The Private Enforcement of the Competition Rules in the European Union – A New Starting Line?

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The European Commission eventually concluded, at the beginning of June, its long-lasting workings on the proper framing of private actions for damages arising out of infringements of competition law. The three documents issued on June 11, 2013 – the proposed *Directive on Antitrust Damages Actions*, the *Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law*, and the *Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union* – mark a new and perhaps decisive milestone for the uniform and steady evolution of actions whereby the victims of antitrust infringements will seek interim relief (injunctions) or full compensation. The freshly issued documents are built on surveys, analysis and debates which practically started back in 2001, when the European Court of Justice clearly affirmed, in *Courage vs. Crehan* (C-453/99), the right of those affected by wrongdoings in violation of Article 101 of the TFEU to obtain reparation for the damages incurred and stated that such claims are of the utmost importance for the effective safeguard of the interests protected by the competition rules.

The European Commission should be, of course, praised for its efforts in support of the private enforcement of the competition rules, but I would say that it was far from being an enthusiastic supporter of private plaintiffs. Its main purpose was, and still is, to avoid interference with public enforcement and especially with the leniency policy. So the European Commission efforts were focused on channeling the flow of private enforcement rather than on creating the conditions for increasing the volume and speed of cases going through this channel. The proposal for a directive, made on June 11, 2013, seems to be equally motivated by the need to introduce legal provisions that would offer an absolute protection to the leniency applicants, thus offsetting the potential negative impact on leniency after the more open approach of the Court of Justice in *Pfleiderer* (C-360/09) and *Donau Chemie* (C-536/11).

As stressed-out by Daniele Calisti and Luke Haasbeek in the CPI Antitrust Chronicle, the European Commission is still half-hearted in respect to promoting the conditions for the private enforcement of the competition rules in the European Union. In the words of the authors, which were actively involved in the drafting of the measures proposed recently, "*it must be stressed that the focus of the Directive is on compensation, not on litigation.*" This statement expresses the concern that the success of the private enforcement could also mean the advent of a "culture of litigation," similar to that in the US, with all the excesses arising out of a large number of private enforcement cases brought to court. Indeed, an excessive number of litigation would put an unnecessary burden on the undertakings, which would need to allocate larger resources in order to fight claims that may be frivolous. However, such a concern is groundless as long as the key ingredients for these excesses – the availability of treble damages and contingency fees – are still absent from the arsenal at the disposal of EU plaintiffs. Ironically, most claims for damages in the United States are settled and do not go through a full-length trial. But this happens exactly because the defendants are concerned that the existence of treble damages, plus the fees for the lawyers, would make the final bill too burdensome and, thus, they propose to settle in order to reduce their liability. Court or out-of-court settlements are not likely to happen if the defendants do not have the right "incentives" for doing so and this is an essential point

missing from the proposals of the European Commission. Settlements – like marriage – require the agreement of two persons and whilst plaintiffs would always be in favor of a quicker recovery of their damage and would like to avoid lengthy and costly legal proceedings, it is essential that plaintiffs want to enter into such agreements. This will not happen as easy as it may be for plaintiffs if these do not see a clear benefit arising out of a settlement.

In this context a few questions remain, and these are more important than the solutions put forward by the Commission.

The first question is whether or not the measures envisaged, the guidelines, and the recommendations of the European Commission will be enough to ensure that private enforcement of the competition rules takes off in the EU. The Commission appears, once again, to be reluctant to introduce legal tools which have proved their efficiency but which the Commission thinks that are "too American" and foreign to the Member States legal systems – the "discovery" procedure, the "one-way" legal costs, the "opt-out" class-action. Is this move, half way, into the right direction enough for ensuring an adequate compensation for the victims, or will the compromise only delay the moment until all of these novel concepts will also be imported, possibly under different names and forms? We should remember that a concept that is now considered essential for the pursuit of antitrust enforcement in the EU and which is dear to the Commission – leniency – was reluctantly imported from the same US legal system years ago.

The second question is whether the European Commission is prepared and would accept to make the step towards a full restructuring of the competition enforcement in Europe. This would mean, in the first place, leaving more space to private plaintiffs, who would bring direct legal actions against infringers of competition law, and focusing its resources on the most serious violations of the competition rules – the hard-core cartels and the most serious abuses of dominance, especially those that create bottlenecks and threaten the development of entire industries (such as those in the digital economy). In the second place, this would mean that the European Commission fully takes the reins of public antitrust enforcement across all the Member States by transforming the current cooperative structure of the European Competition Network (ECN) into an integrated structure, where the national competition authorities would be nothing more than branches of the DG Competition (a similar proposal for a unique EU watchdog is contemplated for the telecom industry). Consequently, as a matter of substantial law, the dual application of the competition provisions enshrined in the TFEU and that of the competition provisions in the laws of each of the Member States should be replaced by the sole application of the TFEU rules. Only if such measures would be implemented, in one way or another, would the private enforcement of the competition rules really gain ground in the European Union whilst coexisting peacefully with a reinforced and more efficient public enforcement.

The answers to these questions would provide proper solutions for an effective enforcement of the competition rules, where public and private enforcement do not collide but coexist, to the benefit of consumers and the competitive process and to the detriment of

wrongdoers. The existence of these open questions also shows that the new package of legislative measures aimed at facilitating the private antitrust enforcement is not the end of a road but rather a new starting line for a new path and the EU authorities should continue to pay attention – and consideration – to the rights of the victims of antitrust infringements.