

## Editorial

# The Proposed Damages Legislation: Don't Believe the Critics

Robert H. Lande\*

The Commission's proposed Directive concerning private enforcement of Competition Law certainly would be beneficial for victims of anticompetitive conduct because it would allow some victims to obtain a certain degree of compensation. It does not, however, go far enough. Because it does not allow opt-out class action or contingent fee cases it will continue to leave most victims uncompensated.

Some critics claim the proposed Directive will move Europe closer towards a US-style of private antitrust enforcement that they characterise in almost apocalyptic terms. An extremely negative view of US private enforcement is indeed the accepted wisdom in the international competition community. Proponents of expanded private rights in Europe are forced to go to great lengths to demonstrate they are not proposing a US-style system. Nevertheless, anyone interested in learning lessons from the US experience should take note that these critics have never offered reliable proof of its alleged defects. If you examine their assertions carefully you will see that their 'evidence' consists only of anecdotes (which often are self-serving), hypotheticals, and opinions. Critics of private enforcement tend to make two (largely inconsistent) claims: that it does too little—it fails to provide meaningful recovery to victims—and that it does too much—it forces defendants to settle even groundless claims. Neither assertion has empirical support.

As to compensation, the best data show that private antitrust enforcement in the United States has produced tremendous benefits for victims of anticompetitive behavior. Professor Joshua Davis and I recently completed a study of 60 large private US antitrust cases demonstrating that victims recovered more than \$33 billion dollars. Only an overall average of 19 per cent of recoveries went for attorneys fees and claims administration expenses. At least \$6–8 billion was recovered from non-US companies, including more than \$3 billion in cases against members of the vitamins cartels. These totals do not include recoveries of products, discounts, coupons, or

the value of injunctive relief or legal precedent. Thus the \$33 billion seriously understates the true benefits of these cases. And, of course, we studied only 60 of the many hundreds of private cases filed in recent years. See Joshua P. Davis & Robert H. Lande, 'Defying Conventional Wisdom: The Case for Private Antitrust Enforcement' (2013) 48 Georgia Law Review 1, available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2217051](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2217051)>.

Critics also claim that in the USA plaintiffs often receive huge sums in meritless cases and that private antitrust actions often amount to 'legalized blackmail'. Since almost every private recovery is a settlement one fairly might ask, for example, whether the 60 cases Professor Davis and I studied involved anticompetitive conduct. Although opinions about specific cases naturally will vary, it is significant that in 17 of these cases there also was a criminal penalty, in 17 the government obtained civil relief, in 15 defendants lost at trial in the same or in a related case, in 14 plaintiffs survived or prevailed at summary judgment or judgment as a matter of law, etc. Only seven of 60 cases didn't have at least one of these indicia of validation (and none contained evidence of a *lack* of merit; the seven cases settled too early for a substantive evaluation of their merits).

While none of this is proof these cases involved anticompetitive conduct, what evidence do critics provide to show private actions lack merit? Essentially . . . nothing. Only anecdotes, hypotheticals, and opinions. No studies, statistics, or reliable evidence. It is ironic that the conventional wisdom about the lack of merit of US private antitrust enforcement itself lacks merit.

It is true that today European victims can sometimes recover in suits filed under the laws of EU member states. Would the proposed Directive therefore lead to over-compensation of victims? Very unlikely. The US experience strongly suggests overcompensation will not be a problem. In fact, if the proposed Directive is

\* BA Northwestern University, MPP and JD Harvard University. Venable Professor of Law at the University of Baltimore School of Law and a

Director of the American Antitrust Institute. The author can be reached at [rlande@ubalt.edu](mailto:rlande@ubalt.edu).

enacted, there are at least three important reasons why most victims will continue to be uncompensated.

First, most large private US antitrust recoveries are opt-out class action cases, including 47 of the 60 cases Professor Davis and I studied. In terms of the money involved, two-thirds of the \$33 billion was recovered in class actions. By contrast, the EU allows only opt-in class action cases. These typically recover significantly lower amounts, and do this for only a tiny percentage of victims. Although some business victims will be able to sue successfully under the proposed Directive, the vast majority of consumer victims and small-business victims will continue to be uncompensated.

Second, most private US recoveries come in contingent fee cases. These are rarely if ever permitted in Europe even though without them consumers and small businesses seldom will be able to bring competition cases.

Third, although US antitrust law theoretically awards 'treble damages', private cases brought in the United States rarely compensate most victims fully. Almost every US private case settles, and one would expect defendants to settle for significantly less than their maximum possible exposure. Indeed, for a variety of complex reasons even settlements for as much as single damages are the exceptions.

Professor John Connor and I are studying a group of 66 cartel cases where a neutral scholar calculated the cartel's overcharges in the US market. We compared these results to the damages secured in private antitrust cases filed against these cartels in the United States. Despite the entitlement to treble damages, our tentative findings are that the victims of only 14 cartels received more than 100 per cent of their damages. The rest—52 cases—yielded less than actual damages. In fact, half settled for less than 50 per cent of actual damages, and the median of the settlements was less than 50 per cent of single damages. (This analysis is subject to lots of caveats and leaves out the value of injunctions, precedent, products, coupons, and discounts.)

By contrast, the proposed Directive provides for single damages, defined to include pre-judgment interest

and lost profit. Because the US 'treble damages' remedy usually yields settlements of less than 50 per cent of actual damages, if this ratio would apply to European private cases under the proposed Directive, victims would be expected to recover on average significantly less than 50 per cent of actual damages. Even if some victims also recover under the laws of individual European nations, their total compensation is likely to be far less than the actual harm they have suffered.

For these reasons the proposed Directive is unlikely to come close to achieving its goal of fully compensating European victims of anticompetitive behavior. Nevertheless, it would be an important move in the right direction.

If the proposed Directive is enacted it should be assessed after it has been in effect for three to five years. The US experience suggests that this examination will produce several important findings: most of the private cases will be found to be meritorious; despite possible suits under national laws as well as EU law, most victims will still be uncompensated or undercompensated; and EU victims will recover a considerable number of euro from non-EU violators.

After this retrospective is complete, the Commission should consider ways to further improve its private enforcement system. Perhaps at that time the EU will be able to objectively evaluate whether to allow opt-out class action cases and/or contingent fees. When the Commission does re-evaluate these issues it should of course do so only on the basis of objective, reliable empirical information. Not on the basis of rumour, unsupported conventional wisdom, opinions, hypotheticals, or anecdotes.

In the meantime, individual member states are free to do more than the minimum set out by the proposed Directive. This short Op-Ed suggests only a few of the ways they could enact laws that are extremely likely to help victims of anticompetitive behaviour.

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