

“Implications for Productivity Growth in the Economy”
Notes for Talk at Workshop on Private Enforcement of
Competition Law, sponsored by Office of Fair Trading

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I start with the assumption that it is not necessary to spend any time explaining why a vigorous, intelligently executed competition policy is an important element in the growth of productivity. Nor should it be necessary to spend any time arguing that productivity growth is the ultimate source of improvements in material well-being. I take those as given, and that my assignment is the more limited one of explaining why private enforcement of competition law is a key element in antitrust enforcement, with all the benefits associated with such enforcement.

The most obvious reason, and one that needs no lengthy explanation in a seminar organised by the OFT, now in the process of paring its case load to the matters most

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important to the successful dispatch of its legislated responsibilities, is that the resources of any enforcement agency are limited. An army of private enforcers, enlisting help from attorney-entrepreneurs free to accept cases on a contingency fee basis, freed of “loser pays” obligations, is an important supplement to those limited resources. In America, the number of private actions brought under the antitrust laws historically has exceeded by ten times the number brought by the government. True, many of these follow successful government-initiated actions, but it is also true, according to the estimate of one scholar, that some 80% of court decisions establishing important principles (not all of which I find agreeable, I might add) in the competition policy area have resulted from private actions.

A less obvious but equally important reason that private enforcement is so important is that it is free of direct political influence. In America, administrations come and go, some more given to a jaundiced view of the activities of dominant firms than others, witness the soft settlement worked out with Microsoft when the Bush administration took office and control of the Department of Justice, and its current disinclination to file any Section 2 cases. In Britain, governments come and go, and not all future governments

might be as wedded to the concept of political independence for regulators as is the current one.

The private sector suffers no such swings in attitude -- the businessman who believes he has been the subject of an anticompetitive act by a dominant competitor has equal access to the courts no matter who controls the White House, the Congress, or Parliament. And no matter who sits in the relevant chairs at the EU.

Like businesses, consumers, using the device of class actions, can provide a politically unaffected supplement (or complement) to the resources of competition enforcers. Moreover, since the private litigant brings his complaint to the courts if the enforcement agencies do not take up his cause, he operates in a forum not subject to the political power that incumbent dominant firms can often bring to bear on political and administrative officers.

This important contribution of private actions is especially important at this time, a period in which there is much musing among serious policymakers, including our Department of Justice and FTC, about the way competition policy should be applied to the practices of dominant firms, musing that is in danger of producing policy paralysis. It is the fashion in some circles to argue that in a world of rapid

technological change all “dominance” is transitory, and best left to the untender mercies of the market, rather than dealt with by lumbering enforcement agencies and the courts. In my view that is wrong, since long periods of transition from dominance to competition can result in serious harm to consumers, massive misallocations of resources, and barriers to entry and technological progress. Private parties operating in the real markets, unlike scholars whose experience is more limited, are unlikely to find this new theory persuasive, and to act on the reality they confront.

This is also a time in which serious students of competition policy are beginning to wonder whether the practices of dominant firms have not become so sophisticated that attempts to separate legitimate competitive instruments from anti-competitive behaviour are more or less futile. After all, potential monopolists have come a long way since the days when John D. Rockefeller thought it perfectly proper to burn down his rivals’ refineries -- if legend is to be believed -- or Alcoa thought it a good idea to buy up all the available hydroelectric sites to deny potential competitors access to needed electrical energy.

Again, those policy makers who worry that increased sophistication of dominant firms leaves them powerless to

sort out anticompetitive from properly competitive acts worry too much. But worry they do, which makes private enforcement more important than ever. The administrators of our antitrust laws might feel cowed by the complexity of these issues, might not feel competent to tell what sort of pricing practice is exclusionary or predatory. But the victims most certainly can. And the private enforcement route gives them an opportunity to state their case, and the courts an opportunity to apply their judgment to the facts of the case, against a background of traditional market share, profit-sustainability, entry history and other important “facts on the ground”.

Finally, we are in a period in which the glamour of “high tech” is blinding the eyes of some enforcement agencies, who are being asked to believe that sauce for the old economy goose is not sauce for the new economy gander. Not so. Indeed, since technical change is more and more important to productivity growth, it is important that powerful incumbents in those industries not be allowed to engage in practices aimed at slowing incursions of technically superior challengers. And who better to argue that to be the case than a competitor, injured by illegal anticompetitive practices, conversant in the technical jargon, on the sharp edge of

customer relations, well informed of the details and consequences of the dominant firm's practices.

In short, now more than ever -- in this age in which enforcement agencies suffer from constrained resources, in this age in which enforcement agencies might find it daunting to come to grips with the complexities of markets in high-tech industries, in this age in which dominant firms are increasingly sophisticated in the anticompetitive weapons they choose -- it is important to preserve and enhance the role of private enforcement in giving added strength to competition policy.

No appraisal of the importance of private enforcement can be complete without three further observations.

First, private enforcement can only be effective if the successful litigant is awarded some multiple of the damages inflicted upon him if these cases are to act as a deterrent. After all, if the aggressor, found guilty of anticompetitive behaviour, merely has to refund his ill-gotten gains, he has nothing to lose by engaging in such acts since the probability of being forced to make good is less than one. Besides, the opportunity to win some multiple of the damages inflicted -- in the United States three is the rather arbitrarily selected number that we use -- gives the plaintiff the means of

compensating an attorney who might be at risk of no fee at all if the case is lost. As the great scholar Phillip Areeda put it, provision for private actions “enlist plaintiffs in the work of detecting, punishing, and thereby deterring wrongdoing.”¹

Second, private enforcement is necessary if venture capitalists and other investors are not to be completely cowed by dominant firms. The first stop on the road to market entry is the venture capitalist, the second the capital markets. Investors in both know that any startup, or upstart, can be squashed like a bug by a dominant incumbent unless that dominant incumbent is constrained by fears of subsequent, possibly ruinous private actions, either following a government case, or brought on its own by the injured entrant. So private enforcement plays a key role in confining the response of a threatened incumbent to practices based purely on his efficiency, rather than on his muscle.

Third, man does live by bread alone, and society is more than a machine to grind out more and more products at better and better prices, laudable as that objective is. During the debate on the Sherman Act, its sponsor referred to the situation in which “a humble man starts a business in

¹ Phillip Areeda, “Antitrust Violations Without Damage Recoveries,” 89 Harvard Law Review 1127 (1976).

opposition to them [the trusts], solitary and alone” and is forced out of business by a monopolist’s predatory acts:

Why, sir, I know of one case where a man
In good circumstances, a thrifty, strong, healthy
American was ... met in just the way I have
mentioned. If he had the right to sue this
company in the courts of the United States
under this section² he would have been able
to indemnify himself for the losses he suffered.

Congress was well aware of the imbalance of power between powerful incumbents and their challengers. “This section opens the door of justice to every man, whenever he may be injured by those who violate the antitrust laws...”, noted Congressman Webb of New York in a 1914 debate on the antitrust laws.

So we cannot ignore the fact that underlying the policy of encouraging private enforcement lies a deep sense that equity demands just such a policy, that the preservation of open markets creates upward social and economic mobility and diffuses economic and hence political power, keys not only to the maintenance of competition, and to continued increases in productivity and material well-being, but to the maintenance of an economic system that is fair, and is seen to be fair.

² Section 7 of the original Sherman Act, now Section 4 of the Clayton Act, created a private right of action not present under the common law.

Thank you for your attention.