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Public and private enforcement of competition law

Check Against Delivery
Seul le texte prononcé fait foi
Es gilt das gesprochene Wort

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Ladies and Gentlemen,

I would like to thank the Dutch speaking section of the Brussels Bar and its President for inviting me to speak to you today.

I know you have planned a busy agenda for the day with very interesting topics for your panel discussions. Allow me to briefly set the scene and introduce some of the issues that will be discussed at greater length throughout the day.

First I will say a few words about the relationship between public and private enforcement; then about the *Pfleiderer* ruling and its aftermath; about collective redress; quantification of harm and – last but not least – about compliance.

1. The relationship between public and private enforcement

The debate about private enforcement of EU competition rules has been a mainstay in the overall antitrust debate these last years.

The European Court of Justice rendered its seminal *Courage* decision a little over ten years ago, in 2001. The Court stated then that anyone who has been harmed by an infringement of the antitrust rules must be able to claim compensation for that harm.

Private enforcement of antitrust law has been a hot topic of discussion ever since and the Commission has done considerable work in this field.

When it comes to determining the appropriate role of private enforcement and in particular its relationship with public enforcement, discussions are often defined by some kind of mutual exclusion approach:

- strengthening private enforcement is often seen as dangerous for the effectiveness of public enforcement,
- and protecting public enforcement means – we are told – that private actions are relegated to a secondary role.

I do not believe that this perspective is correct.

On the contrary, I think that public and private enforcement are complementary tools to enforce competition law and that we need both types of enforcement.

The practices forbidden by Articles 101 and 102 of the Treaty harm competition and consumer welfare. This harm is not abstract or theoretical.

Customers who pay an overcharge because of a cartel and businesses that suffer a loss of profit because of illegal foreclosure feel the negative effects of these infringements directly in their pockets and balance sheets. That is real harm.

If we are to take antitrust rules and their enforcement seriously, there is a need for strong public enforcement, capable of detecting infringements (in particular cartels), of putting an end to illegal practices, and of ensuring deterrence through appropriate fines and other remedies.

And in parallel, there is also a need for an effective system of private enforcement allowing those who have been harmed to obtain the compensation to which they are entitled.

Public and private enforcement must go together. This also means finding the right balance and making the right choices when it comes to regulating the relationship between the two.

2. *Pfleiderer* and its consequences

The issue of the interface between public and private enforcement has received particular attention in the last year, notably due to the *Pfleiderer* judgment of the Court of Justice.

In this judgment the Court had to decide, in the absence of EU wide legislation, whether principles of EU law stood in the way of giving potential claimants access to documents obtained by a national competition authority through its leniency program.

The Court ruled that it was up to the national court to decide on a case-by-case basis and according to national law whether to grant such access, and that the national court had to weigh interests protected by EU law.

A few weeks ago, on 30 January, the German court which had brought the *Pfleiderer* case to the Court of Justice handed down its decision applying the ruling of the EU court. The national court came to the conclusion that leniency documents ought to be protected from disclosure to potential claimants.

Ever since the Court of Justice ruled in the *Pfleiderer* case, the issue of protection of certain types of documents has been at the forefront in a number of different procedures, showing that this is a key area of the interface between public and private enforcement.

Evidence is indeed crucial both for the enforcement work of competition authorities as well as in private damages actions. In particular for claimants in damages actions, it is often difficult to have the necessary information and evidence to substantiate their claims.

In November 2011, the Commission was called upon to intervene in an action before the English High Court. The protection of certain leniency documents was at stake within the framework of the disclosure requirements in English civil procedure. The decision of the High Court is pending.

In its submission to the UK court, the Commission strongly reiterated its policy position that the special characteristics of corporate leniency statements – which are especially prepared for the purposes of the leniency application – must lead to a special kind of protection, different from the one afforded to pre-existing documents.

We have held this policy line for a long time and we believe it strikes the right balance between the competing interests. Our policy gives the necessary protection to leniency programs, which are indispensable tools to fight secret cartels, and at the same time we acknowledge the interests of private claimants who seek compensation.

Of course, we want to make sure that this policy line is effectively implemented. It is quite clear that the most secure way of implementing it would be a legislative rule, applicable in all procedures and ensuring the right balance in the entire EU.

The Commission has therefore included a legislative proposal in its Work Programme for this year seeking to clarify the interrelation of private actions

with public enforcement by the Commission and National Competition Authorities, notably as regards the protection of leniency programmes.

In the meantime, ECN partners should continue exploring the common ground in this domain with a view to protecting the leniency programmes across the EU and keeping in mind EU-wide interests (if not international) to achieve an adequate balance.

The interface between public and private enforcement is only one area which may require legislative action. Indeed, other issues raised in the 2008 White Paper also remain on the table.

3. Collective civil redress

Collective civil redress has also been one of the issues intensely debated ever since the 2008 White Paper.

The total harm caused by a single infringement, for example an EU-wide price-fixing cartel, can be huge. However, the individual harm suffered by each buyer tends to be smaller than the costs of judicial proceedings necessary to obtain compensation. And the procedural costs tend to be significant, given the factual and economic complexity of antitrust damages cases.

Therefore, to make the access to justice reality for certain categories of victims, in particular consumers and SMEs, they should be allowed to aggregate their individual damages claims in an efficient mechanism of collective redress. All stakeholders agree on this.

The debate has rather focused on other issues such as : (i) how best to achieve effective and efficient redress; (ii) what safeguards are needed to

prevent abusive litigation; (iii) what mechanisms are compatible with European legal traditions; and (iv) on whether a binding EU instrument is needed to achieve a level playing field across the Single Market and, if so, if such an instrument should be policy-specific or horizontal.

The European Parliament's most recent resolution on this topic, adopted on 2 February, recognises the importance of collective redress for ensuring effective compensation for victims of EU law infringements.

The resolution acknowledges the specificities of (collective) antitrust private enforcement; it refers to the binding effect of competition authorities' infringement decisions, to the principle of follow-on litigation and to the protection of leniency programmes against undue disclosure, and so on.

Consequently, the resolution recognises that competition-specific legal provisions may be necessary. Depending on the type of instrument(s) chosen, these specific provisions could either be laid down in a separate chapter of a horizontal instrument, or in a separate legal instrument.

The College of Commissioners is yet to decide on the best way forward.

Broadly speaking, the results of the public consultation seem to indicate that there is demand for a model of collective redress which fits into European legal traditions.

Such a model should be based on the compensatory principle (i.e. no punitive damages), achieve effective and efficient compensation, and include robust safeguards against abusive litigation.

As regards safeguards, it should not be forgotten that most damages actions in antitrust are follow-on actions against infringements already established in

final decisions of competition authorities. Thus, such actions lack by their very nature any risk of abusive litigation against innocent companies.

4. Quantification

Another area where the Commission has been very active is the quantification of harm.

Quantification of specific antitrust harm is a special feature of antitrust damages actions, where a claimant comes before a court and submits that he has suffered harm because of an infringement of the antitrust rules.

If the infringement is proven, the court will have to determine the amount to award to the claimant and will therefore not only have to decide whether he has suffered harm at all, but also how great that harm is.

Of course, competition authorities are not called upon to make this assessment in their enforcement action. Even where the finding of an infringement requires a competition authority to investigate the effects of such a practice on the market, that investigation goes into the overall effects, not the quantification of individualized harm.

The quantification of antitrust harm is often difficult and represents one of the main obstacles standing in the way of injured parties when they seek compensation. That is why the Commission committed in the 2008 White Paper to publish non-binding guidance on this question.

In June of last year, we therefore opened the public consultation on a draft Guidance Paper on the quantification of antitrust harm in damages actions.

The draft Guidance Paper makes available to judges and parties to antitrust damages actions insights into the methods and techniques available to quantify antitrust harm.

The starting point for all methods and techniques is the same: to determine how the market would have evolved in the absence of the infringement and what this non-infringement scenario would have entailed for the claimant's position on the market.

This is an inherently difficult question – there is necessarily a degree of uncertainty involved in making this assessment.

The Paper gives helpful guidance. In the end however, the actual application of these insights in a specific case falls on the judge or arbitrator, adjudicating the dispute in the framework of a specific legal regime. This reflects the division of tasks between the Commission and national judiciaries.

I think that the Guidance Paper can be useful for different persons involved in antitrust damages actions: while ultimately the question of quantum may have to be decided by a judge, it is for the parties to a damages action to make their case. It is for a claimant to make a submission as to the award which he seeks and it is for the defendant to contest that claim.

The Paper can therefore help both claimants and defendants in their submissions to the court.

In some Member States, the courts have the power to estimate the amount to be awarded and the Paper can be helpful in those situations, too: it does not argue against such pragmatic approaches to damages quantification, but rather supports and facilitates them.

I would also like to underline that the usefulness of the Guidance Paper is not limited to judicial means of dispute settlement: alternative settlement procedures may play an important role in adjudicating antitrust damages claims and the guidance may be helpful in this respect too.

Since the publication of the draft, we have conducted a wide range of consultations. We have hosted a workshop with economists – both from academia and consultancies - and we have reached out to national judges from a variety of Member States. We have received about forty written contributions which we have published on our website.

These responses have been overwhelmingly positive and we are currently preparing the final version which we intend to publish soon.

5. Compliance

Before concluding, I wanted to refer to another issue which has received considerable attention in recent months which is compliance with competition law and in particular the role of compliance programmes.

Our stance in this field is clear: the prime responsibility for compliance with EU competition rules, as in any other field, rests with those subject to the law.

This applies to large companies and SMEs alike.

Any effort of a company to ensure compliance with EU competition rules is important and welcome. What is most important however is that the rules are actually complied with.

Firms should keep in mind that their compliance efforts will be assessed by competition authorities on the basis of results, or in other words, by their success in not breaking the law.

Consequently, in calculating fines to be imposed, the Commission does not reward companies by way of a reduction of fines if they have put in place compliance programmes which have not in fact prevented the infringement. Neither does the Commission deem the existence of compliance programmes as an aggravating factor.

But it has been our long standing policy to welcome compliance efforts by undertakings. Over the last years, we have supported compliance efforts in different ways:

- By disseminating comprehensive information on EU competition rules;
- Through a constant dialogue with businesses and other stakeholders to refine our guidelines in this area.
- By advocating in favour of compliance programs and training.

For instance we have recently published a brochure to improve awareness among businesses on their obligations to comply with EU competition rules.

The brochure seeks to provide general guidance on compliance issues, by setting-out practical steps that can be taken to ensure compliance. It includes guidance on some of the hallmarks of a good compliance programme.

While these may be issues well known to large companies and their advisors, this effort should also help smaller companies who cannot afford lengthy legal counselling or are less familiar with EU law.

Tips include that the company's compliance strategy should be based on a comprehensive analysis of the areas in which it is most likely to run a risk of competition law infringement. It is also essential that the company's compliance strategy is disseminated through its entire organisational structure. And, clear and committed management support is also critical for the success of any compliance programme.

Conclusion

I hope that you will find this initial tour d'horizon useful and I wish you fruitful discussions today.

Thank you.