The Interaction Between Public and Private Enforcement

New Challenges in EU Competition Law and Enforcement
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The aims of public and private enforcement

Public Enforcement
+ Punishment; Deterrence

Private Enforcement
+ Compensation; Deterrence

...but deterrence is the most important objective.
Will damage claims be deterrence enhancing?

Figure 15
Actual Fines/Lower Dissuasive Fines


Follow-on vs Stand-alone:
A Muddled Picture

+ EU: vast majority of private actions are follow-on cases. Stand-alone actions fail because of a lack of evidence. (Sarra and Marra 2008).
+ Germany: high rate of stand-alone cases, but nearly all concern dominance. Only around 3% concerned price fixing (S Peyer 2012).
+ In UK, 37% follow-on and 63% stand-alone (Rodger 2013)
+ In US around 90% of antitrust actions are stand-alone cases, but many are not strictly speaking competition law cases.
+ Follow-on actions are generally underestimated because many are settled before they reach court.
+ Arguably proposed EU and UK reforms (especially collective actions) will mainly benefit follow-on rather than stand-alone actions.
Leniency: a period of heightened uncertainty

- In effect, immunity no longer means immunity. Whistleblower could pay the penalties it avoids (and more) in subsequent damages.
- Pfleiderer, National Grid and Donau Chemie have had the effect of increasing uncertainty for firms seeking to uncover infringements in return for leniency. Danger of inconsistencies in balancing exercise between national courts.
- UK Government decided not to take action in this area to allow European Commission to decide on EU wide approach. (BIS January 2013)

Less information and poorer decision making?

- If greater private enforcement (and access to leniency documents) does weaken incentive to apply for leniency, competition authorities will have to respond strategically to this.
- Access to leniency documents in US has largely created a paperless leniency process and an even greater incentive to enter plea bargain (90%+ of firms do). Very little information is available at the end of this process.
- Increase in settlements and tendency to give technical admission of guilt while publically maintaining innocence.
- Harder to scrutinise enforcement and ensure fairness.
...or a possible drop in leniency applications?

- Proposed EU Directive on Damages (June 2013) provides for absolute protection against disclosure of leniency corporate statements and settlement submissions in follow on private damage actions.
- Even protecting whistleblower from private actions altogether will not necessarily protect the leniency programme.
- Same problem in relation to cartel offence.
- How do you know you will be first through the door?

How important is leniency?

Proportion of EU cartels uncovered by investigation and leniency (number)
2000 – November 2013

[Graph showing proportion of EU cartels uncovered by investigation and leniency from 2000 to 2013]
Worst Case Scenario

- Introducing measures that fail to adequately stimulate private enforcement, while doing enough to undermine leniency programmes.
- The result will be less deterrence than we had to begin with.