with an antitrust injury or harm, and ending when the decision is made whether to appeal verdict by a trier of fact. The seven stages are as follows:

1. A firm chooses whether to engage in a practice that causes antitrust injury or harm;
2. The victim decides whether to file suit or not (there may or may not be injury);
3. Given that a suit is filed, the parties undergo discovery, choosing in effect how extensive their pre-trial efforts should be;
4. The parties engage in settlement bargaining
5. If the case does not settle, and is not dropped, the parties expend effort during the trial;
6. The trier of fact determines the trial outcome; and

[4] COOTER and RUBINFELD (1989).

7. A decision (or series of decisions) is made as to whether to appeal the verdict.

The key insight of economics, which comes from game theory, is that the behavior of the parties and their response to litigation incentives can best be analyzed by evaluating the strategic options of the parties in reverse chronological order. A complete analysis, using an extensive form game tree,[5] would begin with the appellate decision, noting that that decision depends on the options that the parties have based on the trial verdict and all that led up to it. Similarly, the court's verdict will depend not only on the effort at trial, but also on the effort of the parties at trial and during discovery. Likewise, the decision to settle will depend on the extent of discovery and indeed whether or not there was an antitrust violation. And so on.

It should be immediately clear that a full and complete empirical analysis of a private enforcement system would be an extremely difficult undertaking. Fortunately, however, we do know quite a bit about the subject. Our knowledge comes in part from a project on private enforcement in the U.S. sponsored over a decade ago by Georgetown Law Center, and in part from a long and vibrant literature on empirical methods and the litigation process. In the section that follows, I comment briefly on our knowledge about private enforcement generally, and on a set of relevant issues that have been studied from an empirical perspective. The references included are highly selective; they are not meant in any way to be comprehensive.

V. What do we know about private enforcement?

To evaluate private enforcement, it is useful to begin with a base case in which the system contemplates single damages, no class actions, limited discovery, and standing to direct purchasers only.

We know that the imposition of such a system, with no change in the existing public enforcement system, will increase deterrence, with a substantial number of private cases "following on" investigations undertaken by the enforcement authorities. This will lead to increased litigation costs, and (importantly) increases in the costs of avoiding litigation. But, the details of how such a system will play out are quite complex, because of the incentives created by the strategic incentives that flow through the reverse chronology of litigation.[6]

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[5] For a basic presentation of this framework, see PINDYCK and RUBINFELD (2005).
[6] For two useful studies, see SALOP and WHITE (1996) and BAKER and RUBINFELD (1999).

To get a sense of some of the important issues that arise as one develops a private enforcement system, and to highlight some of the relevant empirical literature, I offer a list of even policy issues that should be evaluated.

Choice of Forum

Will judges be favorably inclined to "resident plaintiffs?" If the answer is yes, we can expect plaintiffs to aggressively engage in forum shopping. Perhaps surprisingly, the answer appears to be a tentative no (THEIL (2000)). Indeed, one study suggests that forum shopping tends to benefit defendants (CLERMONT and EISENBERG (1995)).

Will the competition for forums in which to bring private litigation create a race to the bottom in which the most frequently sought after forums are those that support large verdicts, or will there be a race to the top in which forums that specialize in antitrust litigation tend to attract the most significant cases? Two interesting papers that lay out the issues in the context of the battle over corporate charters are BEBCHUK et al. (2002) and ROMANO (2002).

The question of standing for indirect purchasers also has relevance here. Allowing indirect purchasers the right to see will generate additional deterrence, but it can create further incentives to shift forums, and it could lead to duplicate recovery and over-deterrence.

Discovery

Are the benefits of allowing extensive discovery worth the costs? There is evidence that more extensive discovery will increase the probability of settlement and reduce trial costs (RUBINFELD (1998)). Moreover, discovery under control of the court can encourage the more efficient provision of information to resolve disputes (MCKENNA and WIGGINS (1998)).

However, a system of discovery in which each party bears only its only discovery costs can lead to parties to engage in strategic behavior in which seeks to raise its rival's costs (COOTER and RUBINFELD (1994)).[7]

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[7] This effect can be exacerbated if plaintiffs are able to operate under a contingent fee payments system (as has been utilized in England, the U.S., and elsewhere); see SHEPHERD (1999). For a proposal which would align the interests of lawyers with their clients, see POLINSKY and RUBINFELD (2003).

Settlement

It is well known that cases are more likely to go to trial, the greater the relative optimism of the plaintiff (see, for example, COOTER and RUBINFELD (1989)). What will happen if damages are doubled in private litigation? Theory tells us that the effects are ambiguous. On one hand, the plaintiff's relative optimism will increase, which would tend to lead to more trials. On the other hand, the increased cost of litigation and the greater risk will tend to discourage trials.

Which effect is more important empirically? My view, based on work with co-authors Jeffrey Perloff and Paul Ruud, is that more cases will be filed, but the percentage of cases tried will increase; see PERLOFF and RUBINFELD (1987) and PERLOFF, RUBINFELD, and RUUD (1996).

Trial

How will plaintiffs fare at trial? One argument is that the selection of cases will leave plaintiffs with a 50 percent chance of winning (PRIEST and KLEIN (1984)). However, the basic Priest and Klein model does not account for asymmetric stakes; this is important in antitrust where defendants are frequently repeat players. In antitrust, I have found in a previous study that defendants win 70 percent of their antitrust cases (PERLOFF and RUBINFELD (1987)).

The legal burdens can affect the effort that the parties make at trial, which in turn will influence trial outcomes. In general, increasing the burden of persuasion increases litigation effort and diminishes the costs of Type 1 (wrongfully finding liable) and Type 2 errors (failing to find a party liable when it violated the law); see RUBINFELD and SAPPINGTON (1987).

Appeal

The selection process suggests that if the rewards to the parties are reasonably symmetric, the probability of success on appeal would be 50 percent. However, there are frequently asymmetries, so it is not surprising, according to CLERMONT and EISENBERG (2002) that defendants are successful in overturning verdicts 31 percent of the time, while plaintiffs are successful only 13 percent of the time.

Fee Shifting

Many policy issues generate incentives that transcend many of the stages of litigation. For example, moving from a litigation system in which each party pays its own costs to a system in which the loser pays is known to increase the fraction of cases settled (and dropped), but to increase the fraction of cases of cases that plaintiffs win (HUGHES and SNYDER (1995)).

VI. Conclusion

In this brief essay, I have suggested how our empirical knowledge of the law and economics of legal process informs the policy issue currently facing the European Union; should they put into place a system of private enforcement. The range of actual policy issues will almost certainly be much broader than those suggested here, and the answers will undoubtedly bring some surprises. That is what makes the study of empirical methods and legal institutions so exciting.

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