

Irwin Stelzer's Response

I have lost track of the person in charge of comments on the April 2007 discussion paper on private actions, and would appreciate it if you would forward this brief comment.

This is an excellent paper, laying out the costs and benefits of alternative policies, while making with great clarity the most important point: private actions can usefully supplement enforcement by public authorities.

My only quibble is with the emphasis on representative bodies as key actors. It is precisely because "the representative body does not have a pecuniary interest in the outcome" (4.35) that I can't help wondering what will motivate it. I suppose that the desire to enlarge the "body" will drive the filing of actions, but I don't see how this solves the principal-agent problem, since the interest of the body might well diverge from those on whose behalf it will be acting. I would rather trust the greed of class actions lawyers, constrained by courts that limit their share to some reasonable relationship with the risks and costs borne. Indeed, it might be possible for the courts to supervise a bidding process in which law firms bid to be lead counsel -- with the lowest competent bidder to be chosen by the courts. That allows those with time and costs at risk to appraise the quality of the complaint, and bid accordingly.

I worry, too, about inviting ministers back into competition enforcement. If the Secretary of State is to designate bodies to represent victims of cartel and other anticompetitive behaviour (4.14), I shudder to think how he/she will make his/her selection -- and decide on whether to discharge or re-designate chosen bodies. Finally, I would hope that the competition authorities would have the option of filing amicus briefs if they thought that an efficient way to help private parties make anticompetitive behaviour increasingly costly.

I emphasise that these are quibbles. You are on to something, and fighting a culture that is not viscerally supportive of the direction in which you are trying to move policy. I do hope you prevail.

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