Suing the suits –
Derivative Shareholder Actions To Bring Home the Message of Antitrust

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Condensed Abstract

This article starts by analysing the potential benefits of derivative actions brought by shareholders against the management of firms which have infringed the antitrust laws (derivative shareholder suits). It goes on to discuss the limitations of these actions as they are currently implemented in selected jurisdictions, such as Delaware, the United Kingdom and Germany. The article then addresses possibilities for reforming the instrument of derivative actions to overcome these limitations. It concludes that – with the necessary adaptations – these actions could make a valuable contribution to the fight against antitrust law violations, *inter alia*, by providing incentives to install effective antitrust compliance schemes.

Extended Abstract

The aim of the ongoing review of antitrust remedies in Europe is to make antitrust enforcement more effective. The traditional approach in Europe has been to punish undertakings with increasingly steep administrative fines. Additionally, the European Commission has in recent years vigorously advocated a greater role for private enforcement to complement public enforcement.

While both administrative fines and the exposure to claims for damages may increase the deterrent effect on the undertaking, both sanctions share a common weakness: Even “optimal” fines and damages provide the right incentives only for the undertaking *as a whole*; they do not necessarily provide the right incentives for the actual decision-makers *within* the firm. Sanctioning the undertaking as such makes sense if one either perceives the undertaking as a monolithic black box, or if one assumes that the management’s incentives are perfectly aligned with those of the undertaking. This approach

neglects the less than perfect alignment of interests of management and shareholders; it disregards the separation of ownership and control.

One way to deter the actual decision-makers within the firm from infringing antitrust law is the introduction of criminal sanctions. While legislation providing for criminal sanctions has been promulgated in several Member States of the European Union, criminal antitrust enforcement does not yet play a large role in Europe, and is riddled with problems of its own.

The purpose of this article is to pursue a different avenue of bringing home the message of antitrust to the management of a firm: by means of derivative actions. If the imposition of fines and the exposure to damages claims are caused by a culpable act or omission of the management which contributed to the antitrust infringement, the firm may have a claim for damages or indemnification against the management. Of course, the management of the firm will not usually have an incentive to pursue the firm's claim vigorously. In contrast, the – or some of the – shareholders will have such an incentive. Derivative actions are the medium through which such claims of the firm against the management may be enforced.

Effective derivative actions have the potential to overcome certain deficiencies of other antitrust remedies. First, they provide incentives for management to establish effective safeguards against "maverick" antitrust infringements by subordinate employees, in particular by installing antitrust compliance schemes. Secondly, they may also alleviate – though they will not eliminate – one of the limitations of administrative and private enforcement: the problem of "judgment proofness" which arises when optimal fines and damages exceed the financial capacity of the infringing firm.

Additionally, derivative actions may provide an incentive for the firms and the management to reveal private information on the expected profitability of antitrust infringements, a profitability which may persist despite the current level of antitrust sanctions. One of the defences for the management in a derivative action would presumably be that the decision to infringe the antitrust laws was the *ex ante* profit-maximising decision for the firm, because the expected discounted cost of future sanctions against the firm were outweighed by the benefits accruing from the antitrust law infringement. Managers faced with a derivative action have an incentive to reveal the – currently private – information on the costs and benefits of infringing the antitrust laws. Once the informational basis on which firms calculate the profitability of antitrust infringements is revealed, it can be used to adjust the calculation of optimal fines and damages.

While these beneficial effects of derivative actions seem to make this procedural route an attractive complement to other antitrust remedies, derivative actions bring to the fore a number of objections.

The first is a variation of the objections against private enforcement in general: Private claimants pursue their self-interest, which can be, but is not necessarily aligned with the public interest in the enforcement of antitrust law. In particular, an increased role for derivative actions risks creating a potential for "*greenmail*" and other unmeritorious derivative actions which interfere unreasonably with the proper management of the firm.

This potential for unreasonable interference with the affairs of the management has led some jurisdictions to curtail the possibilities for derivative actions. These legislative limits placed on derivative actions make them a less potent tool in the fight against antitrust infringements than they potentially could be.

Another factor which might discount the usefulness of derivative actions in antitrust enforcement is the influence of the availability of insurance for directors' liability.

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Delaware, the United Kingdom and Germany. The article then addresses possibilities for reforming the instrument of derivative actions to overcome these limitations. It concludes that – with the necessary adaptations – derivative actions could make a valuable contribution to the fight against antitrust law violations, *inter alia*, by providing incentives to install effective antitrust compliance schemes.