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EU Competition Law Enforcement: Towards a US Style Private Antitrust Action?

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Summary

The European Commission – led by the European Commissioner for Competition – and other competition authorities takes steps to develop private actions based on infringement of competition law. Simultaneously, the Commission and the French legislator try to fill in the gaps that hinder this development. Still, when taking a closer look, numerous obstacles remain.

Introduction

It is well known that in Europe, competition law is primarily enforced by specialised public authorities, for example the European Commission or, in France, the Competition Council, while private antitrust litigation before ordinary law jurisdictions remains very rare, as opposed to the situation prevailing in the United States.

This is particularly true for damages actions for breach of competition law. In France especially, for a victim to receive an indemnity for competition damages, the most efficient way remains to bring two distinct and successive actions: one will first seek from the Competition Council or the European Commission the establishment of the anti-competitive practice, and then one will ask, in front of a legal jurisdiction and on the basis of a liability in tort, for compensation the for the damages suffered. In practice, the length of these successive procedures, the uncertainty characterising the proof of the damage and the traditionally small amounts granted as indemnity by French courts, dishearten most complainers. This situation is far from satisfying and, as recently expressed by the European Commissioner for Competition, "private actions should not be dependent on public enforcement. We need a system that allows private actions to stand on their own two feet." (speech made on 9 March 2006)

French Action

The European Commission is thus wishing to act towards this objective, encouraged by the *Courage v Crehan* judgment by the European Court of Justice on 20 September 2001 which states that:

> "the full effectiveness of Article 85 of the Treaty [...] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition."

In the wake of the European Commission, the French competition authorities led by the French Competition Council, have called for an increase in the number of damages actions for breach of competition rules. This stand has one goal: to waken a litigation which has been lifeless until now.

There are certainly in France a few examples of private antitrust litigation. France Telecom, summoned by Tele2 before the commercial court of Paris, was ordered to pay in May 2004 a 15 million indemnity for questionable customer "win-back" practices, that the Court regarded as the expression of an abuse of dominant position. Besides, in practice, the French Ministry of Economy often intervenes in private litigation cases when one of the parties arguing a breach of competition law requests it. The Ministry's decision to intervene is then comparable to a support of the demanding party, though in theory, its role, like an *amicus curiae*, is to clarify the application of the rule of law.

However, damages actions before ordinary law jurisdictions remain very rare. Hence, beyond discourses, tools to actually facilitate the bringing of private actions are now being contemplated.

Amendment to Leniency Notice

The Commission published on 23 February 2006 a draft amendment to its 2002 "leniency" notice, aimed at preventing any misuse of this notice during non-EC competition damages claims (in practice only American procedures are targeted). Indeed, the Commission wishes to impede the disclosure of deliberate self-incriminating corporate statements, which are the core element of the leniency procedure, and to counter in that way any potential effects of the US-style "open-discovery" practice. Furthermore, the Commission disclosed on 19 December 19, 2005 a Green Paper identifying the obstacles encountered by private litigation in bringing damages claims, as well as possible options to improve the situation.

From its end and after four years of waiting, the French government published on 31 December 2005 the list of the eight specialised jurisdictions competent to hear private antitrust actions; this should facilitate the implementation and improve the efficiency of competition rules before substantive jurisdictions.

Commission Green Paper

However, if one considers the obstacles listed by the Commission in its Green Paper, the development of the "private pillar" of antitrust litigation is likely to be

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slow. Indeed, the list of obstacles is long, as one could expect on a topic that combines both substantive and procedural issues, at times dealt with in radically different manners according to the legal traditions of Member States.

Though the inventory work of the Commission and its will to revive the debate are laudable, one may remain dubious in front of some of the suggested options.

Indeed, the Commission first stresses the difficulty for a private party, as opposed to a public authority, to provide evidence. One of the suggested solutions is to give the force of *res judicata* to the decisions of competition authorities, which would then bind the judge. This controversial suggestion violates the principle of independent judiciary, even if, *de facto*, all practitioners are aware of its quasi application. Some other suggestions approximate the "discovery" American-style procedures.

The Commission brings forward other issues that might call forth active debate. Indeed, it considers creating a sort of "punitive" damages through a double indemnity in the case of anticompetitive horizontal agreements. But this approach would replace one unjust enrichment by another, hence possibly contributing to the alteration of the market equilibrium by wrongfully strengthening the doubly compensated competitor. Amongst other issues addressed by the Green Paper, one could also mention the choice of the applicable law and that of the competent jurisdiction, the question of collective action, which is here of particular importance, or the articulation of leniency policies and damages actions.

Still, the Green Paper does not cover all issues – for example, the possibility of creating, in the field of competition law, derogations to ordinary procedural law. Indeed, what a funny and disputable habit it is to stack up derogations one over the other, to the detriment of coherence and stability of the legal system.

Conclusion

To conclude, the long list of obstacles identified by the Commission and the difficult harmonization of diverse legal traditions allow for a certain scepticism as to the rapidity of the implementation of the suggested reforms. Indeed, the modification of litigation strategies, through the full integration of arguments of infringement of competitive law, seems to depend on significant legal revisions. Yet, if one considers the acute debate going on in France over the collective action reform – *ie* the importation, in a way still to be determined, of "class actions" –, another key element of private competitive litigation, these revisions are likely to rouse opposition.

Private actions will thus probably need a bit more time to stand out in France and in Europe, though, with time, their development seem inescapable.