The interaction between the public and the private enforcement of competition law

Training of National Judges in EU Competition Law

DEFCOMCOURT 3

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Compensation of damages and Competition law

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Historical background

- European competition law was center more or less exclusively in public enforcement by the Commission and the national competition authorities and national courts after Regulation 1/2003.

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Leniency program

- The Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ C 298.12.2006 amended 2015-2016) introduces the leniency program that becomes a key of the public enforcement of competition law in Europe.
- The Commission accepts a no proved statement by the USA experience that the possibility to follow private suits against the applicant shall reduce the utility of leniency program.
- The Commission notice is not legal binding.
- National judges may ask for information to the Commission in the framework of Directive 2014/104/EU

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Change of scenario

- The role of private suits in Europe was merely testimonial before CDC case Hydrogen Peroxide (C- 352/13), Judgement 21.05.2015 that alarm the EU Commission in relation of the possible risk for the leniency program.
- Directive 2014/104/EU was build as a way to protect leniency program more than a way to help victims of cartels to obtain damages compensation.
- Directive introduces a merely compensation vision of damages claims denying any deterrence function to private enforcement in Europe.
- But deterrence effect exists.

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Commission's view

- In order to protect EU leniency program the Commission will protect the confidentiality of the leniency corporate statements not only in relation of the actor of a damages action against the cartel members but also in relation to national courts for use in damages action for breaches of articles 101 and 102 TFEU with the sole exception of the situation referred in Article 6 (7) Directive.

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The preeminence of public enforcement in Directive 2014/104/2019 (26)

- Leniency programs and settlement procedures are important tools for the public enforcement of Union competition law as they contribute to the detection and efficient prosecution of, and the imposition of penalties for, the most serious infringements of competition law.
- Furthermore, as many decisions of competition authorities in cartel cases are based on a leniency application, and damages actions in cartel cases generally follow on from those decisions, leniency programs are also important for the effectiveness of actions for damages in cartel cases.
- Undertakings might be deterred from cooperating with competition authorities under leniency programs and settlement procedures if self-incriminating statements such as leniency statements and settlement submissions, which are produced for the sole purpose of cooperating with the competition authorities, were to be disclosed.
- Such disclosure would pose a risk of exposing cooperating undertakings or their managing staff to civil or criminal liability under conditions worse than those of co-infringers not cooperating with the competition authorities.

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Consequences

- The Directive and Commission view produce a substantial reduction of the success possibilities of the damages actions in Europe, and
- An important benefit for cartelists and a heavy burden to damages claimants.
- The limitation of increase of damages actions in Europe, limited in relation of the number of victims and the total amount of damages, and worst
- The substantial reduction of success possiblities of these actions.

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EUCJ View – deterrence-

- EUCJ Judgements have recognize, before and after the Directive 2014/104/EU, a double function of the private enforcement – compensation and deterrence -.
- At least Skanska,45 case (C-724/17, Judgement 14.03.2019).
- 45. *As the Advocate General stated essentially, in point 80 of his Opinion, actions for damages for infringement of EU competition rules are an integral part of the system for enforcement of those rules, which are intended to punish anticompetitive behaviour on the part of undertakings and to deter them from engaging in such conduct.*
- As the water, with the Canaan exception, can't be converted in wine, the private enforcement deterrence effect may not be eliminated by the lack of recognition by Directive 2014/104/2019.

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Kone (36) Case C-557/12, Judgement 5.06.2014

- It must be noted that the leniency programme is a programme developed by the Commission, through its Notice on Immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17), which has no legislative force and is not binding on Member States (Pfleiderer EU:C:2011:389, paragraph 21).
- Consequently, that leniency programme cannot deprive individuals of the right to obtain compensation before the national courts for loss sustained as a result of an infringement of Article 101 TFEU.

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Today's situation

- Public and private enforcement are today in a dialectical relationship in Europe.
- That situation
  - makes less effective the private enforcement
  - allowing the cartelists to retain the more important part of its illicit benefits,
  - preventing victims from claim, and
  - making more dificult the success of the damage claims in Europe.

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Perspectives
Directive revision 2020
(Art. 20 Directive 2014/104/EU

- The Commission shall review the Directive and shall submit a report thereon to the European Parliament and the Council by 27 December 2020.
- The report referred to in paragraph 1 shall, inter alia, include information on all of the following:
  - the possible impact of financial constraints flowing from the payment of fines imposed by a competition authority for an infringement of competition law on the possibility for injured parties to obtain full compensation for the harm caused by that infringement of competition law;
  - the extent to which claimants for damages caused by an infringement of competition law established in an infringement decision adopted by a competition authority of a Member State are able to prove before the national court of another Member State that such an infringement of competition law has occurred;
  - the extent to which compensation for actual loss exceeds the overcharge harm caused by the infringement of competition law or suffered at any level of the supply chain.
- If appropriate, the report referred to in paragraph 1 shall be accompanied by a legislative proposal.
- We need a new equilibrium that protect leniency program and improve the possibilities of success of damages actions in Europe.
- This equilibrium shall recognize what is right now impossible to ignore, the deterrence effect of private enforcement.
- We need overcome the dialectic relationship between public and private enforcement in Europe.

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National Judges and application of national damages systems after the implementation of Directive 2014/104/EU

- National judges are address by the Directive as grant keepers of the principle of effectiveness ground of the damages compensation right of victims.
- As article 4 Directive said
- *In accordance with the principle of effectiveness, Member States shall ensure that all national rules and procedures relating to the exercise of claims for damages are designed and **applied** in such a way that they do not render practically impossible or excessively difficult the exercise of the Union right to full compensation for harm caused by an infringement of competition law*
- In these way national judges may and shall follow the judgements of CJEU and see the Commission Leniency Notice in its real value and favor through the national substantive and procedural media the effectivity of compensation rights.

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