



Competition law enforcement and incentives for revelation of private information

Michael Harker
and
Morten Hviid

ESRC Centre for Competition Policy
and
Norwich School of Law
University of East Anglia

Why is this interesting?

Broad question: what are the benefits from private enforcement of competition law, and how can we realise these?

Narrow focus: private litigation can trigger information revelation

- ❖ Information about current or past violations is
 - ❖ Important for detection - asymmetric information
 - ❖ Hard to obtain - incentives to keep quiet

We will:

- ❖ Focus on deterrence
- ❖ Focus on information revelation about potential violation and how private litigation can enhance this

We will not:

- ❖ Focus on compensation
- ❖ Focus on hard-core cartels

Potential plaintiff obtains information about possible violation of competition law in which he has been harmed. He can:

- ❖ Do nothing
- ❖ Sue for damages directly
- ❖ Bring the information to the attention of the Competition Authority [motivated by the chance to pursue a case later once the outcome is known?]

Option two and three have the capability of revealing information

De novo cases

- ❖ Case initiated and concluded by a private plaintiff
 - ❖ Such cases all reveal information by the plaintiff putting its money where its mouth is [especially if loser pays]

Follow-on cases

- ❖ Decision by the Competition Authority before private plaintiff initiates case [likely EU model]
 - ❖ A follow-on case does not imply that private information was revealed [Litigant provider of information?]
 - ❖ May offer a “free go” - and what if they get it wrong?
 - ❖ Information from interested parties - scrutiny?

Better at:

- ❖ Revealing information
- ❖ Information more likely to be unbiased

Other benefits

- ❖ Increases funds for bringing new cases

Any problems?

- ❖ Suffers from many of the possible strategic abuses

What is needed to support de novo cases?

Simple model in paper.

Main findings:

- ❖ Overriding issue is that the de novo case concludes much more quickly than the total time of a follow-on case.
- ❖ If that can be achieved, the de novo case has to be as much like the follow-on case as possible in terms of the probability of success, the costs of the case and the size of the damages.

The results indicate the importance of procedures if we want to encourage de novo cases

In particular

- ❖ de novo cases should be heard by a specialist court

Specialist courts are also more likely to be able to deal with any strategic misuse of competition law

- ❖ This is more important in de novo cases

Example from the UK:

Those harmed through an infringement of competition law can seek recompense in the High Court (Chancery Division) or in the Competition Appeal Tribunal (CAT)

- ❖ The CAT is a specialist court
- ❖ BUT claims may only be brought before the CAT when
 - ❖ the relevant competition authority has made a decision establishing that a relevant prohibitions has been infringed
 - ❖ any appeal from such decision has been finally determined

Thus the CAT can only be used in follow-on cases, while de novo cases must be brought through the High Court.

So finally ...

If we want to promote information revelation we need specialist competition courts

However, this does not necessarily mean that private enforcement should be encouraged