Obtaining effective application of competition law

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for

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What is an effective application of EU competition law?

- Competition authorities shall catch a relevant part of
  - Cartels, horizontal and vertical restrictions and abuses of dominance in Market (101 and 102 TFEU)
  - State aids infringements (107- 112 TFEU)
  - Mergers that represents a relevant risk for competition – for instance killer acquisitions-.

- The decisions of the competition authorities shall include effective remedies and proportional fines, and be, in general, confirmed by Courts
  - European Court of Justice
  - National Courts, when applying EU Competition law.

- A relevant part of the damages shall be compensated by national courts (Full compensation principle)
  - Through easy, quick and simple procedures (Effectivity principle).
  - Avoiding problems derived of the conection between cases in a
    - National context (Coordination) and in an
    - International context.

Deterrence

- The effective application of EU Competition law needs also obtain a relevant deterrence effect.

- Commission's and EU Directive 104/2014 reduce the deterrence function to the public enforcement.

- Jurisprudence of the Court of Justice extend the deterrence function to private enforcement.

The place of leniency programs in this context

- Leniency programs act only in relation of the first of requirements – catch a relevant number of cases, and only in relation of one of the restrictions – cartels – that obvious are the more dangerous.
- Leniency programs have:
  - Increase the number of cartels caught by competition authorities.
  - Increase the amount of fines and the transaction solutions.
  - Maintained the competition authorities
- Balance leniency programs vs compensation of damages.
  - A declaration of culpability can only have effects in administrative procedure and not in a civil one? What about a criminal one?
  - Limited compensation of damages of the beneficiary of the clemence represents a true risk for the programs.
  - Harder reaction of the Commission in cases of Discovery of cartels without use of leniency programs could be a solution?
- Make weak the right of compensation is not the way and is probably against the treaties.
- Are there alternatives?
  - Technologic improvement of the competition authorities with instrument that allow a quick and extended analysis of the markets and detection of the restrictions.

Technologic improvement of the competition authorities' analysis instruments (Computational Antitrust)

- Improve the computer science expertise of competition authorities.

- Increase investments in this area.

- Mechanization of legal analysis.

- Creation of specific competition algorhytms to analyze markets.

- Use of the machine learning for cartel screening.

- Construction of EU competition law decission trees API.

- Improving Mergers simulations.

- Security problems – private providers/risk of capture-.

- Need of interdisciplinarity wit technologica departments of Commission.

- Computational Antitrust Project hosted by the Stanford University Codex Center, that gathers 65 competition authorities.
  - https://law.stanford.edu/codex-the-stanford-center-for-legal-informatics/computational-antitrust/

Best experiences far of improve the use of data by officers.
See Thibault Schrepel & Teodora Groza (editors) "The Adoption of Computational Antitrust by Agencies: 2021 Report"

- Not all the authorities - more than hundred - are covered by the report.

- Competition and Consumer Commission of Singapore ("CCCS"), in collaboration with the Government Technology Agency

  - Bid Rigging Detection Tool ("BRDT") to identify bid rigging behavior. The BRDT is a tool developed in-house that analyses bid prices and bid patterns to flag tenders based on a variety of quantitative indicators that signal suspicious bidding behavior.

  - The document similarity tool is then applied to perform a deep dive into the bid documents submitted to the respective tenders.

    - The tool employs text analytics techniques such as Longest Common Sequence and Bilingual Evaluation Understudy ("BLEU") to generate similarity scores for sentence and document level comparisons.

- Autoritat Catalana de la Competencia ACCO

  - ERICCA for bid rigging detection.

- Other authorities are developing projects as

  - United Kingdom Competition and Markets Authority

  - Hellenic Competition Commission ('HCC')

What should do national courts as private enforcers?

- Follow the European Court of Justice jurisprudence.

- Decide including deterrence effects of private enforcement in its analysis.

- Include the effectivity principle in the reasoning of its decisions.

- Ask the competition authorities for the maximum of information possible in application of its national procedural rules.

- Use its fixation of the amount of compensation powers without fear.

Coordination of procedures

- National context:
    - Increasing the facilities of accumulation.
    - Improving collective actions procedures.
    - Reducing the number of competent courts through specialization.

- International context:
    - Voluntary harmonization of procedural rules in relation of the coordination of procedures based in a notification of the Commission elaborated in connection of national judicial experts.

Conclusion

- An effective application of the EU competition law depends

  - of an harmonized improvement of all the requirements we have show and

  - not of an asymmetrict improvement of them.