The role of contribution among defendants in private antitrust litigation

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ABSTRACT

The incidence of private actions for damages in antitrust cases has varied markedly across jurisdictions. The procedural rules surrounding private litigation may account for some of these differences. This paper explores the effect of rules concerning contribution among multiple defendants who are jointly and severally liable for a cartel infringement. The no-contribution rule is shown to lead to higher levels of aggregate damages and more information revelation to the private plaintiff. However the no-contribution rule also has the potential to neutralise any public leniency programme, thereby possibly reducing the number of cartels detected.

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1. Introduction

The last few years have seen a strong push by the European Commission for an increased level of private enforcement of competition law.[1] This has generated renewed interest in understanding how private enforcement works. With hard core cartels singled out by the majority of enforcement agencies as the "worst" form of infringement, it is of particular interest to understand the potential role of private enforcement in these cases. Anticompetitive agreements to collude on prices or quantities involve multiple defendants, all of whom have engaged in a violation of competition law. To ease the burden on the private plaintiffs, such co-defendants have typically been made jointly and severally liable, ensuring that the plaintiff needs only sue one of the defendants. However joint and several liability raises the question of whether the defendant, who has been ordered to pay the damages caused collectively by all the defendants, can ask for contributions from the co-defendants. The answer to this question appears to differ between the US and the majority of EU Member States. In the former jurisdiction, the rule is very explicitly one of no contribution[2] so that a defendant who is taken to court faces the whole liability for the losses incurred by the plaintiff, minus any amounts already settled, and cannot recover any of this from co-defendants. In the latter jurisdictions there is scope for at least some level of contribution[3] so that the defendant who is found liable in court can, if it is faced with a disproportionate liability, demand contributions from co-defendants.

The aim of this paper is to provide a better understanding of the impact of contribution rules when defendants are jointly and severally liable by demonstrating how a "no-contribution" rule has the effect of introducing a type of leniency programme for co-defendants in the area of private enforcement, leading to more

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[1] This is evidenced by the recently published White Paper (White Paper on Damages actions for breach of the EC antitrust rules {COM(2008) 165 final}). The White Paper is accompanied by a Commission Staff Working Paper {SEC(2008) 404}, an Impact Assessment {SEC(2008) 405} and a Report: "Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios". All documents are available at the European Commission Web site at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html. The new Commissioner Almunia is equally committed to making private enforcement work, see for example his May 12th, 2010 speech "Competition and consumers: the future of EU competition policy", {SPEECH/10/233} page 6. The issue has also been discussed at EU member state level. For example the UK Office of Fair Trading published their own discussion paper, OFT (2007).

[2] It may be possible for the defendants to create a contribution rule contractually, see Leslie (2009). This possibility is discussed further in the conclusion.

[3] See e.g. the 2007 special report of the Global Competition Review on "Private Antitrust Litigation". The EU Commission Staff Working Paper {SEC(2008) 404}, paragraph 281, also makes clear that contribution is available. Dunleavy (2009) provides an extensive discussion of the availability of contribution in English law and confirms its availability.

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information being revealed. This information revelation effect is in addition to the already identified ability of the no-contribution rule to increase the expected total settlement. This provides two avenues through which the no-contribution rule delivers greater deterrence of cartel behaviour, better information about the violation and increased liability.

Most jurisdictions with a competition law also have a public leniency programme aimed at undermining cartels. Although the details of how these programmes work differ across jurisdictions, they all involve a reduction in the penalty imposed by the competition authority on a firm in return for information and in some cases an admission of guilt. These public leniency programmes have become a corner-stone in the fight against hard core cartels. With two parallel leniency programmes, one explicitly designed for the purpose by the competition authority and another arising as a side-effect of a rule about liability, comes the question of how they may interact with each other. In particular we consider whether there are any negative effects on the public leniency programmes arising from this aspect of private enforcement. Such concern about private enforcement undermining the public leniency programme are not new. The US Antitrust Criminal Penalty Enhancement and Reform Act of 2004 removed joint and several liability from a firm granted immunity under the leniency programme and in addition reduced the private liability of that firm to single damages.

The literature on contribution in antitrust is relatively sparse, with early contributions by Easterbrook, Landes, and Posner (1980) and Polinsky and Shavell (1981) who offer a theoretical analysis of the merits of contribution and claims reduction.[4] Both papers put considerable emphasis on risk-aversion, something which is not considered in our paper. Their models have subsequently been generalised. Cavanagh (1987) cites the corrugated container litigation in the US as an example of the ability of the no-contribution rule to increase the recovery by the plaintiff.[5] He argues that the no-contribution rule is unfair on firms with only a marginal participation in a price-fixing conspiracy: "these companies, precisely because they are small players with marginal culpability, are rarely if ever offered settlement terms comparable to those provided to the ringleaders" Cavanagh (1987, p. 1920). Cirace (1980) focuses on how contribution rules affect the incentives of defendants to settle early or late, showing how no-contribution leads to the former and contribution to the latter. Stanley (1994) assumes asymmetric information with the defendants having better information than the plaintiff. He assumes that the settlement bargaining between the plaintiff and all of the defendants occurs simultaneously and that any private information revealed in a settlement increases the probability that the plaintiff prevails in court. Stanley (1994) is the only paper which clearly identifies the scope of early settlements to lead to information revelation, though the focus of the analysis is on the effect of the different contribution rules on deterrence and the likelihood of settlements rather than information revelation. However, partly due to the assumptions made, the full effect of information revelation is not explored. Finally, the recent paper

by Goetz, Higgins, and McChesney (2006) summarises and builds on most of the existing literature in the US regarding contribution. Unlike Cirace (1980) and Stanley (1994), they assume sequential settlement. However, as they do not ensure that the equilibria they find are subgame perfect, there are some doubts about the predictive power of their analysis.

The focus of this paper is on an industry with N firms who may decide to form a cartel, depending on the substantive law and the procedural rules. Where a cartel is uncovered, members are assumed to be jointly and severally liable and we contrast the two cases of no-contribution and contribution.[6] We will assume that those harmed by the cartel are sufficiently alike that any private case they would pursue can be consolidated into a single class action. While a class action is not generally available in the EU, many of the jurisdictions have other means for claims to be consolidated.[7] We assume sequential bargaining, which we feel is closer to reality, and that private information enhances the level of damages awarded.

The remainder of the paper is organised as follows. Section 2 provides an overview of the basic model of joint and several liability with and without contribution and demonstrates that the no-contribution rule leads to a larger overall settlement for the plaintiff. Section 3 extends this to the case where defendants have private information about the case. We consider the situation where revelation of this private information to the plaintiff will increase the total level of damages which can be established in court. The main insight of this section is that the no-contribution rule gives an incentive to reveal information in return for a reduced level of damages, in effect introducing a private leniency programme. The section also highlights how a firm applying for public immunity may be at a disadvantage in the private settlement game. Up to that point we simply look at the aftermath of an infringement with multiple defendants having been detected. The classic case which fits this scenario is collusion. In sections four and five we take the analysis further by focusing on collusion and considering first (in Section 4) how a no-contribution rule for private damages interacts with the stability of a collusive arrangement and secondly (in Section 5) the interplay between a public leniency programme and the private leniency programme arising from the no-contribution rule. Section 6 concludes. All proofs are collected in Appendix A.

2. Sequential settlement with N defendants and one plaintiff.

Let there be a single plaintiff and N defendants, who if found guilty, are jointly and severally liable for a breach of antitrust laws. Let D be the total amount of damages which would be awarded at trial and p be the probability of a court finding for the plaintiff which would impose the level of damages D minus any contributions arising from pre-existing settlements. We will assume that both D and p are the same for all defendants[8] and that D and p are unaffected by the number of settlements and the amount settled

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[4] There is a more substantial literature on joint and several liability. Part of this literature is concerned with the incentives for cases to settle and generally employs a model in which a single plaintiff makes simultaneous take-it-or-leave-it offers to several defendants, e.g. Kornhauser and Revesz (1988–89), Klerman (1996) and Feess and Muehlheusser (2000). These papers focus on set-off rules and consider more general cases where some of the harm is caused by non-negligent actions, something which is not relevant in the antitrust setting. Because the plaintiff is assumed to make the offer, there is no scope for information being revealed. Kim and Song (2007) focus on information sharing between defendants, which the plaintiff may want to undermine, rather than information sharing between the plaintiff and some of the defendants.

[5] As Stanley (1994, fn 100) points out, it also provides an example of information revelation in return for a lower settlement. The court in that case noted with approval this trade-off of a smaller settlement in return for valuable information.

[6] The literature has also considered a third model, in which there is no contribution, but there is set-off. This can be either the amount already settled for, or the liability of those who have settled, whichever is greater. This possible model was also discussed by the Antitrust Modernization Committee (AMC) in the US. This third model is not very interesting because no defendant can ever face more liability that the harm it has itself caused. It can ensure this simply by waiting for others to settle. In this case the recovery can for that reason alone not exceed the expected liability of the defendants as a whole.

[7] The special review by Global Competition Review on private antitrust litigation indicates that there is currently a debate about introducing some form of class action in many of the EU member states.

[8] Thus neither the probability of winning the case nor the amount of damages which can be established depends on the identity of the defendant.