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# Towards a Constructive Public-Private Partnership to Enforce Competition Law.

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Towards a Constructive Public-Private Partnership  
to Enforce Competition Law

Spencer Weber Waller\*

Virtually every jurisdiction currently is considering the most appropriate role for private rights of actions for damages for competition violations. The United States is in the midst of reexamining these issues in the context of the Antitrust Modernization Commission created by Congress.<sup>1</sup> The European Commission is nearing the conclusion of its lengthy review of the proper role of private damage actions in member state courts.<sup>2</sup> Other jurisdictions both new and old to competition enforcement are wrestling with whether and how to implement effective private enforcement.<sup>3</sup>

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<sup>1</sup> The Antitrust Modernization Commission was created pursuant to the Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, §§ 11,051-11060, 116 Stat. 1856. The Commission's web site can be found at <http://www.amc.gov/index.html>. See generally Ronan P. Harty, *The Antitrust Modernization Commission: An Introduction*, The Antitrust Source, Nov. 2004, available at <http://www.abanet.org/antitrust/source/11-04/Nov04-Harty1129.pdf>.

<sup>2</sup> Commission of the European Communities, Brussels, 19.12.2005, COM(205) 673 final, Green Paper, Damage Actions for Breach of the EC antitrust rules, available at [http://europa.eu.int/comm/competition/antitrust/others/actions\\_for\\_damages/gp\\_en.pdf](http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/gp_en.pdf); Brussels, 19.12.2005 SEC(2005) 1732, Commission Staff Working Paper, Annex to the Green Paper, Damage Actions for Breach of the EC antitrust rules, available at [http://europa.eu.int/comm/competition/antitrust/others/actions\\_for\\_damages/sp\\_en.pdf](http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/sp_en.pdf). See also Comments of the Institute for Consumer Antitrust Studies on EU Green Paper on Private Rights of Actions, available at [http://www.luc.edu/law/academics/special/center/antitrust/green\\_paper\\_comments.pdf](http://www.luc.edu/law/academics/special/center/antitrust/green_paper_comments.pdf).

<sup>3</sup> For example, Turkish competition law provides for private damage actions with the possibility of up to treble damages but few if any such actions have been brought. Part V, Law

My thesis is that some private rights of actions are a necessary compliment to the public enforcement of competition law, but that the precise shape and extent of those rights is heavily dependent on the unique law, history, judiciary, and legal culture of each jurisdiction. It is most ironic that the United States is seeking to restrict those rights of actions precisely at the same time that most of the rest of the world is seeking to expand private rights of actions to supplement existing public enforcement regimes. Neither public nor private enforcement should “monopolize” competition law, but must work together to deter, detect, punish, and compensate victims of unlawful anticompetitive conduct. Only then is a consumer friendly competitive economy possible.

I. The Traditional Public-Private Partnership in the United States

II. There has been a mix of private and public remedies in United States antitrust law since the passage of the Sherman Act in 1890.<sup>4</sup> The Antitrust Division of the United States Department of Justice has the exclusive power to bring criminal antitrust cases. Criminal cases normally are limited to per se illegal hard core cartel cases violating Section 1 of the Sherman Act such as price fixing, bid rigging, and market division.<sup>5</sup>

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on the Protection of Competition, available at <http://www.rekabet.gov.tr/ebaskanmesaj.html> (Legislation).

<sup>4</sup> The Sherman Act was the first federal (national) antitrust in the United States. There were earlier state antitrust laws whose ineffectiveness in dealing with national corporations led in part to the passage of the Sherman Act. See James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. PA. L. REV. 495 (1987).

<sup>5</sup> While it is theoretically possible to bring a criminal monopolization case under Section 2 of the Sherman Act, it has not been done since the 1960s. *United States v. Union Camp Corp.*, Crim. Action No. 4558 (E. D. Va. 1967).

Penalties for criminal violations can be quite severe. Individuals can be imprisoned for up to ten years and corporations can be fined the greater of 1) \$100 million or 2) double the gain or loss caused by the offense. In the international vitamins cartel litigation, Hoffman-LaRoche pled guilty and paid an agreed fine of \$500 million. More recent, Samsung paid a fine of \$300 million in a criminal price fixing case involving computer chips.

The Justice Department also can bring civil action seeking injunctions. The Justice Department uses civil antitrust enforcement to challenge anticompetitive agreements that it believes are illegal under the rule of reason, conduct that violates the monopolization provisions of the Sherman Act, and to bar mergers and acquisitions which may harm competition in violation of Section 7 of the Clayton Act.

There is a second federal agency which enforces the United States antitrust laws, namely the Federal Trade Commission (FTC). Created in 1914, the FTC enforces both consumer protection and antitrust law through Section 5 of the FTC Act which prohibits unfair methods of competition and unfair and deceptive acts or practices.<sup>6</sup> The FTC has no criminal jurisdiction and is limited to bringing administrative proceedings for cease and desist orders or to seeking injunctions in federal court.

Both the Antitrust Division and the FTC lack the power to bring civil actions for fines. There is no American analogue to the EU remedy of a civil action seeking a fine of up to 10% of the annual turnover of the offending enterprise. Instead, a combination of criminal penalties and individual liability are relied upon to deter hard core anticompetitive behavior. The only time

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<sup>6</sup> 15 U.S.C. § 45. For more on the operation of the FTC and the relationship between antitrust and consumer protection law see Spencer Weber Waller, *In Search of Economic Justice: Considering Competition and Consumer Protection Law*, 36 LOY. CHI. L.J. 631 (2004).

that the Antitrust Division can seek damages is on behalf of the federal government when the government itself is the buyer of goods or services and has overpaid by reason of an antitrust violation. The FTC also has the highly contested power of “disgorgement” in which it may seek to compel a firm or individual to return the unlawful gains resulting from an antitrust violation. However, this power which is more frequently used in consumer protection cases, has been used in antitrust only in a handful of consent decrees (negotiated settlements). It has been upheld only in one reported case<sup>7</sup> and its legality has never been ruled on by the United States Supreme Court.

Litigation by the federal government represents only a small fraction of the antitrust litigation in the United States federal courts. The federal antitrust laws allow anyone injured in their business or property by reason of an antitrust violation to sue for three times their actual damages (treble damages), plus attorneys fees and costs.<sup>8</sup> Private antitrust litigation seeking treble damages and/or injunctive relief represents well over 90% of the antitrust litigation in the United States.<sup>9</sup>

Private antitrust litigation falls into two main categories. The first is litigation brought by competitors of the defendants alleging that they have been excluded or injured by reason of anticompetitive actions by the defendant or defendants. This type of litigation is often suspect because of the concern that the plaintiffs are seeking to use the antitrust laws to reduce

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<sup>7</sup> Federal Trade Commission v. Mylan Lab., Inc., 62 F.Supp.2d 25 (D.D.C. 1999).

<sup>8</sup> 15 U.S.C. §§ 4, 16. Unlike the case in civil litigation outside the United States, a losing plaintiff is not required to pay the defendant’s attorneys fees and costs in most situations.

<sup>9</sup> LAWRENCE A. SULLIVAN & WARREN GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 954 (2d ed. 2006).

competition, and protect themselves, rather than increase competition in their market.<sup>10</sup>

The other main category of private antitrust in federal court consist of the cases brought by direct purchasers of products or services where producers of these items have violated the antitrust laws.<sup>11</sup> Typically, these law suits involving price fixing and other per se violations of the antitrust laws and often are brought as class actions (cases brought on behalf of all persons similarly affected by the illegal conduct). Only direct purchasers can bring antitrust claims in federal court,<sup>12</sup> although a majority of states also permit suits by indirect purchasers in state court under state antitrust law.<sup>13</sup>

The final type of “private” antitrust action in federal court is brought by the attorney generals of the 50 states (plus the District of Columbia, the Commonwealth of Puerto Rico, and the handful of territories such as Guam and the Virgin Islands). The state attorneys general enforce their own state antitrust laws in their own state courts, but also appear as plaintiffs in federal court. They may bring cases in federal court when the state government or its various agencies are the victims of antitrust violations and overpay when purchasing goods or services with taxpayer dollars. They may also appear on behalf of their natural citizens (not business undertakings) when their citizens were the direct victims of antitrust violations. Under certain

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<sup>10</sup> William H. Page & John Lopatka, *Antitrust Injury, the Competitor Plaintiff, and Merger Policy*, 82 IOWA L. REV. 127 (1996); Thomas E. Kauper and E.A. Snyder, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551 (1991).

<sup>11</sup> 15 U.S.C. § 4. There are important rules of standing that also limit who can bring such cases. *Associated General Contractors of Cal. v. California State Council of Carpenters*, 459 U.S. 519 (1983); *Brunswick v. Pueblo Bowl-o-Mat, inc.*, 429 U.S. 477 (1977).

<sup>12</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

<sup>13</sup> See generally ABA SECTION OF ANTITRUST LAW, STATE ANTITRUST PRACTICE AND STATUTES (2d ed. 1999).

circumstance they may be able to join claims under state antitrust law to valid federal claims and have those local claims heard in federal court as well.

Some of the larger states have between 5-20 antitrust lawyers, although some of the smaller states may have only a single attorney enforcing competition law. In a handful of states, one lawyer has responsibility for both antitrust and consumer protection cases. However, most successful cases where the states are plaintiffs are investigated and brought as multi-state coalitions through the National Association of Attorneys General.<sup>14</sup> Such multi-state coalitions can consist of twenty or more attorneys giving the states combined resources in a particular case equal or exceeding either the federal agencies or the defendant's legal teams.

Many of the private treble damage cases follow government cases or investigations and seek to take advantage of guilty pleas or convictions in an earlier criminal case. When a defendant is convicted or found liable in a government antitrust case, it is presumed liable for any subsequent civil cases brought by private plaintiffs.<sup>15</sup> A private plaintiff under these circumstances need do little more than prove damages in order to prevail in this scenario. For example, the guilty pleas and convictions in the international vitamins case spawned dozens of private treble damage individual and class action law suits against the same defendants.<sup>16</sup>

Private enforcement also plays an important role when the federal government cannot or will not act for whatever reason. There are numerous important private cases where the government simply believed that it would not be successful or that the case otherwise was not

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<sup>14</sup> See <http://www.naag.org/issues/issue-antitrust.php>.

<sup>15</sup> 15 U.S.C. § 5.

<sup>16</sup> See *e.g.*, *F. Hoffman-LaRoche Ltd. V. Empagran, S.A.*, 542 U.S. 155 (2004).

worth bringing. These include cases challenging a boycott of the US insurance market organized by British firms,<sup>17</sup> a separate price fixing conspiracy in the food additive industry from the group of cases brought by the government,<sup>18</sup> and one of the largest antitrust cases of all time challenging the structure and operation of the United States credit card market.<sup>19</sup>

Private rights of action also provide a safety net ensuring the viability of theories endorsed by the legislature and the courts that the government disfavors at a particular time. Currently, the federal government rarely, if ever, enforces the prohibitions against resale price maintenance, tying, price discrimination, and brings few if any monopolization or attempted monopolization cases. The enforcement of these aspects of the antitrust laws thus falls almost entirely to private parties and the law would be in effect repealed by inactivity if left to the agencies. For example, during the 1980s, the agencies brought so few merger cases that enforcement of the law was kept alive by private parties and the state attorneys generals bringing these cases in the federal courts.

#### I. The Attack on Private Antitrust Enforcement

Private antitrust enforcement and class actions are under attack today in the United States. The climate for antitrust enforcement is more limited than any time since the rise of modern antitrust in the late 1930s during the administration of President Franklin Delano Roosevelt. The

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<sup>17</sup> *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

<sup>18</sup> *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651 (7<sup>th</sup> Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003)(subsequently settled for \$525 million).

<sup>19</sup> *In re Visa Check/Master Card Antitrust Litig.*, 280 F.3d 124 (2d Cir. 2001), *cert. denied*, 536 U.S. 917 (2002).



bi-partisan political consensus in favor of the core mission of antitrust vanished sometime in the 1980s during the administration of President Ronald Reagan. More recently, the so-called “Chicago school of antitrust” has sought to redefine antitrust as being principally, or even solely, concerned with hard-core price fixing and only the most blatantly anticompetitive horizontal mergers. The federal enforcement agencies have been led for most of the past twenty years by devotees of this approach to antitrust and many conservative antitrust scholars have even declared victory over all contending schools of thought about the purpose and meaning of antitrust.<sup>20</sup>

The best example of the current atmosphere may be the Supreme Court’s 2004 opinion in *Verizon Comm., Inc. v. Law Offices of Curtis Trinko, LLP*.<sup>21</sup> In that case, a unanimous Supreme Court dismissed a private antitrust suit challenging a dominant local telephone company’s attempts to interfere with a new entrant’s access to customers. In dismissing the complaint, the Court stated both that the pursuit of monopoly power was an important part of the free enterprise system and that there was little that courts could do to increase competition through the antitrust laws. Hardly, inspiring stuff for those who believe in the promise of competition law.

Although *Trinko* sets the general atmosphere towards private enforcement of US antitrust

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<sup>20</sup> HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* (2005); RICHARD POSNER, *ANTITRUST LAW* (2d ed. 2001); Fred S. McChesney, *Talking ‘Bout My Antitrust Generation: Competition for and in the Field of Competition Law*, 52 EMORY L. REV. 1401 (2003); Timothy J. Muris, *How History Informs Practice – Understanding the Development of Modern U.S. Competition Policy*, American Bar Association, Antitrust Section Fall Forum, Washington, D.C., November 19, 2003, available at <http://www.ftc.gov/speeches/muris/murisfallaba.pdf>.

<sup>21</sup> 540 U.S. 398 (2004). For a critique of *Trinko* see, Spencer Weber Waller, *Microsoft and Trinko: A Tale of Two Courts*, available at [http://www.luc.edu/law/academics/special/center/antitrust/waller\\_utah\\_comment.pdf](http://www.luc.edu/law/academics/special/center/antitrust/waller_utah_comment.pdf).

law, a number of other specific developments in the law have combined to restrict private rights of action. First, the substantive law of antitrust has changed over the past thirty years with virtually no per se rules prohibiting anticompetitive conduct outside the area of hard-core price fixing and related conduct.<sup>22</sup> Second, the courts have aggressively applied concepts of standing and antitrust injury to limit who can challenge even admittedly illegal conduct.<sup>23</sup> Third, the Justice Department, and to a lesser extent the Federal Trade Commission, have participated in private litigation seeking to restrict either the scope of the antitrust laws themselves and/or the availability of private antitrust litigation.<sup>24</sup> Finally, there is the looming presence of the Antitrust Modernization Commission which is considering a number of proposals which would further limit private antitrust enforcement.<sup>25</sup>

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<sup>22</sup> For example, this year the Supreme Court has held that neither the pricing decision of a joint venture nor the tying of a patented item to a non-patented item are per se unlawful. *Texaco v. Dagher*, \_\_\_ U.S. \_\_\_ (2006), available at <http://a257.g.akamaitech.net/7/257/2422/28Feb20061050/www.supremecourtus.gov/opinions/05pdf/04-805.pdf>; *Illinois Tool Works v. Independent Ink, Inc.*, \_\_\_ U.S. \_\_\_ (2006), available at <http://a257.g.akamaitech.net/7/257/2422/01Mar20061050/www.supremecourtus.gov/opinions/05pdf/04-1329.pdf>.

<sup>23</sup> Joseph P. Bauer, *The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing*, 62 *University of Pittsburgh Law Review* 437 (2001).

<sup>24</sup> See e.g., Brief for the United States as Amicus Curiae Supporting Petitioners, *Texaco, Inc. v. Dagher*, United States Supreme Court, available at <http://www.usdoj.gov/atr/cases/f211000/211046.htm>; Brief for the United States as Amicus Curiae Supporting Petitioners, *Illinois Tool Works Inc. v. Independent Ink, Inc.*, United States Supreme Court, available at <http://www.usdoj.gov/atr/cases/f210500/210544.htm>; Brief for the United States as Amicus Curiae Supporting Petitioners, *Hoffmann-La Roche Ltd., v. Empagran, S.A.*, United States; *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 n.7 (1984).

<sup>25</sup> See [http://www.amc.gov/commission\\_hearings/civil\\_remedies\\_issues.htm](http://www.amc.gov/commission_hearings/civil_remedies_issues.htm) (hearings on civil antitrust enforcement issues).

## I. General “Procedural” Reforms That Would Affect Private Antitrust Enforcement

There are also various procedural changes and proposals that have the potential to further restrict private antitrust enforcement by narrowing the availability of class action litigation which is a mainstay of private enforcement against per se unlawful price fixing claims under Section 1 of the Sherman Act.

Class actions are a form of mass aggregate litigation where one or more “named” plaintiffs represent the interests of all persons similarly situated. Class actions are designed to be used for cases involving relatively small claims by very large groups of affected persons or enterprises, none of whom would have the practical ability to bring their small individual claims on their own. If the class action is successful, all members of the plaintiff class who do not opt out win. If the action is unsuccessful, the members of the class also are bound by this result, unless they affirmatively opt out of the class action and litigate on their own. Similarly, if the class action is settled, members of the class receive their pro rata share of the settlement unless they opt out to pursue their claims on their own.<sup>26</sup> Unfortunately, the debate in the United States over the utility of class actions has barely moved from the early 1970s when proponents of class actions called them “one of the most socially useful remedies in history” and opponents called them “legalized blackmail.”<sup>27</sup>

The effort to rein in class actions has taken a number of different forms. The United States Congress has passed two separate bills to limit class actions in the area of securities

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<sup>26</sup> See Rule 23, Federal Rule of Civil Procedure.

<sup>27</sup> Compare Abraham Pomerantz, *New Developments in Class Actions – Has Their Death Knell Been Sounded?*, 25 BUS. LAW. 1259 (1970) and Milton Handler, *Anti-Trust Suits*, 71 COLUM. L. REV. 1, 9 (1971).

fraud.<sup>28</sup> At the same time, state Supreme Courts, such as Illinois, have limited class actions in a number of areas, including consumer fraud.<sup>29</sup>

On January 1, 2004, Rule 23 of the Federal Rules of Civil Procedure was amended to grant courts more control over certification of class actions. All settlements, dismissals, or compromises must now be approved by the court as “fair, reasonable and adequate.” The amendments also provide more opportunities for notice and the right to opt out and give the court more control over the appointment of lead counsel for the plaintiffs and the awarding attorney fees.

These changes are relatively uncontroversial in comparison to the Class Action Fairness Act of 2005.<sup>30</sup> This act would shift class actions from state to federal court if:

- 1) more than \$5 million is at stake;
- 2) at least one plaintiff and one defendant are from different states;
- 3) more than 2/3 of the plaintiffs are from different states from where the litigation was filed; and
- 4) grant the federal court discretion to hear the cases if between 1/3 and 2/3 of the plaintiffs are from states other than where the case was filed.

The effect of these many changes are difficult to predict at this early stages. The federal

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<sup>28</sup> Private Securities Litigation Reform Act, Pub. L. No. 104- 67, 109 Stat. 737 (1995); Securities Litigation Uniform Standards Act of 1998, Pub. L. 105-353, 112 Stat. 3227 (1998).

<sup>29</sup> Avery v. State Farm Mutual Automobile Insurance Co., available at <http://www.state.il.us/court/Opinions/SupremeCourt/2005/August/Opinions/Html/91494.htm>; Price v. Philip Morris, Inc., available at <http://www.state.il.us/court/Opinions/SupremeCourt/2005/December/Opinions/Html/96236.htm>.

<sup>30</sup> 28 U.S.C. §§ Sections 1332(d), 1453, and 1711-1715.

courts are just now beginning to see antitrust cases which otherwise have been brought in state court because of this new legislation. It may make some cases somewhat easier to settle because most claims against the same defendants will now be consolidated in a single federal court as opposed to being strewn around the United States in a variety of different state and federal courts. However, the cases that do settle are likely to settle for larger cash amounts and help prevent so-called collusive settlements where plaintiffs get relatively little, their attorneys get large fees, and the defendants are protected from subsequent litigation by class members.

## II. The Growth of Private Rights of Action and Class Actions Abroad

III. There are many ironies in the assault on private antitrust litigation and class actions in the United States. At precisely the time the United States is seeking to restrict these types of actions, the rest of the world is warming to the idea of private rights of actions in the competition area and realizing the need for some form of aggregate or class litigation.

The European Union has made the strongest commitment to the development of private rights of action to complement public enforcement efforts. The European Court of Justice has held that each member state must provide some effective form of private right of action for damages for violation of EU competition provisions.<sup>31</sup> The European Commission pushed through a dramatic modernization of EU competition law in 2004 premised on the need to revitalize enforcement by member state competition authorities and unleash private litigation in the member state courts.<sup>32</sup>

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<sup>31</sup> Crehan v. Courage, (Case C-453/99).

<sup>32</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, available at

So far that modernization has only had a modest impact on the growth of private rights of action and the contemplated European competition network is still in its infancy. As a result, the EU has promulgated a Green Paper posing a series of very pointed questions on how best to achieve a system of robust private enforcement.<sup>33</sup> Even before the publication of the Green Paper, the topic of whether and how to increase private antitrust enforcement in the EU has been hotly debated in this journal and elsewhere.<sup>34</sup>

The jurisdiction outside the United States that is farthest along in the development in private antitrust litigation is probably Canada which has developed a vigorous body of actual class action litigation in price-fixing litigation normally following or accompanying similar cases in the United States which have revealed illegal conduct affecting the entire North American economy.<sup>35</sup> Private class actions have proved to be a viable method of recovery (at least by settlement) despite the absence of strong discovery rules, treble damages, or the other more extreme features of the United States litigation system.

Other jurisdictions, such as England, are experimenting with the concept of a "supercomplaint" where specified consumer groups have the statutory authority to bring complaints before the competition authority. This type of procedure amounts to an

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[http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l\\_001/l\\_00120030104en00010025.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_001/l_00120030104en00010025.pdf).

<sup>33</sup> Green Paper, *supra* note 2.

<sup>34</sup> Compare Wouter P.J. Wils, *Should Private Antitrust Enforcement be Encouraged in Europe?*, (2003) 26 W. Comp. 3, pp. 1-16 and C.A. Jones, *Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check*, 27 W. Comp.1, pp. 13-24.

<sup>35</sup> LITIGATING CONSPIRACY: AN ANALYSIS OF COMPETITION CLASS ACTIONS (IRWIN PRESS 2006); Charles M. Wright & Matthew Baer, *Price-Fixing Class Actions: A Canadian Perspective*, 16 LOY. CONS. L. REV. 463 (2004).

administrative class action and has proved to be another effective way to aggregate consumer claims which otherwise most likely would have gone unresolved because of their relative small size.<sup>36</sup>

The handful of jurisdictions that already have an established private of action are at the very earliest stages of experience with such actions in their court systems. More generally, other jurisdictions are wrestling with the question of whether and how to implement a private right of action for competition cases either through their existing law or through statutory change. Suffice it to say that to the best of my knowledge, the United States system with its byzantine array of public and private actors and remedies is not seriously under consideration in any jurisdiction.

Virtually every jurisdiction must face this issue, including many with well respected competition regimes, but no tradition of private enforcement. For example, Turkey and other jurisdictions similar situated, must decide how to incorporate such remedies into their existing competition regime if for no other reason than their long term obligations to harmonize its competition law with that of the European Union.<sup>37</sup>

#### I. Doing Better: A Model for a Public-Private Partnership in Enforcing Competition Law

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<sup>36</sup> Press Release, 29-10-2001, Consumers' Association makes first 'supercomplaint' to OFT, available at <http://www.which.net/media/pr/oct01/general/supercomplaint.html>. The EU has adopted a similar procedure empowering consumer associations to bring actions for injunctive relief in consumer protection cases in member state courts. Directive 98/27/EC of the European Parliament and the Council of 19 May 1998 on injunctions for the protection of consumer interests (OJ L 166/51 11.06.1998).

<sup>37</sup> Organisation for Economic Cooperation and Development, *Competition Law and Policy in Turkey*, Policy Brief (August 2005).

II. An important goal of competition law at both the national and international level should be the deterrence, detection, and punishment of hard-core cartels, as well as the compensation of their victims. Every system needs to think about these issues in a systematic way. Every system can do better, including the United States.<sup>38</sup> What follows are specific suggestions for the United States, recommendation for the European Union, and a brief framework in which to think about these issues for other jurisdictions contemplating whether and how to implement private rights of action in competition law.

The question of what combination of remedies best deals with the problem of national and international cartels is ultimately an empirical one. No amount of rhetoric will help decide whether maximizing detection or maximizing compensation will best deter this type of behavior which is now universally condemned by all competition law regimes. Similarly no amount of rhetoric will determine whether criminal versus civil sanctions or corporate versus individual liability will work best against this problem. We need more empirical research, which is just beginning to emerge.

Everyone agrees that if we were starting fresh in the United States no one would design the system we currently have. We have a peculiar system of multiple enforcers enforcing multiple laws in multiple forums. If anything, the opposite problem is present in the EU with too few enforcers with too few options for effective enforcement. Neither system is entirely logical but neither jurisdiction has the luxury of writing on a clean slate. Most legal systems are a product of history, culture, inertia, and often random chance. For a new set of laws or procedures to accomplish their intended purpose, they must also be consistent with their jurisdiction's

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<sup>38</sup> Spencer Weber Waller, *The Incoherence of Punishment in Antitrust*, 78 CHI-KENT L. REV. 207 (2003).



history and culture. A little luck never hurts either. But most commentators agree that a legal system that is not thoughtfully designed and not consistent with history and culture has little chance to succeed.<sup>39</sup>

It was largely an unexpected consequence of the success of the leniency and amnesty program of the Antitrust Division of the US Department of Justice that brought the principal US government competition agency (at least in the cartel area) in direct conflict with private plaintiffs. In the 1990s, the Antitrust Division created a program which laid out formal criteria how to obtain immunity from criminal prosecution for antitrust violations. According that policy, a corporation will be immune from prosecution if the following six conditions are met:

1. At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;
2. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;
3. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation;
4. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;
5. Where possible, the corporation makes restitution to injured parties; and
6. The corporation did not coerce another party to participate in the illegal activity

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<sup>39</sup> Spencer Weber Waller, *Neo-Realism and the International Harmonization of Law*, 42 U. KAN. L. REV. 557 (1994).

and clearly was not the leader in, or originator of, the activity.<sup>40</sup>

In addition the corporation's employees will receive similar immunity from prosecution if they truthfully cooperate with the government as well. However, the firm receiving amnesty is **not** immune from civil antitrust litigation.

The amnesty program has been tremendously successful and similar versions have been adopted by many other jurisdictions as well. But it has thrust the US government in direct conflict with private plaintiffs who routinely sue all the firms who are prosecuted in a cartel case, including the firm who cooperated with the government. The Antitrust Division has become highly dependent on the amnesty program and is concerned about any circumstances that decrease the likelihood that a firm will defect from a cartel and inform the government of its existence. Thus, the US government frequently views private treble damage cases as a competitor, rather than a partner, in the war against cartels.

This hostility to private damage enforcement takes a number of forms. First, the Antitrust Division filed an amicus brief in the Supreme Court in the *Empagran* case arguing that foreign firms who were the victims of price fixing should not have the ability to sue in the United States for treble damages.<sup>41</sup> An important part of the Division's support for the very same defendants they had recently prosecuted was based on the negative effect granting standing to such foreign plaintiffs would have on the amnesty program and allegedly on overall cartel deterrence. Second, the Antitrust Division supported 2004 amendments to the antitrust laws which strengthened the amnesty program at the expense of private enforcement by increasing the penalties for a criminal

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<sup>40</sup> <http://www.usdoj.gov/atr/public/guidelines/0091.htm>

<sup>41</sup> The Justice Department's brief is discussed at *F. Hoffman-LaRoche Ltd. v. Empagran, S.A.*, 542 U.S. 155, 168 (2004).

violation of the Sherman Act and by limiting any subsequent civil liability for the cooperating firms to *single* rather than *treble* damages.<sup>42</sup> Third, many observers believe the current Antitrust Modernization Commission will recommend further restrictions on the ability of state attorneys general and private firms to bring private antitrust litigation. These developments are all substantially based on the untested empirical belief that increased detection through amnesty programs and the resulting criminal prosecutions is the best route to deterrence of cartel behavior.

A more productive partnership in the United States is needed. There is no statutory or historical reason to believe that one form of enforcement is superior to another. The combination of criminal investigations through the grand jury process combined with the amnesty program is a powerful one, but so far not sufficient to rid the world of cartels. However, if government criminal enforcement is going to preempt private enforcement, or have some sort of primacy, at a minimum restitution must be an explicit part of all plea agreements and the actual sentences imposed by the courts.

Otherwise, the federal government should support, rather than undermine, private plaintiffs. The federal agencies should share publicly available information about cases and investigations with both the state enforcers and the private bar, as it does with foreign competition authorities. The government should further make a detailed factual record in plea agreements and sentencing proceedings to ensure vigorous private enforcement resulting in effective compensation and/or restitution for the victims of price-fixing.

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<sup>42</sup> Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA), Pub. L. No. 108-237, § 215, 118 Stat. 665, 668 (2004).

One substantive change in US antitrust law is necessary to make this happen. The bar on indirect purchaser claims in federal court must be repealed which would permit all claims against any group of defendants to be brought in federal court and eventually consolidated into a single set of claims before the same judge. Under the current patchwork system of state and federal claims, too many resources are wasted on cases where plaintiffs are jockeying in literally dozens of cases involving the same basic claims against the same set of defendants. Under a more rational system where all claims can be brought in the same court against the same defendants it would ultimately be the plaintiff's burden (with court supervision) to allocate damages among the direct and indirect purchasers to all victims of price fixing are fairly compensated and defendants bear less of a risk of inconsistent or duplicative verdicts.

For all other types of cases, the goal should be to determine which types of ad hoc networks or which individual plaintiffs have the greatest comparative advantage. In other words, let the market decide who is the best plaintiff, or group of plaintiffs, for any particular cause of action. Over time, the federal agencies, state attorneys general, and various private plaintiffs will come together in different efficient arrangements to attack anticompetitive agreements, abusive dominant firm behavior, or mergers which threaten competition. The states already routinely do this in their multi-state coalitions and occasionally work with the FTC or the Justice Department on particular cases. These public-private and public-public networks have worked well in numerous cases, although apparently the coalition of the Justice Department and twenty states in the Microsoft cases did not work well once the Bush Administration decided that it wanted to settle the case. We should not let those frustrations drive an overreaction to a series of ad hoc

enforcement networks that have worked well in the vast majority of cases.<sup>43</sup>

The federal agencies have a natural lead role to play into certain areas but that role may be different and less extensive than previously thought. Monopolization cases are a natural area where the importance of the remedy suggests that the US antitrust community should speak with one voice. Similarly, those few cases with important foreign policy ramifications also deserve a single voice controlled by the executive branch of the federal government.<sup>44</sup> Certain mergers with a truly national or international dimension may be another such area.

Beyond that there is no obvious comparative advantage for the federal government in the absence of compelling empirical research. There are in fact certain antitrust areas where the states have a natural advantage. Resale price maintenance claims (vertical price fixing) are one of those areas. The states have the statutory power to represent their natural citizens in federal courts, a political affinity for consumer interests, and the proven ability to handle such cases including the distribution of damages to consumers. The federal agencies have long since lost interest in investigating these cases. The private bar is not well equipped to handle these cases because of their complexity and because of the relatively small amounts of potential damages. The states similarly have a natural role to play in other complex vertical restraint cases where the federal government has ceased enforcement and in those cases which are of inherently local interest. At the same time, other cases can best be left to the private bar where issues of damages, compensation, and restitution are the main issue.

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<sup>43</sup> See Richard Wolfram & Spencer Weber Waller, *Contemporary Antitrust Federalism: Cluster Bombs or Rough Justice?* in ANTITRUST LAW IN NEW YORK STATE 3 (2d ed. 2002).

<sup>44</sup> JAMES ATWOOD, KINGMAN BREWSTER & SPENCER WEBER WALLER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 21.30 (3d ed. 1997 & annual supp.).

My overall suggestion is not to fight the growth of ad hoc partnerships and networks but to improve them. While the *Microsoft* case can be read as an example of where things go wrong, it can also be read as an example where one partner in a coalition fails to live up to its end of the bargain.<sup>45</sup>

#### I. Suggestions for a Viable Private Right of Action

The EU is to be commended for its efforts to make private rights of action a reality and to conceive of these cases as a partnership between Brussels, the member states, and the private bar. Right now the theory is much better than the practice with few cases having been brought and actual damage awards still quite rare.<sup>46</sup> While the Green Paper raises numerous important questions which have to be worked out as part of an effective system of private enforcement, I would like to comment on two of what I consider the most important issues: 1) the need for some form of class action (aggregate) litigation and 2) the need to permit indirect purchasers to sue for damages.

The first issue is not just procedural in nature. It has grave substantive overtones, and is frequently outcome determinative. Without some form of class action mechanism, small damage claims simply will not be brought. No individual consumer or small group has the incentive or practical ability to bring those claims on their own. Thus, the choice is not between individual and class action claims. It is between class actions and no private litigation at all with respect to

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<sup>45</sup> Harry First & Andrew I. Gavil, *Reframing Windows: The Durable Meaning of the Microsoft Antitrust Litigation*, 2006 UTAH L. REV. xx (forthcoming).

<sup>46</sup> For a thoughtful survey of the issues to be surmounted in order to create effective private antitrust enforcement in the EU by an official in DG-Comp deeply involved in the modernization effort see Donnadh Woods, *Private Enforcement of Antitrust Rules and the Road Ahead*, 16 LOY. CON. L. REV. 431 (2004).

most consumer claims for overcharges from price fixing and related hard-core violations.

The spread of aggregate litigation around the world has forced numerous jurisdictions to grapple with versions of the same issues that the United States. The experience of the United States, Canada, and the handful of other countries which have adopted class actions have shown that some form of aggregate litigation is necessary.

The experience in the United States also indicates the need to allow suits for damages by *indirect* purchasers otherwise consumers, the intended beneficiaries of the antitrust laws, will receive little if any compensation for most price fixing violations. While the United States Supreme Court was convinced that direct purchasers were the best and most efficient enforcers of antitrust,<sup>47</sup> this has not proved to be the case.

Consider the average consumer good (foodstuffs, household products, clothing, etc.). With the exceptions of certain internet and mail order sales, virtually all such sales go through several levels of distributions before the consumer enters the picture. As a result, if recovery is limited to direct purchasers, actual consumers will rarely have the right to sue for damages. 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. Even where the direct purchasers may have the ability to negotiate some compensation for past overcharges (the manufacturers also have the incentive to retain good distributors) there is no assurance that such compensation

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<sup>47</sup> Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

will be passed along to the ultimate consumers. Thus once again, the question is not whether suit is brought by direct versus indirect purchasers, but whether suit is brought at all.

Experience has shown that each jurisdiction should be careful not to let the class action tail wag the antitrust dog. Whether to allow indirect purchasers to recover under competition law is a difficult issue for which reasonable people are going to differ. However that question should be tackled head on and not through the back door of class action certification. Canada is seeking to resolve this difficult issue through case-by-case litigation on the requirements for certification of class actions.<sup>48</sup> To proceed in this fashion only perpetuates the undesirable fiction that only class versus individual litigation is at stake, when the reality is that the choice is between the deterrence and compensatory value of potential recovery and the certainty of no recovery, no compensation, and no deterrence.

When faced with a bar on indirect purchaser suits under federal antitrust law in the United States,<sup>49</sup> states rushed to fill void and the Supreme Court held that it was constitutional and statutorily permissible for them to do so.<sup>50</sup> According to some accounts as many as forty four states permit some form of recovery for indirect purchaser under state antitrust law.<sup>51</sup> While the exact number of states that permit such actions by statute or common law is disputed, all agree that most of the American economy is subject to such actions since virtually all of the

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<sup>48</sup> Chadha v. Bayer Inc., 63 O.R. (3d) 22 (Ont. Court of Appeals 2003).

<sup>49</sup> Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

<sup>50</sup> California v. ARC Am. Corp., 490 U.S. 93 (1989).

<sup>51</sup> Daniel R. Karon, *"Your Honor, Tear Down that Illinois Brick Wall!": The National Movement Toward Indirect Purchaser Antitrust Standing and Consumer Justice*, 30 WM. MITCHELL L. REV. 1351 (2004).



larger economy states make such actions available. However, a number of states limit such indirect purchaser class actions to actions by the State Attorney General, making enforcement subject to the priorities and resources of each state enforcement bureau. The pressure to do something about this absurd result of no federal indirect purchaser actions, multiple state court indirect purchaser cases, and now the prospect of all of the above being consolidated in federal multi-district litigation pretrial procedures because of the Class Action Fairness Act is likely to push the United States to eliminate the judicial ban on federal indirect purchaser treble damage actions altogether.

I would urge every jurisdiction to enact or permit indirect purchaser suits and to apply class action certification in a realistic manner, lest competition enforcement in the name of consumer welfare become a cruel parody where the average consumer can never recover in class actions because certification is impossible and then cannot recover by way of an individual action because such cases cannot be brought in the real world.

## Conclusion

My recommendations require much of a jurisdiction in the way of a court system and a practicing bar in order to implement. It also requires a culture of competition that it is late in coming to many countries, including the United States.<sup>52</sup> For those jurisdictions whose history, culture, and legal system will not permit a meaningful private of action in the foreseeable future, there are other steps that can be taken to create a public-private partnership to enforce

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<sup>52</sup> See SPENCER WEBER WALLER, THURMAN ARNOLD: A BIOGRAPHY 78-110 (2005)(describing tension between competition and government economic planning during the Great Depression in the 1930s and World War II in the early 1940s).

competition law for the benefit of consumers. Consumers associations need to be created and nurtured to advocate for competition with the enforcement agencies and the rest of the government.<sup>53</sup> National competition agencies need to be given adequate resources and political independence to fairly carry out their mission. They must also operate in a transparent and procedurally fair manner in carrying out investigations and responding to complaints. Judges need to be trained both as to the value of competition law and the technicalities of its administration.

Perhaps most of all, the public needs to be persuaded of the importance and values of enforcing competition by law. If you succeed at this, then some appropriate form of a public-private partnership will emerge. But if you fail, then nothing else really matters.

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<sup>53</sup> One shining example in this regard is the Consumer Unity & Trust Society (CUTS) in India. For a full account of CUTS's activities see <http://www.cuts-international.org>.