

Damages actions: the relationship with, and effects on, enforcement

Prepared for RPI

Robin Noble, Managing Consultant



September 15th 2008

Overview

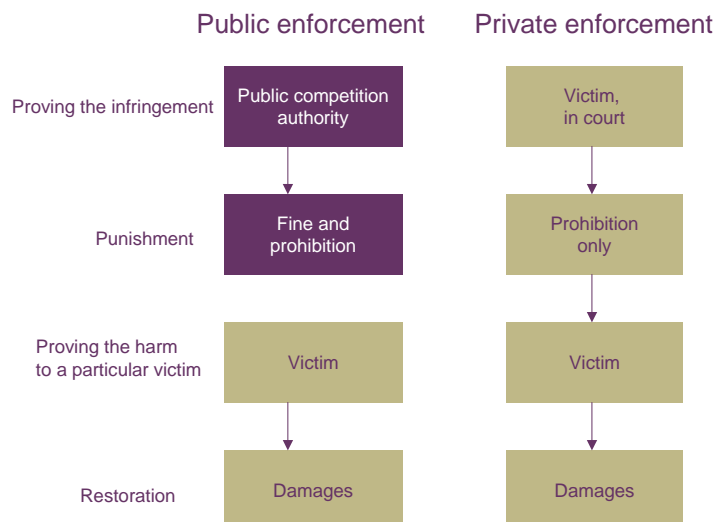
- the balance between optimal public and private enforcement
 - the role of fines, private enforcement and damages
- policy context
 - European Commission proposed White Paper on competition law based damages—April 2008
 - OFT recommendations on private actions—Nov 2007
- some common misperceptions

Misperception 1

- the claim: private actions can replace much public enforcement when it concerns business-to-business disputes
- the reasoning: companies are incentivised by the ability to claim damages
- policy implication: enforcement priorities should avoid business-to-business infringements, instead focusing on business-to-consumer

3

September 15th 2008



4

September 15th 2008

Externalities from private actions

- divergence between social and private costs
 - plaintiffs do not take into account the costs they induce others to incur
- divergence between social and private benefits
 - plaintiffs do not internalise the social benefit of their suit due to increased deterrence and detection

5

September 15th 2008

Misperception 1 revisited

- the claim: private actions can replace much public enforcement when it concerns business-to-business disputes
- a substitute?
 - in some cases, yes
 - however, big differences in incentives—both in bringing actions and deterrence
 - security guards vs police?

6

September 15th 2008

Misperception 2

- the claim: that more follow-on damages actions imply more deterrence and hence more efficiency
- the reasoning: cartels and other infringements are more costly to be in, so companies are less likely to engage in them
- policy implication: making follow-on damages actions easier generates more economic efficiency

7

September 15th 2008

An economist's look into a perpetrator's mind

the economics of being the 'bad guy': is the cartel profitable?



8

September 15th 2008

A real-world example

Graphite electrodes (EU)

- additional profit estimated at up to €1 bn
- fines: €219
- assume a 20% detection probability and 'correct' guess of fine by cartelists

then:

- expected fine approx. €44m
- expected profit around €950m

Sources: European Commission (2001), 'Commission fines eight companies in graphite electrode cartel', press release; OECD (2002), 'Affected commerce, estimated harm and sanctions applied', *Fighting Hard-core Cartels: Harm, Effective Sanctions and Leniency Programmes*, p. 96.

9

September 15th 2008

Misperception 2 revisited

- the claim: that more follow-on damages actions imply more deterrence and hence more efficiency
- efficiency benefit?
 - yes, but potentially simpler and more effective to increase fine levels
 - eg, 2006 changes to European Commission fining guidelines
- equity benefit?
 - yes, a clear benefit here

10

September 15th 2008

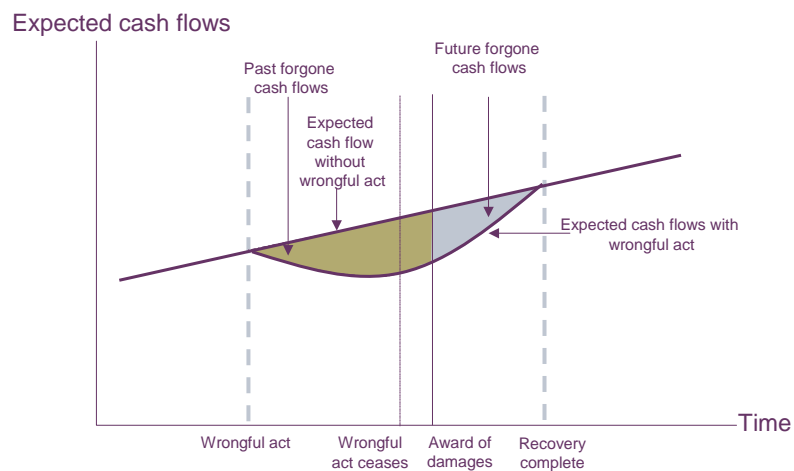
Misperception 3

- the claim: that damages actions based on competition law are more complex and therefore more difficult than other types of claim
- the reasoning: there are so few claims
- the policy implication: put in place legal presumptions to simplify the claim procedure

11

September 15th 2008

Comparing the factual against the counterfactual



12

September 15th 2008

Misperception 3 revisited

- the claim: that damages actions based on competition law are more complex and therefore more difficult than other types of claim
- more complex?
 - not obviously the case—the counterfactual needs estimating in all damages cases
- more difficult counterfactual?
 - not obviously the case—eg, pass-through issues matter even outside competition law cases

13

September 15th 2008

Misperception 4

- the claim: that the policy reforms surrounding damages will lead to a culture of excessive litigation
- the reasoning: the US example is not one to follow
- the policy implication: policy measures which make claiming damages easier should be viewed with suspicion

14

September 15th 2008

Funding a litigation

costs lie where they fall

vs

loser pays

- role of insurance and third-party funders
- leads to a great deal of diligence before an action is brought

15

September 15th 2008

Misperception 4 revisited

- the claim: that the policy reforms surrounding damages will lead to a culture of excessive litigation
- excessive?
 - suing over trivial matters?—funding issues limit this
 - suing when there is no real harm?—again, funding issues limit this
 - wrong parties suing?—pass-on defence limits this

16

September 15th 2008

Some final thoughts

- damages based on competition law are having many effects
 - a risk that some are being driven by misperceptions
- some are small changes
 - eg, European Commission cartel fine press releases
- others are bigger
 - changes to legal structures—eg, White Paper
 - changes to argument within cases—eg, parties keener to rebut effects-based arguments

www.oxera.com

Contact:

Robin Noble
+44 (0) 1865 253 037
robin.noble@oxera.com



Although every effort has been made to ensure the accuracy of the material and the integrity of the analysis presented herein, the Company accepts no liability for any actions taken on the basis of its contents.

Oxera Consulting Ltd is not licensed in the conduct of investment business as defined in the Financial Services and Markets Act 2000. Anyone considering a specific investment should consult their own broker or other investment adviser. The Company accepts no liability for any specific investment decision, which must be at the investor's own risk.

© Oxera, 2008. All rights reserved. Except for the quotation of short passages for the purposes of criticism or review, no part may be used or reproduced without permission.