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Civil actions – Europe

Private antitrust enforcement of EC competition rules: recent developments

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In the words of recital 7 to Regulation 1/2003, "National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the member states. They should therefore be allowed to apply articles 81 and 82 of the Treaty in full."

The importance of private enforcement – litigation in which private parties advance independent civil claims or counterclaims based on EC competition law provisions – for the full effectiveness of the competition rules of the Treaty was also stressed by the Court of Justice in *Courage v Crehan:*

> the existence of [...] a right [to claim damages for infringement of article 81 EC] strengthens the work of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community *(para 27)*.

The debate has revived recently after the publication of a report for the European Commission on the conditions of claims for damages in case of infringement of EC competition rules (the "EU Report on Private Enforcement").

This article will review the framework put in place by the modernisation package to achieve the policy goal of enhancing private enforcement of competition rules in the European Union. It will conclude that the developments introduced by the modernisation package may not be adequate in practice to make any substantial change to the situation existing before 1 May 2003, when Regulation 1/2003 and the other decentralisation measures came into force.

In the absence of a significant harmonisation effort at EU level, national courts will continue to play only a limited role in the enforcement of EC competition rules. The national procedural and substantive frameworks provide little incentive for the resolution of antitrust disputes before national courts rather than before administrative agencies.

The study on the conditions of private claims for damages

The current status of private enforcement in Europe is not encouraging at all. On the contrary, the EU Report on Private Enforcement concluded that

- private litigation in antitrust cases is currently in a state of "total underdevelopment"
- from a comparison of the 25 national systems, a situation of "astonishing diversity" emerges

The study revealed that, since the institution of the European Economic Community, only about 60 actions for damages have been decided by national courts. Of these, 12 were on the basis of EC law, around 32 on the basis of national law, and 6 on both. Only 24 have so far resulted in a damages award: 8 on the basis of EC law, 14 on national law, and 4 on both. This disappointing picture is even more striking if compared with the US situation where – according to an often-quoted figure – private actions for damages account for 90% of competition enforcement.

An extensive inventory of obstacles faced by private companies seeking to bring antitrust actions before national courts is listed. They include uncertainty as to the legal basis for bringing such actions, the identification of the competent courts, the standing of consumers and associations to bring such actions, the absence of collective claims in most jurisdictions, the high burden of proof for plaintiffs, the limitations on forms of evidence, the uncertainty as to the methodology for calculating the damages suffered, the high cost of private litigation, and its excessive duration.

Overall, the picture that emerges from the study is one of great confusion for plaintiffs. Albeit for mainly psychological reasons, this makes it most unlikely that private antitrust litigation will become a real alternative to public enforcement in the near future. The study puts forward some proposals for facilitating private enforcement. As will be suggested in this article, any facilitating measure will call for harmonisation at European level to be effective.

Advantages of private enforcement as compared with public enforcement

An increase in private enforcement from today's level would certainly be a welcome event. For plaintiffs, private enforcement has many advantages that are not generally available when the same claim is brought before the Commission or a national authority.

The differences offer the complainant the opportunity to balance the advantages and disadvantages of private and public enforcement and choose the most effective action in the circumstances of the particular case.

In its notice on cooperation within the European Competition Network, the Commission does not allocate cases

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between private and public enforcement, only between public enforcers. Rather, it simply lists the main advantages of private enforcement *vis-à-vis* public enforcement, leaving the decision of whether to pursue a civil case before the court to the private parties *(para 16 of the notice, OJ 2004 L101/65)*.

How to raise private enforcement to an adequate level and so achieve the policy objective set by the modernisation package is the challenge facing the European Commission in the coming years. The main advantages of private enforcement lie in the powers of the national court:

- the award of damages for loss suffered as a result of an infringement of article 81 or 82
- adjudication of claims for payment or contractual obligations arising from an agreement that is being examined under article 81
- application of the civil remedy of nullity under article 81(2) in contractual relationships
- assessment, in the light of the applicable national law, of the scope and consequences of that nullity, having regard to all the other matters covered by the agreement
- being better placed than the Commission to adopt interim measures
- combination of a claim under EC competition law with claims under national law
- awarding legal costs to the successful applicant – normally possible, and never possible in an administrative procedure before the Commission

The modernisation process has certainly introduced important modifications to the enforcement of articles 81 and 82 EC, but more will have to be done before private enforcement will be considered as a real alternative to public enforcement.

It is not only a question of eliminating psychological barriers, which certainly have a role in the limited use of private enforcement in Europe, but also of providing private parties with economic incentives to act through the court rather than through administrative agencies. Such incentives are now lacking in the European system.

The main changes introduced by Regulation 1/2003

The modernisation package – *in primis* Regulation 1/2003 on antitrust enforcement – has introduced several changes in the way that the Treaty rules on competition are applied throughout the EU. Three elements of the reform are particularly relevant in the context of private enforcement, promising to have a significant effect on the application of EC competition rules by national courts.

A. Direct applicability of article 81(3)

Regulation 1/2003 established the direct applicability of article 81(3) EC and abolished the notification system for agreements and concerted practices, thereby removing the European Commission's former monopoly over exemption. Both these aspects of the reform will generate an increasingly decentralised application of the EC competition rules. Article 81(3) can now be invoked in all proceedings, including those before national courts.

By extending the power to apply article 81(3) to national courts, Regulation 1/2003 makes it impossible for companies to delay national court proceedings by filing a notification with the Commission. One obstacle to private litigation that existed under Regulation 17 has therefore been eliminated.

B. Convergent application of EC and national competition rules

Regulation 1/2003 requires articles 81 and 82 EC to be applied in all proceedings that may affect intra-Community trade, at least in parallel with national competition rules. This may have significant practical effects.

This provision, which was not present in the Commission's original white paper but introduced on the suggestion of the Parliament and the Economic and Social Committee, will play a central role in the creation and safeguarding of a level playing field for the application of EC competition law in an enlarged Europe. Claims based on EC law will therefore be treated similarly before national courts and before the Commission or national competition authorities ("NCAs").

C. A new framework for judicial cooperation

Regulation 1/2003 introduced a new framework for cooperation between the European Commission and national courts and NCAs, and between NCAs, when applying EC competition rules.

The duty of the national courts and the Commission to cooperate could already be construed from other provisions of the EC Treaty. However, Regulation 1/2003 establishes a clearer legal framework that allows national judges to ask formally for information or opinions from the Commission, and enables the Commission and the NCAs to intervene as *amici curiae* in proceedings in the national courts, with the right to submit written and oral observations.

These three aspects of the reform are unambiguously related: if national courts are allowed to apply articles 81 and 82 of the Treaty in full, there is a clear need to ensure a uniform and coherent application of the competition rules throughout the 25 member states. In this respect, a duty to apply the Treaty provisions, added to the cooperation procedures set up by Regulation 1/2003, grants the Commission a wide margin within which to intervene in national procedures. Thus, it provides greater guarantees for uniform application of EC competition rules and also for legal certainty.

Need for further incentives to private enforcement

The question of whether the reform will generate the expected results in terms of an increase in private enforcement of the EC competition rules in the member states remains largely open. There is no doubt that allowing national courts to apply EC competition rules in their entirety makes judicial review more complete by eliminating the incentive to delay national litigation through the notification procedure. On the other hand, the reform does not offset the main causes for limited private recourse to the courts in antitrust matters.

For instance, in 2001, speakers at the workshop on the effective private enforcement of EC antitrust law that was held at the European University Institute identified the following as the main reasons for limited use of private litigation in the antitrust field:

- the length of judicial procedures (as opposed to faster administrative procedures)
- the legal costs of protracted civil litigation
- the lack of sufficient pre-trial discovery
- the inadequate *ex officio* investigative powers of national courts (particularly of civil courts governed by the adversarial system)
- the lack of specific expertise in the competition field

Most of these factors have been confirmed as real obstacles to the development of private litigation by the EU Report.

The modernisation reform only deals to a very limited extent with these constraints on private enforcement. While the legislative changes introduced by Regulation 1/2003 should in theory contribute to the development of a system of effective private enforcement, the reform does not introduce any economic incentive like that present in jurisdictions where private enforcement is widespread, particularly the US – treble damages, other forms of punitive damages, contingency fees, class actions, pre-trial discovery procedures, etc.

The relevant factors continue to be governed largely by national law. Existing differences between legal systems do not help the process of establishing private enforcement as a credible alternative to public enforcement. On the contrary, they create confusion and uncertainty on the rights granted to private parties and create opportunities for forum shopping. These uncertainties can (and should) be eliminated by harmonisation measures taken at European level.

The main areas that would benefit from further developments are the following.

A. The remedies available

The EC reform does not answer all the questions on the remedies available to private parties. In particular, it does not contribute to any clarification of the remedies that are in practice available to the plaintiff, other than the nullity expressly provided for in article 81(2) EC and the recovery of damages. For example, can a national court order specific performance, such as access to a network?

Moreover, while it is now settled in the European Court's case law that private parties are entitled to recover damages caused by an infringement of the competition rules, it is less clear what the legal basis for such action is (i.e. national or EC law), what kind of damages are recoverable (i.e. compensatory only or punitive and exemplary damages also), and how to calculate damages in practice – what the notion of loss sustained as a result of the breach is and how it is to be proved.

While most of these questions are today dealt with under national law, the ECJ in *Courage v Crehan* has made it clear that those remedies in private actions have their legal basis in EC law. This opens the way to adoption of further harmonisation measures at EU level that would preserve the coherence of the whole system of private enforcement throughout Europe.

B. Locus standi

National civil and procedural laws deal with *locus standi* in private antitrust litigation in different ways. The modernisation reform fails to provide a uniform framework throughout the EU, leaving room for differentiation that may ultimately work as an obstacle to the development of private enforcement.

For instance, while some countries allow collective claims by consumer associations, other countries have strict legal requirements according to which plaintiffs have to show a direct and personal interest in the matter at stake – a test that could hardly be met by a consumer association.

Some countries allow plaintiffs to cluster their individual claims in a class action, but this possibility is not recognised in others. It is widely acknowledged, particularly following the example of the US, that the availability of class action lawsuits is critical for the development and growth of private antitrust litigation. Class actions facilitate access to courts by a larger number of plaintiffs and reduce the costs of litigation for individual plaintiffs.

The existing differences at national level on who may bring an antitrust suit may therefore affect incentives to private enforcement, positively or negatively. In addition, there is a risk that a few jurisdictions will become the forum of choice for antitrust litigation (as seems to be the case of the UK) simply because they offer potential plaintiffs the most favourable substantive and procedural framework for their antitrust actions.

C. The procedural framework

A third area that would greatly benefit from a wider harmonisation effort at European level is the procedural framework governing private antitrust litigation. Many observers identify a possible constraint on the development of private enforcement in the adversarial system that characterises many civil law jurisdictions.

The fact that antitrust enforcement relies heavily on factual market information poses two kinds of problem for private enforcement:

- When a potential plaintiff decides whether or not to bring a lawsuit, he must have at his disposal a sufficiently convincing body of evidence before trial. Lack of pre-trial discovery in most European jurisdictions risks confining private litigation to those rare cases where the plaintiff already has clear-cut evidence of an antitrust infringement (the so-called "smoking gun") or to cases where an administrative agency has already established that an infringement of competition law has occurred.
- Once the litigation has been initiated, the plaintiff has the sometimes impossible task of proving its claim that antitrust rules have been infringed. Most courts in continental civil law systems do not have power to investigate *ex officio* the case that is being litigated before them, but can only base their judgment on the evidence put forward by the parties. This system puts the plaintiff in the difficult position of having to provide the court with all the evidence it needs to decide the case.

  Article 2 of Regulation 1/2003 allocates the burden of proof in article 81 EC cases more evenly – the plaintiff has to prove the infringement of article 81(1), while the defendant has to provide all the evidence supporting its claim that the conditions in article 81(3) EC are fulfilled. Nevertheless, the plaintiff may still face an insurmountable task if he is pleading an infringement of article 82 EC. Here, as is clear from past experience at the European Commission and the NCAs, most of the key information

required to prove an abuse of dominance is in the possession of the dominant company. Access to this information may not be easy if the plaintiff or the court cannot force the dominant firm to disclose such information at trial.

Recent national initiatives to promote private enforcement

Currently, some member states are considering the adoption of measures to facilitate private enforcement within their own jurisdictions. However, these efforts are not coordinated and they raise the risk of increasing the gap that already exists between the various jurisdictions.

The UK is seeking to foster private actions, making it likely that the UK will be the preferred forum for antitrust litigation, thanks to the legislative changes introduced by the Enterprise Act 2002. This Act introduced a right to file actions for damages for infringements established by a prior decision of the Office of Fair Trading or the European Commission before a specialised court, the Competition Appeal Tribunal, which has a wide jurisdiction. The Enterprise Act also enabled consumers to file class actions.

Moreover, UK courts have asserted a broad jurisdiction covering cases brought by non-UK residents that may be difficult to bring before courts in other member states because of the weak jurisdictional link. It is possible for English or foreign plaintiffs to bring a damages claim for the entirety of the losses suffered, irrespective of where the loss was suffered, provided that the defendant has a subsidiary in the UK that has taken part in the infringement *(Provimi v Aventis)*.

Following the UK example, other countries have already introduced amendments to their national laws to favour private actions in the antitrust area, or are planning to do so:

- Germany has recently proposed to reform its competition rules to ensure compliance with the European rules. In particular, following the *Courage v Crehan* judgment, the proposed reform provides that anyone may claim damages for infringements of articles 81 and 82 EC and the national competition rules, regardless of whether the violation was directed at a specific set of buyers or suppliers.
- In Sweden, "opt-in" class actions were introduced in 2003, although these are restricted to parties in a contractual relationship with the infringing party. Further measures are envisaged to support private enforcement, including the extension of class actions to consumer groups and other private individuals affected by an infringement of competition law.

While in general these legislative developments are to be viewed positively, it is important that initiatives of this sort do not have the practical effect of increasing the already large differences between the various legal systems. A European system where private enforcement is favoured and encouraged in some countries but neglected in others is not desirable. Already, the UK system offers advantages compared with other European systems that makes it the most likely forum of choice for antitrust actions in the EU.

It is worth preserving the principle that plaintiffs in antitrust actions have equal access to justice throughout the 25 member states. This can only be achieved if there is some harmonisation effort at European level.

Conclusion

In the light of the above, it seems likely that the public route will be the most important means of enforcing competition rules for the near future. Private enforcement will continue to play a minor role, limited to those few cases where complainants perceive that court action might offer results that cannot be achieved easily or at all through public enforcement.

Antitrust enforcement by the European Commission and the NCAs still offers numerous advantages to a complainant, including strong investigative powers, keeping the complainant's involvement to the minimum, a relatively speedy procedure, and no significant legal costs. The tight confidentiality rules include the right of a complainant not to disclose its own identity – valuable when alleging abuse of dominance.

Thus, it is likely that in the coming years private enforcement will be viewed as an adjunct to public enforcement, which will retain its overwhelming central role in antitrust enforcement. It is also likely that we will see a growing use of private litigation when the plaintiff is seeking interim measures and the recovery of damages. These are the two areas where courts are the only – or at least the better-placed – forum for private parties. Even in these cases, though, the merits of the case are likely to be adjudicated by administrative agencies.

Many issues are still open. These may hold up the development of private enforcement of competition rules in Europe for many years to come if they are not properly addressed. Many of the problems have to do with the fact that private antitrust enforcement in Europe is largely governed by national procedural and substantive rules for civil litigation, not by Community law.

Now that the European Court in *Courage v Crehan* has made clear that remedies for infringement of EC competition rules are based on Community law rather than on national law, there are no restraints on the European Commission proposing further harmonisation measures at European level.

These should include not only soft law, such as the guidelines that have already been announced by Commission representatives, but also a regulation and/or a directive based on article 83 EC that would contribute to the harmonisation of the procedural and substantive laws of the member states.

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