

Remedial discretion and the interaction between public and private enforcement in Europe

Dr. Ioannis Lianos
Faculty of laws
University College London

Function of the remedies	Curative	Punishing	Preventing
Administrative remedial process	<ul style="list-style-type: none"> • Termination of the infringement • Behavioural remedies • Structural remedies • Fines (to a certain extent) • Accessory remedies 	<ul style="list-style-type: none"> • Fines 	<p>SPECIFIC DETERRENCE</p> <ul style="list-style-type: none"> • Fines • Termination of the infringement • Forward looking structural and behavioural remedies <p>GENERAL DETERRENCE</p> <ul style="list-style-type: none"> • Fines • Structural remedies • Heavy-handed long duration behavioural remedies <p>PROPHYLACTIC REMEDIES</p>
Civil remedial process	<ul style="list-style-type: none"> • Declaratory relief • Prohibitory injunctions • Mandatory injunctions • Compensatory damages • Restitutionary damages 	<ul style="list-style-type: none"> • Exemplary (punitive damages) and • Criminal individual sanctions 	<p>SPECIFIC DETERRENCE</p> <ul style="list-style-type: none"> • Mandatory injunctions • Restitutionary damages • Exemplary (punitive) damages <p>GENERAL DETERRENCE</p> <ul style="list-style-type: none"> • Restitutionary damages • Exemplary (punitive) damages • Harsh mandatory injunctions <p>PROPHYLACTIC REMEDIES</p>

The relation between public and private enforcement of competition law: looking to their respective functions

- Complementary
 - Private enforcement: **compensation**, deterrence, **relief function**
 - Public enforcement: deterrence
- Competitive
 - The relation between the two different forms of enforcement in this case would be either complementary, if additional deterrence is always good, or competitive, if there can only be an optimum level of deterrence, in which case more deterrence through private enforcement should lead to less deterrence through public enforcement, if the authorities want to avoid over-deterrence, assuming that over-deterrence would be suboptimal for total welfare

3

The “optimal” combination of public and private enforcement

- W.P.J. Wils, The Relationship between Public Antitrust Enforcement and Private Actions for Damages, (2009) 32(1) World Competition pp. 3-26, p. 12 observes the following:
 - “(i)f [...] public antitrust enforcement is the superior instrument to pursue the objectives of clarification and development of the law and of deterrence and punishment, whereas private actions for damages are superior for the pursuit of corrective justice through compensation, then the optimal antitrust enforcement system would appear to be a system in which public antitrust enforcement aims at clarification and development of the law and at deterrence and punishment, while private actions for damages aim at compensation”
 - The “separate tasks approach”

4

Designing a system of “optimal” sanctions and remedies

- An **optimal sanction** will correspond to the harm caused by the violation of the law, divided by the probability of detection, to which should be added the administrative costs of law enforcement, that is the amount needed to impose and collect the sanction
- In order to maximize social welfare, policy makers may act on the following fronts:
 - increase enforcement expenditures and hence the probability of detection;
 - increase the level of fines or sanctions and alter their form so as to increase deterrence;
 - impose a liability rule that would maximize social welfare.

5

Public and private enforcement and the need for “equalization”

- Principle of proportionality in EU law
- The “internalization thesis”
- The “pure deterrence thesis”
- J. Kloub, White paper on Damage Actions for Breach of the EC Antitrust Rules: Plea for a more Holistic Approach to Antitrust Enforcement, (2009) 5(2) European Competition Journal, pp. 515-547, p. 523
 - “A right is enforceable if the total damage inflicted by the violator (D) equals the amount of compensation (C) and monetary punishment (P). In short: $D = C + P$ [...] ; therefore, an optimal enforcement system should strive to impose sanctions (in the form of compensation and monetary punishment) that equal the total damage inflicted by a violation (in the context of antitrust violations this includes both the actual damage caused to victims and the damage caused to society as a whole in the form of deadweight loss)”
 - Enforcement in excess of D is deemed to be **over-enforcement**

6

Table 7 - Deterrence for a global cartel

Jurisdiction	Scenario		
	Low	Medium	High
Global Cartels			
Detection rate	18%	24%	30%
Conviction rate	75%	75%	75%
Ex ante probability of conviction	13.5%	18.0%	22.5%
Public fines US - % of overcharge	10.8%	18.8%	26.8%
Public fines Canada - % of overcharge	11.2%	24.0%	36.8%
Combined North America	10.9%	19.2%	27.5%
EU penalty - % on overcharge	9.2%	20.5%	31.8%
Combined North America and Europe	20.0%	39.6%	59.2%
Global penalties	1.6%	3.5%	5.4%
Combined penalties	21.6%	43.1%	64.7%
Awards/settlements North America	35%	80%	125%
Awards/settlements EU	29%	85%	145%
Awards/settlements combined	64%	165%	270%
Total liability - public fines and private awards/settl.	86%	209%	335%
Deterrence w/out EU private enf.	7.6%	22.2%	42.7%
Deterrence with EU private enf.	11.6%	37.5%	75.3%