

2019

Toward a Realistic Comparative Assessment of Private Antitrust Enforcement

Daniel A. Crane

University of Michigan Law School, danocrane@umich.edu

Available at: https://repository.law.umich.edu/book_chapters/137

Follow this and additional works at: https://repository.law.umich.edu/book_chapters

 Part of the [Antitrust and Trade Regulation Commons](#), [Comparative and Foreign Law Commons](#), and the [Legal Remedies Commons](#)

Publication Information & Recommended Citation

Daniel A. Crane (2009-). "Toward a Realistic Comparative Assessment of Private Antitrust Enforcement." In *Reconciling Efficiency and Equity: A Global Challenge for Competition Policy*, edited by Damien Gerard and Ioannis Lianos, 341-54. Cambridge: Cambridge University Press, 2019.

This Book Chapter is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Book Chapters by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

Toward a Realistic Comparative Assessment of Private Antitrust Enforcement

Daniel A. Crane

Over the course of her extraordinary career, Eleanor Fox has contributed in many vital ways to our understanding of the importance of institutional analysis in antitrust and competition law.¹ Most importantly, Eleanor has become the leading repository of knowledge about what is happening around the globe in the field of competition law and its enforcement institutions. At a time when much of the field of antitrust was moving in the direction of theoretical generalization, formal modeling, game theory, and the like, Eleanor tirelessly worked the globe to discover the *actual practice* of competition law in the world. She left no doubt that she preferred an inductive, fact-based approach to studying competition law to armchair theorizing.²

Until recently, comparative institutional analysis in antitrust centered largely on comparing public enforcement institutions – for example, on comparing independent agency versus prosecutorial models, sectoral regulators versus generalist competition agencies, administrative versus criminal enforcement, and the like. However, the rise of private antitrust enforcement in many jurisdictions requires extending institutional analysis to comprehend comparisons between private enforcement systems, between public and private systems, and taking account of the complex interactions between public and private systems.

This chapter will propose a framework for conducting comparative analysis of antitrust systems given the rising growth of private enforcement. In particular, I shall argue that a realistic assessment of the country-specific practice of private antitrust litigation requires looking beyond the stated objectives and justifications for the practice – such as providing compensation to injured consumers or complementing public enforcement – and to the actual effects of private enforcement on the overall antitrust ecosystem. The evidence from the United States’ long and not always felicitous experience with private enforcement suggests that private litigation has

¹ See e.g. E. Fox and M. J. Trebilcock, *The Design of Competition Law Institutions: Global Norms, Local Choices* (Oxford University Press, 2013).

² E. M. Fox and L. A. Sullivan, ‘Antitrust-Retrospective and Prospective: Where Are We Coming From? Where Are We Going?’ (1987) 62 *NYU Law Review* 936, 958–60 (criticizing Chicago School for being grounded in theory rather than fact and based on ideology rather than science).

important feedback effects on public enforcement and may, in some contexts, diminish the incidence and efficacy of public enforcement. As private antitrust enforcement grows around the globe, it will be important to study whether these effects are replicated or whether, instead, public enforcement remains predominant and relatively unmodified.

17.1 THE GROWTH OF PRIVATE ANTITRUST LITIGATION

Throughout much of the world, public enforcement of competition law principles remains the norm. Outside of the United States, private enforcement has been theoretically available but relatively rare. However, in recent decades there has been a surge of interest in private enforcement of competition law,³ led particularly by the decade-long study of the issue in European Commission leading to the November 26, 2014 Council Directive on Antitrust Damages.⁴ The Directive calls for expanded private antitrust enforcement throughout the European Union, and could, over time, lead to a dramatic increase in private antitrust litigation in Member States.

Private antitrust litigation seems to be breaking out in other parts of the world as well. Canada, which like the European Union has decided in favor of indirect purchaser standing,⁵ has seen a steady growth in antitrust class actions, with twenty-five cases in 2013 and thirty-four cases in 2014.⁶ South Korea has seen a similar growth in private antitrust damages cases filed in recent years, with an estimated thirty damages actions pending as of 2013.⁷ Since the liberalization of Chile's rules on private antitrust enforcement in 2004, private litigants have filed over one hundred cases, 69% of all cases heard by the Competition Tribunal.⁸ Many OECD countries report a steady increase in private antitrust cases in recent years.⁹

³ See A. Andreangeli, *Private Enforcement of Antitrust: Regulating Corporate Behaviour through Collective Claims in the EU and US* (Edward Elgar, 2014); A. A. Foer and J. W. Cuneo (eds.), *The International Handbook on Private Enforcement of Competition Law* (Edward Elgar, 2010).

⁴ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.349.01.0001.01.ENG (hereafter EU Private Damages Directive).

⁵ *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 (Can.); *Sun-Rype Prods. Ltd. v. Archer Daniels Midland Co.*, 2013 SCC 58 (Can.); *Infinion Tech. AG v. Option consommateurs*, 2013 SCC 59 (Can.).

⁶ Canadian Competition Bureau, 'The Relationship Between Public and Private Antitrust Enforcement' (June 10, 2015), www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03926.html.

⁷ CPI Overview of Current Antitrust Enforcement in Korea, www.competitionpolicyinternational.com/overview-of-current-antitrust-enforcement-in-korea

⁸ OECD Relationship Between Public and Private Antitrust Enforcement, Note by Chile (15 June 2015), [www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD\(2015\)14&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2015)14&docLanguage=En)

⁹ OECD, 'Public and Private Antitrust Enforcement in Competition', www.oecd.org/daf/competition/antitrust-enforcement-in-competition.htm

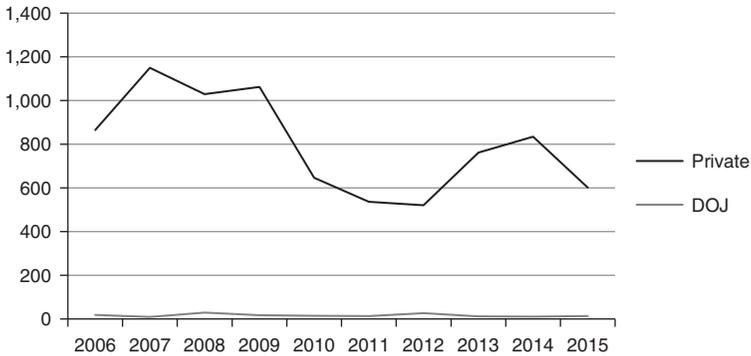


FIGURE 17.1 DOJ and private antitrust cases 2006–15

In the United States, private enforcement continues to far outstrip public enforcement, by a ratio of over 10:1. Figure 17.1 shows the trend lines for the last decade for antitrust filings by the Justice Department and by private parties suing under the antitrust laws in federal court. While there has been a good bit of volatility in the number of private antitrust cases initiated, the Justice Department's trend line has been flat and stuck in low single figures. The Federal Trade Commission (FTC) files a few additional cases, as do state attorneys general, but the overall numbers of public enforcement cases remain very small compared to the number of private cases filed.

Raw numbers of case filings do not always tell the story, since a single public case may have a much greater effect on the competitive landscape or the formulation of antitrust principles than a number of private cases. But by almost any metric, private antitrust litigation has wielded a greater influence on the shape of US antitrust law in recent decades. For example, since 1990 the US Supreme Court has decided thirty-six antitrust cases, thirty of which were private and only six of which were public. This means that antitrust norms have been overwhelmingly created in the context of private enforcement.

In short, private antitrust remains the bedrock of US antitrust enforcement and a growth industry around the world.

17.2 DISCREPANCIES BETWEEN PRIVATE ANTITRUST LITIGATION AS SCRIPTED AND AS PRACTICED

The worldwide growth of private antitrust enforcement raises new opportunities to study the actual effects of the private enforcement system. While there has been much written about the US private enforcement system, much of it may seem idiosyncratic to the framework of US civil litigation more generally – including such features as relatively permissive use of class actions, juries, and liberality on

questions of proof and damages. As private antitrust enforcement becomes a more regular feature in other jurisdictions, it will be appropriate to ask how it actually operates – what are its actual patterns and effects.

While there are many different potential angles on understanding the practice of antitrust enforcement, two broad questions are of particular importance. First, does private antitrust enforcement achieve the purpose for which it ostensibly exists in most jurisdictions – providing compensation to injured consumers. Second, does private antitrust enforcement serve a complementary and supporting role to public enforcement – as it is advertised to do – or does it instead become competitive with, and to some extent displacing of, public enforcement?

17.2.1 Compensation for Who?

The US private enforcement system is oriented primarily around a deterrence goal. This is evident from the very way the courts speak of private enforcers – as “private attorneys general.”¹⁰ Treble damages are allowed as a bounty to encourage private suits in the public interest.¹¹ Standing principles – allowing direct purchaser suits without the pass-on defense despite the potential absence of any injury at all and disallowing indirect purchaser suits even though the indirect purchaser often incurs the real economic injury – are explicitly justified on deterrence grounds.¹² Similarly, the rule of joint and several liability without a right of contribution¹³ is squarely grounded in deterrence.

Europe’s recent movement in the direction of expanded private antitrust enforcement charts the opposite course, perhaps drawing from the continental tradition of more sharply distinguishing between private and public law than occurs in the Anglo-American tradition.¹⁴ In contrast to common law systems, continental legal systems have long expressed skepticism about co-opting private plaintiffs into serving as surrogates for the public interest. For example, continental systems generally disfavor punitive damages,¹⁵ and the *qui tam* action is an Anglo-American curiosity largely unknown on the continent.¹⁶

¹⁰ e.g. *Hawaii v. Standard Oil Co. of California*, 405 US 251, 262 (1972) (“By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as ‘private attorneys general’”).

¹¹ *Exxon Shipping Co. v. Baker*, 554 US 471, 511 (2008) (“We know, for example, that Congress devised the treble-damages remedy for private antitrust actions with an eye to supplementing official enforcement by inducing private litigation, which might otherwise have been too rare if nothing but compensatory damages were available at the end of the day”).

¹² *Illinois Brick Co. v. Illinois*, 431 US 720, 746 (1977) (justifying indirect purchaser standing prohibition by observing that, from a deterrence perspective, it is irrelevant whether the party receiving the damages was actually injured).

¹³ *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 US 630 (1981).

¹⁴ R. B. Schlesinger, *Comparative Law* (5th edn, Foundation Press, 1988), 300 (“In a civilian mind, all law is automatically divided into private law and public law”).

¹⁵ H. Koziol, ‘Punitive Damages – A European Perspective’ (2008) 68 *Louisiana Law Review* 741.

¹⁶ On the Anglo-American roots of the *qui tam* action, see J. Randy Beck, ‘The False Claims Act and the English Eradication of *Qui Tam* Legislation’ (2000) 78(3) *North Carolina Law Review* 539, 548–9.

The European Commission's initial intervention in the debate – the Commission's 2005 Green Paper – appeared to tilt in the deterrence direction.¹⁷ It articulated both a compensatory and deterrence objective for private antitrust enforcement,¹⁸ but espoused a damages multiplier in cartel cases,¹⁹ expressed doubt on indirect purchaser standing and allowing the pass-on defense in light of its complexity.²⁰ By the 2008 White Paper, however, compensation had clearly won out. The White Paper stated emphatically that “Full compensation is . . . the first and foremost guiding principle” of private antitrust litigation and 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.”²¹ The emphasis on compensation is also highly visible in the Commission's directive on private damages, which allows for the passing-on defense and indirect purchaser standing and prohibits damage multipliers.²²

As jurisdictions outside the United States and Europe cautiously transition toward increased private enforcement, they will necessarily be confronted with similar choices. Early signs suggest that jurisdictions may tend to frame private enforcement around a compensation goal rather than thinking of private enforcement as a supplement to public enforcement designed to maximize deterrence. Jurisdictions such as Canada,²³ Germany,²⁴ and South Africa²⁵ have decided in favor of indirect purchaser standing with the pass-on defense (although other jurisdictions, such as South Korea, have rejected the pass-on defense).²⁶

Although the impulse toward compensation is understandable given continental assumptions about the public–private divide and the role of private law, antitrust

¹⁷ Green Paper – Damages actions for breach of the EC antitrust rules, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52005DC0672>

¹⁸ *Ibid.*, at 1.1 (“Damages actions for infringement of antitrust law serve several purposes, namely to compensate those who have suffered a loss as a consequence of anti-competitive behaviour and to ensure the full effectiveness of the antitrust rules of the Treaty by discouraging anti-competitive behaviour, thus contributing significantly to the maintenance of effective competition in the Community”).

¹⁹ *Ibid.*, at 2.3 (“[D]oubling of damages at the discretion of the court, automatic or conditional, could be considered for horizontal cartel infringements”).

²⁰ *Ibid.*, at 2.4 (“The ‘passing-on defence’ substantially increases the complexity of damages claims as the exact distribution of damages along the supply chain could be exceedingly difficult to prove. Evidentiary problems also burden actions of indirect purchasers, as they might be unable to prove the extent of their damages and the causative link with the infringing behaviour”).

²¹ 2008 White Paper, at 3.

²² See EU Private Damages Actions Directive, recital 29, recital 36, arts. 2(3), 12–16.

²³ J. Bodrug, A. Fanaki, and C. Spagnola, ‘Supreme Court of Canada Allows Indirect Purchaser Class Actions for Antitrust Claims 13-APR’ (2014) *Antitrust Source* 1.

²⁴ Kartellteilnehmer haften auch mittelbar Geschädigten auf Schadensersatz, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2011&Sort=3&nr=56711&pos=1&anz=119>

²⁵ Private anti-trust litigation 2014: South Africa, www.ensafrica.com/news/Private-anti-trust-litigation-2014-South-Africa?Id=1202&STitle=Anti-trust%20%7C%20Competition%20ENSight

²⁶ Korean Supreme Court rejects passing-on defense in private damages action arising out of price-fixing agreement, www.lexology.com/library/detail.aspx?g=32446d04-e8e0-41ed-8c5f-13b3b037b76f

litigation to date has done a poor job of achieving a compensatory goal, if by compensation we mean identifying an injured class for whose benefit the law exists – consumers – and providing financial redress in proportion to their injuries. As I have previously submitted,²⁷ antitrust enforcement is incapable of compensating consumers for two out of three major categories of injury – deadweight losses and dynamic injuries. That leaves wealth transfers or overcharges as possibly compensable. Yet, even as to this third category of injury, the prospects for adequate compensation to large percentages of injured consumers are remote.

The difficulties with providing compensation for overcharges are many. As the Council Directive recognizes in providing for indirect purchaser standing, large shares of overcharges are ordinarily passed on downstream to household consumers, who absorb the majority of the loss. They are the primary victims in need of compensation. But, by the time it reaches the household consumer level, the overcharge is often spread widely over thousands or millions of persons, each of whom incurs a relatively modest injury. Practically speaking, locating and providing compensation to the majority of the injured consumers is usually impossible.

To illustrate this point, I refer to important empirical work by Bob Lande and Josh Davis, who argue that the United States antitrust system has been successful in pursuing compensation for injured victims.²⁸ In a debate with Lande and Davis hosted by the American Antitrust Institute, I took their most recent study of sixty cases and provided an alternative perspective on the figures they reported. Lande and Davis report a total recovery of between \$33.8 billion and \$35.8 billion in these sixty cases,²⁹ an impressive-sounding number. But when one scrutinizes the numbers closely, the compensation claim appears much weaker. Even though over half of the states allow indirect purchaser suits under state antitrust law, only \$2 billion out of the total pot was awarded to indirect purchasers. Of the total, \$13 billion went to competitors – whose welfare is at best an incidental focus of antitrust laws – and \$15 billion to direct purchasers, many of whom may have passed on nearly the full overcharge and hence suffered no substantial injury. Attorneys' fees ate up between 9 and 27 percent of the awards, and claims administration costs an additional 4 percent (notably, such costs went up by 50 percent in indirect purchaser cases).

Focusing now on the indirect purchaser claims, I calculated the average claims rate (meaning the percentage of all persons in the class who filled out the paperwork to be awarded a share of the judgment or settlement). In the seven cases for which this information was available, the average weighted (by magnitude of the award) claims rate was 12 percent, meaning that 88 percent of the injured class members did

²⁷ D. A. Crane, *The Institutional Structure of Antitrust Enforcement* (Oxford University Press, 2011).

²⁸ See R. H. Lande and J. P. Davis, 'Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases' (2008) 42 *University of San Francisco Law Review* 879; J. P. Davis and R. H. Lande, 'Defying Conventional Wisdom: The Case for Private Antitrust Enforcement' (2008) 48 *Georgia Law Review* 1; J. P. Davis and R. H. Lande, 'Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement' (2013) 36 *Seattle University Law Review* 1269.

²⁹ Davis and Lande, 'Empirical and Theoretical Assessment of Private Antitrust Enforcement'.

not partake in the damages at all. In sum, 12 percent of indirect purchasers received 6 percent of between 70 and 87 percent of damages awarded in the sixty cases. Accordingly, only a small fraction of consumers received a share a small piece (about 5 percent) of the total damages generated by the United States' antitrust system, reflecting only one aspect of their injury.

One can, of course, argue that my interpretation of the data takes a “cup 88% empty” perspective and neglects the important compensatory benefit to the 12% of consumers who did receive some compensation for their injuries. And perhaps more could be done to improve the system and reach more consumers. Perhaps. For present purposes, my point is just that there is a large gap between compensatory justifications and compensatory practices. As new private enforcement systems develop, they should be judged by what they do rather than what they say.

17.2.2 *Spillover Effects on Government Enforcement*

Courts, antitrust enforcers, and legislators often assert that private antitrust enforcement complements and bolsters public enforcement. The US Supreme Court has explained that private enforcement should be secondary to, and never competitive with, public enforcement:

The private-injunction action, like the treble-damage action under s 4 of the Act, supplements Government enforcement of the antitrust laws; but it is the Attorney General and the United States district attorneys who are primarily charged by Congress with the duty of protecting the public interest under these laws. The Government seeks its injunctive remedies on behalf of the general public; the private plaintiff, though his remedy is made available pursuant to public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served. These private and public actions were designed to be cumulative, not mutually exclusive.³⁰

The EU Directive also shows sensitivity to the relationship between public and private enforcement, asserting the need for “coordination of these two forms of enforcement in a coherent manner,”³¹ and proposing mechanisms for preventing private enforcement from undermining public enforcement, such as limiting private access to self-incriminating materials received as part of leniency applications.³²

The reality, however, is that private enforcement cannot help but have spillover effects on public enforcement – not all in the direction of making public enforcement more effective. To the contrary, the US experience shows that a swell of private enforcement can subtly undermine public enforcement, or even choke it off altogether.³³ Particularly if private enforcement in particular areas comes to

³⁰ *US v. Borden Co.*, 347 US 514, 518 (1954).

³¹ EU Private Damages Directive, recital 6.

³² *Ibid.*, recital 26.

³³ See generally Crane, *Institutional Structure*.

significantly outstrip public enforcement in frequency, with the governing liability norms being predominantly created in private litigation, public litigation can become laden with the baggage of private litigation to the point of ineffectiveness or practical disappearance.

US monopolization law is a case in point. Historically, public antitrust enforcement of s. 2 of the Sherman Act has declined since a high in the 1970s, when the agencies were bringing over three cases a year,³⁴ to the last several administrations where very few monopolization cases have been brought. Over the eight years of the Bush administration, the Justice Department filed no monopolization cases. While running for office in 2007, Senator Barak Obama singled out this ostensibly weak enforcement record for condemnation, characterizing the failure to pursue monopolization cases as “lax enforcement” that harmed consumer interests.³⁵ His Antitrust Division immediately withdrew a report on monopolization offenses disseminated by the Bush administration and promised that the Justice department would be “aggressively pursuing” monopolization cases.³⁶ But, then, over seven and a half years, the Justice Department brought only one monopolization case. The case, against United Regional Health Care System of Wichita, Texas, was hardly a blockbuster antimonopoly action of the earlier Standard Oil, IBM, AT&T, or Microsoft variety. The Justice Department alleged that the relevant market was for the sale of inpatient hospital services to insurance companies in a geographic area “no larger than the Wichita Falls Metropolitan Statistical Area.”³⁷ The government’s theory – that United had a 90% market share in acute inpatient services and used exclusive dealing contracts with insurance companies to stifle competitors – broke no new theoretical or practical ground.

What happened to public enforcement against monopolization? Among the several contributing factors is the dramatic rise of private monopolization actions in the later part of the twentieth century. Figure 17.2 below provides a statistical summary of public and private monopolization cases in the federal appellate courts in the post-war period. From the 1950s to the 1970s, the federal agencies filed a modest number of monopolization cases during each five-year period – far fewer than private monopolization cases, but still enough to make a significant impact on the formation of legal norms and market circumstances. But, as private monopolization litigation skyrocketed from the mid 1970s to the early 1990s, public monopolization enforcement receded, both proportionally and absolutely. With a few notable exceptions such as the DC Circuit’s *en banc Microsoft* decision, the monopolization

³⁴ W. E. Kovacic, ‘The Modern Evolution of US Competition Policy Enforcement Norms’ (2003) 71 *Antitrust Law Journal* 377, 448, table 4.

³⁵ Statement of Senator Barak Obama for the American Antitrust Institute, www.antitrustinstitute.org/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf

³⁶ Justice Department Withdraws Report on Antitrust Monopoly Law, www.justice.gov/opa/pr/justice-department-withdraws-report-antitrust-monopoly-law

³⁷ Complaint at 7, *United States v. United Reg'l Health Care Sys.*, No. 7:11-cv-00030 (ND Tex. Feb. 25, 2011), available at www.justice.gov/atr/cases/f267600/267651.pdf

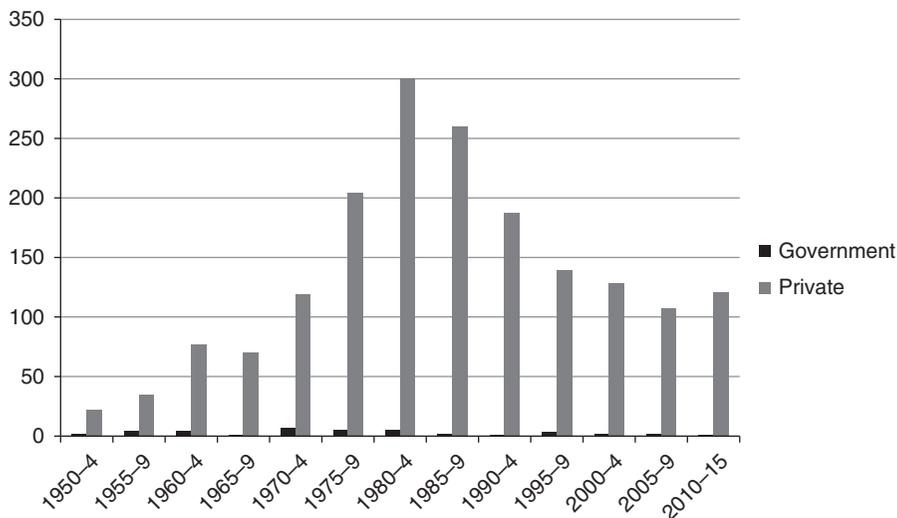


FIGURE 17.2 Monopolization cases in federal appellate courts by five-year period

law made from the 1970s forward was made in the context of private litigation. As the courts reacted to the dramatic rise of private monopolization cases by announcing new restrictions on a variety of exclusion theories – from predatory pricing, to tying, to duties to deal – private monopolization cases began to recede, reaching an apparently stable equilibrium at about half of their peak levels for the last two decades. This dramatic rise and then significant reduction of private monopolization litigation left in its wake public monopolization enforcement, which all but disappeared.

As with the previous comments on compensation, one can propose alternative explanations of the data and case trends. Again, my point in this chapter is not so much to argue for the correctness of my own interpretation, but to suggest the importance of asking questions of this nature in analyzing the actual relationship between public and private enforcement.

17.3 A FRAMEWORK FOR ANALYZING THE EFFECTS OF PRIVATE ANTITRUST LITIGATION

Having articulated some skepticism about two of the strong assumptions underlying many private antitrust enforcement systems – that they provide effective compensation to injured consumers and that private enforcement complements rather than substitutes for public enforcement – I will now propose seven questions that should be posed of emerging private enforcement systems in order to evaluate their actual incidence and effects. The answers to these questions will likely vary over

jurisdictions and over time, and should provide a fruitful basis for comparative study and improvement in private enforcement.

17.3.1 *Who Receives Compensation Awards?*

As discussed above, the vast bulk of damages in the US system are going to competitors and direct purchasers. Even when damages payments are made to household consumers, only small fractions of the injured populations are receiving awards. To the extent that emerging private enforcement regimes are predicated on a compensatory rather than deterrence objective, the systems should be evaluated based on their effectiveness in achieving meaningful compensation to significant fractions of injured consumers.

In principle, this criterion can be assessed relatively simply: (i) what is the injured population; (ii) what is the amount of the alleged overcharge; (iii) what is the fraction of the injured population that actually obtains damages; and (iv) what is the percentage of the claimed overcharge recovered in damages. Obtaining data may be difficult, although studies such as Lande and Davis's in the United States show that it is not impossible.

17.3.2 *Are Private Cases Generally Congruent with Normative Theories of Antitrust Law?*

One of the abiding concerns with private antitrust litigation in the United States is that private litigants do not have optimal incentives when it comes to competition. Competitors, in particular, would often prefer a *less* competitive world, and hence may complain of behavior that harms them but benefits consumers. To address the problem of private antitrust cases that are incongruent with the purposes of the antitrust laws, the United States has developed an antitrust injury doctrine that requires symmetry between the plaintiff's theory of injury and the normative theories underlying the antitrust laws.³⁸

The antitrust injury requirement is not only important as a doctrinal tool to weed out misguided cases, but it also may serve as evidence of the proclivities of a private enforcement system. Evidence that many private cases articulate theories of harm that are essentially complaints about *more* competition may show that the system has not been optimally calibrated to incentivize the right kind of cases to be brought.

Similarly, the mix of classes of private plaintiff and kinds of theories they advance can provide valuable insight on the practical effects of expanded private enforcement. One such study was particularly influential in shaping attitudes toward private antitrust litigation in the United States, and ultimately may have had a significant effect on the subsequent development of the law. The Georgetown Private Antitrust

³⁸ See Daniel A. Crane, *Antitrust* (Wolters Kluwer, 2014), 169.

Litigation Project studied 2,350 private antitrust cases filed in federal court in five judicial districts between 1973 and 1983.³⁹ The survey results provided some interesting insights into what kinds of cases were being filed and who was filing them. First, complaints of vertical misconduct outnumbered horizontal complaints.⁴⁰ Second, most private cases were brought by businesses vertically related to the defendant, such as dealers, licensees, and franchisees or by competitors.⁴¹ Competitors brought 35.5 percent of all cases, dealers 27.3 percent, and suppliers 5.6 percent and franchisees and licensees cumulatively around 3 percent.⁴² Customers – the ostensible beneficiaries of antitrust law – played a comparatively minor role. Final or end customers brought 8.7 percent of cases, perhaps not surprisingly in light of the Supreme Court’s limitation of indirect purchaser standing.⁴³ But customer companies filed only 12.5 percent,⁴⁴ hence all customer complaints accounted for only about a fifth of antitrust filings.⁴⁵ One takeaway from the Georgetown Study was that the US private antitrust litigation system was incentivizing the wrong mix of cases to be filed and that corrections in both substantive and procedural rules were necessary to achieve a more desirable balance.

17.3.3 *Are There Indicia of Average Quality of Private Cases?*

Civil litigation case quality can be measured statistically. For example, the percentage of cases that survive pretrial screening motions such as motions to dismiss or for summary judgment may provide a rough measure of case quality,⁴⁶ giving an indication of whether the system creates incentives for meritorious cases to be brought or rather provides incentives for low-quality cases to be brought for reasons collateral to expected victory and recovery. There probably is not a uniform way of assessing case quality statistically across multiple jurisdictions, since different jurisdictions utilize differing procedural devices for case management and apple-to-apples comparisons may therefore be challenging. Nonetheless, jurisdiction-specific measures could be created to assess the percentage of cases that are allowed to advance to a determination on the merits or are instead screened out at some earlier stage.

³⁹ S. C. Salop and L. J. White, ‘Economic Analysis of Private Antitrust Litigation’ (1986) 74 *Georgia Law Review* 1001, 1001–2.

⁴⁰ *Ibid.*, at 2005.

⁴¹ *Ibid.*

⁴² *Ibid.*, at 1008, table 5.

⁴³ *Illinois Brick Co. v. Illinois*, 431 US 720 (1977).

⁴⁴ Salop and White, ‘Economic Analysis’, 1008, table 5.

⁴⁵ *Ibid.*, at 1002–3.

⁴⁶ See e.g. J. B. Gelbach, ‘Material Facts in the Debate Over Twombly and Iqbal’ (2016) 68 *Stanford Law Review* 369, 381–2.

Similar analysis can be conducted around case settlement. Pretrial settlements provide some indication of the parties' respective view of the merits. Cases that settle for nuisance value reflect low-merit filings, whereas cases that settle for more significant sums signal higher-value filings.

These sorts of case quality indicia do not demonstrate that filed cases are meritorious in a strong sense – i.e. compared to some ideal of what competition rules should be and what kinds of cases should be allowed to proceed. But they do provide some insight into the merit of cases as judged from a system's internal norms.

17.3.4 *What Happens to Public Agency Budgets?*

If private litigation truly is a complement rather than a substitute for public enforcement, then the growth of private litigation should not lead to a decrease in government funding for public enforcement. (Indeed, in economic terms, if public and private enforcement truly are complements, an increase in the demand for private enforcement should lead to an increase in the demand for public enforcement as well.) Thus far, there is no historical evidence in the United States that the growth in private litigation has led to a diminution in public enforcement funding, since the FTC and Antitrust Division have been funded at near-historic highs in recent years, even adjusted for GDP growth.⁴⁷

Still, with antitrust budgets quite limited and politically dependent in many newer antitrust enforcement jurisdictions, it would not be surprising to see a rise in private antitrust enforcement correspond with a decrease in public funding. Politicians eager to cut budgets may see little need for generosity to public agencies as to a public good supplied amply supplied by private markets. At any rate, as private enforcement grows throughout the world, it will be important to understand how, if at all, this affects legislatures' willingness to fund competition authorities.

17.3.5 *What Happens to Mix of Public Cases?*

The US experience suggests the following pattern: with a rise in private enforcement, the public agencies become more or less specialized in merger and anti-cartel enforcement, whereas private litigants take over monopolization enforcement and most other civil non-merger enforcement. Will this pattern be repeated elsewhere? Is this particular pattern a feature of US idiosyncrasies – criminal enforcement against cartels, two federal agencies, state attorney general enforcement, treble damages, fee-shifting, class actions, and the like – or does it have more general resonances?

Up until recently, these questions were largely unanswerable because there were few, if any, other natural experiments with the scale of private enforcement that has

⁴⁷ Crane, *Institutional Structure*.

occurred in the United States. The emergence of other significant private enforcement regimes will begin to provide answers. Further, the effects on the mix of public cases need not resemble the US pattern to be significant. It would be surprising if a large increase in private enforcement did not affect the distribution of public cases, which in turn could have important effects on the emerging shape of competition law.

17.3.6 *Does Public or Private Litigation Make the Law?*

Even if public enforcement proceeds unabated by an increase in private enforcement, the efficacy of public enforcement may be hindered if an increasing amount of antitrust law is made in the context of private litigation and then applied wholesale to public enforcement. The US experience contains telling instances in which antitrust principles created in private litigation have been applied to defeat government claims in subsequent cases. Predatory pricing provides a case in point. After many years in which the government brought no predatory pricing cases but a very pro-defendant legal reform was occurring in scores of private predatory pricing cases, the Justice Department finally brought a predatory pricing case against American Airlines, which it then lost under the new predatory pricing case law.⁴⁸ Something similar occurred as to “pay-for-delay” patent settlements, where the FTC was stuck for a decade with a very pro-defendant legal rule created in private litigation.

17.3.7 *Does Private Enforcement Weaken or Strengthen Enforcement Overall?*

Finally, as a catch-all question, one should inquire whether private enforcement weakens or strengthens antitrust enforcement overall. Is there evidence that the growth of private enforcement inserts new vigor into the competitive landscape by effectively supplementing public enforcement, leveraging private resources (money, knowledge, creativity, and perspective), and creating new constituencies and public support for competition law? Or, does private litigation interfere with public enforcement by disrupting cooperative relationships between regulators and regulated entities, stealing public enforcers’ power to set the enforcement agenda, and creating inconsistencies in the law or suboptimal norms by focusing litigation on the idiosyncratic positions and preferences of the individual litigants rather than the public interest more broadly.⁴⁹ While it may be impossible to answer these questions categorically, some effort should be made to understand and catalogue the subtle interplay between public and private enforcement as private enforcement systems grow.

⁴⁸ *US v. AMR Corp.*, 335 F.3d 1109 (10th Cir. 2003).

⁴⁹ M. C. Stephenson, ‘Public Regulation of Private Enforcement: The Case for Explaining the Role of Administrative Agencies’ (2005) 91 *Virginia Law Review* 93, 118–19.

17.4 CONCLUSION

Eleanor Fox's extraordinary career in antitrust should inspire everyone working in the field to pay careful attention to the facts on the ground, to learn how antitrust systems really work rather than just theorizing about them. In this chapter, I have attempted to suggest the kinds of questions that one might ask to understand the actual effects of expanded private antitrust enforcement around the globe. The list is certainly not exhaustive; it is to be hoped that comparative study will yield greater insights on private enforcement which, in turn, will prompt a richer set of questions.