IDENTIFYING THE BUILDING BLOCKS OF PRIVATE COMPETITION ENFORCEMENT

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CPI ANTITRUST CHRONICLE
FEBRUARY 2019

I. INTRODUCTION

This short note summarizes a number of insights concerning the interaction between public and private competition enforcement and the pre-conditions for the functioning of an effective private competition enforcement regime. These insights arise from a Report recently written by the author for the OECD on "Individual and Collective Private Enforcement of Competition Law."[2]

Each of these topics will be discussed in its own section below. A detailed discussion of these and other topics concerning private competition enforcement can be found in the above-mentioned Report.

II. PUBLIC AND PRIVATE COMPETITION ENFORCEMENT

Competition laws employ multiple tools for enforcement. Ideally, the various enforcement mechanisms should support each other and, taken together, achieve effective deterrence in the most efficient way. While both public and private enforcement can deter anticompetitive conduct, the objectives and incentives underpinning public and private enforcement are different.

Public enforcement primarily pursues the public interest in competitive markets by entrusting a public entity (the competition authority) with the tools and powers to detect, investigate, and ultimately punish competition law infringements. Public enforcement is not directly concerned with the compensation of damages suffered by the victims of anticompetitive conduct – reparation for such damages is traditionally the province of civil liability and private enforcement.

If by private enforcement we mean reliance on competition law by private parties in litigation, there are arguably three types of private actions involving competition law: (i) where competition law is used as a "shield," i.e. as a defense against a contractual or some other type of claim; (ii) where competition law is used as a basis for claims for injunctive relief, including interim relief; and (iii) where competition law is used as a basis for claims for damages.[3] In all these cases, private plaintiffs do not sue under competition law in order to improve the general welfare: they sue in order to pursue their own interests.[4] However, the activity of private plaintiffs has an indirect deterrent effect on anticompetitive activities by allowing courts to stamp out anti-competitive conduct that was not detected or investigated by competition authorities.[5]

2 OECD (2018) "Individual and Collective Private Enforcement of Competition Law: Insights for Mexico," available at http://www.oecd.org/daf/competition/individual-and-collective-private-enforcement-of-competition-law-insights-for-mexico-2018.htm.

3 Wouter Wils, "Private Enforcement of EU Antitrust Law and its Relationship with Public Enforcement: Past, Present and Future," (2017) World Competition 40(1) 3, p. 4.

4 Herbert Hovenkamp, "The Antitrust Enterprise," (Harvard, 2005), p. 58.

5 OECD (2015), The Relationship between Public and Private Enforcement, WP3(2015)14, p. 37.

Furthermore, public enforcement is also perceived as being less effective than private enforcement at detecting and prosecuting certain competition infringements – e.g. those involving vertical restraints and monopoly abuses, as well as violations in industries with very specific characteristics.[6] Some regimes – most notably the U.S. – go so far as to rely on private enforcement as their main tool to deter competition infringements. Nonetheless, in most jurisdictions private enforcement has, to date, played a minor role.[7]

It is increasingly acknowledged, however, that private enforcement can provide a safety net for when public enforcement fails.[8] Private and public enforcement play different, yet complementary roles; they are better understood as parts of an integrated system in which numerous factors contribute to the complementary goals of deterrence and compensation. It is thus crucial to strike the right balance between public and private enforcement.[9] Identifying such a balance is key to ensuring that private enforcement: (i) does not adversely affect the effectiveness of public enforcement; and (ii) encourages greater compliance with antitrust rules, while avoiding wasteful litigation that could discourage socially beneficial conduct.[10]

The correct balance will depend on the individual characteristics and mix of sanctions in each jurisdiction.[11] Nonetheless, jurisdictions around the world have adopted a number of common measures to ensure that private enforcement does not negatively influence public enforcement. These include rules restricting access by private parties to the competition agency's investigation file; protection against disclosure of leniency-related documents and information; the granting of civil immunity or otherwise limiting the liability of leniency applicants; and rules protecting the confidentiality of sensitive information even in public versions of infringement decisions. In addition, it is also common to allow or require competition agencies to provide support for courts or to intervene in private disputes that include a competition element.[12]

III. TOWARDS EFFECTIVE PRIVATE ENFORCEMENT REGIMES

Effective private competition enforcement requires more than finding an appropriate balance with public enforcement. It also requires the implementation of a number of discrete elements, and the making of important choices that will determine how the regime will operate.

This section describes the main elements common to private enforcement regimes by reference to competition damages claims, and identifies some of the main choices that a jurisdiction will have to make.

A. Setting up Appropriate Procedural Mechanisms

The first step towards implementing an effective private enforcement system is to consider what types of procedural mechanisms will be made available to private parties in their attempts to obtain damages (or other remedies) from infringers of competition law. An initial distinction can be made between judicial litigation and out-of-court dispute resolution mechanisms.

With respect to judicial litigation, the distinction between individual and collective claims is particularly relevant for competition damages claims. The harm suffered from competition infringements can be scattered among many potential claimants, particularly when consumer products are at stake. In these cases, damage suffered by each potential claimant can be very low and, where a claimant can only bring a competition claim individually, the costs and effort of filing a claim will probably outweigh the potential gains from a successful claim. Consequently, there is little incentive for individual victims to bring actions for compensation in relation to "atomized" damages.[13]

6 Kent Roach & Michael Trebilcock, "Private Enforcement of Competition Laws," (1996) Osgoode Hall Law Journal 34 461, 480.

7 OECD (2015), The Relationship between Public and Private Enforcement, WP3(2015)14, p. 3-4.

8 Jens-Uwe Franck & Martin Peitz, "Toward a coherent policy on cartel damages," ZEW Discussion Papers No 17-009, p. 12-13.

9 Edward D. Cavanagh, "Detrebling Antitrust Damages in Monopolization Cases," (2009) American Bar Association, p. 808.

10 OECD (2015), The Relationship between Public and Private Enforcement, WP3(2015)14, p. 3.

11 Andrew Gavil, "The Challenges of Economic Proof in a Decentralized and Privatized European Competition Policy System: Lessons from the American Experience," (2007) Journal of Competition Law and Economics 4(1) 177.

12 OECD (2018), "Individual and Collective Private Enforcement of Competition Law: Insights for Mexico," p. 37-39.

13 OECD (2007), Private Remedies DAF/COMP(2006)34, p. 16-17; OECD (2015), The Relationship between Public and Private Enforcement, WP3(2015)14, p. 20.

To help overcome this collective action problem, jurisdictions across the world have developed mechanisms to promote collective redress – usually either opt-in, opt-out or mixed systems. Collective redress mechanisms provide a solution to the economic obstacle faced by individual claimants whose losses are too small to support the cost of litigation – by aggregating a large number of individual claims into a single action. This aggregation also allows defendants (and courts) to save the time, energy, and resources required to litigate hundreds or thousands of individual claims – particularly in the context of opt-out claims.

At the same time, however, class actions are a complex and costly way of achieving compensation and deterrence. In some cases, they might lead to speculative, opportunistic claims and excessive litigation. In order to serve the efficiency of justice and protect against frivolous litigation, systems that adopt opt-out class actions insist that the admissibility of the claims should be verified at the earliest possible stage of litigation, and that cases which do not meet the conditions for collective action (as well as manifestly unfounded cases) be dismissed as soon as possible.

Out-of-court dispute resolution mechanisms are a second type of tool for dealing with competition claims. Such mechanisms allow victims to settle cases quickly and easily on a voluntary basis. Given the costs and uncertainty of litigation, and the complexity of competition-related damage claims, most systems try to promote the resolution of claims out of court. Three main mechanisms can be found around the world: (i) voluntary redress schemes; (ii) alternative dispute resolution and settlement schemes; and (iii) arbitration.[14]

B. Removing Practical Obstacles to Bringing Private Enforcement Claims

While the existence of procedural avenues to vindicate a right to compensation is a necessary element of any system of redress, it is not sufficient to ensure the system's effectiveness. Instead, the effectiveness of any system of redress often depends on removing practical obstacles to the bringing of a claim – e.g. by allowing collective redress actions. However, given the expense and difficulty of claiming competition damages, the effectiveness of the system often depends on mechanisms that allow for sharing the risk and costs of bringing a claim, or that reduce the costs of bringing a successful claim.

A number of mechanisms that operate to this effect have been adopted, to differing degrees, in various jurisdictions. These include: (i) third-party funding; (ii) success-based billing; and (iii) cost-based billing. All these mechanisms have in common that they transfer the risk of bringing a claim to someone other than the victim of the competition infringement.[15]

C. Who Should be Able to Bring Private Enforcement Proceedings

An important question in all private enforcement regimes concerns who should be able to start such claims. Economic injuries have a way of rippling through markets, creating larger numbers of victims than the typical contract or tortious dispute. In addition to consumers, the victims may also include competitors, suppliers, and firms operating in complementary markets. This creates a broad range of potential claimants. There are rules on standing for non-contractual liability – e.g. on capacity and on the existence of some "interest" or "genuine grievance" – that determine who has standing to sue. These rules tend to be purposefully vague, and hence do not really allow for the exact identification of who does or does not have the standing to sue. As a result, an important step in most jurisdictions is determining who should have the standing to bring a private enforcement claim under competition law, and whose loss is too "remote" to allow them to start judicial proceedings.

Different jurisdictions approach this matter differently, mainly because of the different objectives underlying their private competition enforcement regimes. In the United States, where the main objective of private enforcement is to punish and deter competition infringements, only direct purchasers and suppliers have standing to sue. Importantly, this means not only that other victims are unable to sue, but also that the infringing party is unable to argue that the claimant did not suffer a loss because the economic impact of the competition infringement was passed onto others.[16] Conversely, where the goal of private competition enforcement is primarily compensation, as is the case in Europe, every

14 OECD (2018), "Individual and Collective Private Enforcement of Competition Law: Insights for Mexico," p. 79-83.

15 OECD (2018), "Individual and Collective Private Enforcement of Competition Law: Insights for Mexico," p. 87-92.

16 *Hanover Shoe, Inc. v. United Shoe Mach. Corp.* 392 U.S. 481, 494 (1968); *Illinois Brick Co. v. Illinois* 431 U.S. 720 (1977).

entity that may have suffered losses as a result of the infringement is a potential claimant.[17] Importantly, this means that both indirect purchasers (as a claimant) and infringing parties (as a defendant) may argue that a direct purchaser passed on all or part of its loss. This seeks to ensure not only that all losses are compensated, but also that compensation is correctly allocated to all levels of the supply or distribution chain.

In practice, however, the possibility of a victim claiming damages in compensatory systems depends on the applicable rules of causation, which may limit the extent to which a loss may be said to flow from a competition infringement. Rules of causation which require the harm to flow directly and immediately from the competition infringement may prevent indirect purchasers or other types of victims from being granted compensation for losses. As such, there is an intimate relationship between rules on standing and the applicable rules of causation.[18]

A related issue, which arises in compensatory damages regimes in particular, concerns "passing on." In the context of distribution or production chains, an illegal overcharge can be passed on through the chain, which means that each of the parties in that chain may suffer an antitrust injury – but also that the extent of losses suffered by parties at each level of the chain is reduced by the amount of overcharge that the party was able to pass on downstream. Therefore, passing on creates significant difficulties regarding the identification of who is entitled to compensation, since it is extremely hard to identify who ultimately bore harm and in what amount.

In short, identifying who can bring forth claims for competition damages entails policy choices that need to be made in light of trade-offs between the ease and incentives for claiming competition damages, the correctness in the allocation of damages, and the costs and resources devoted to addressing private competition enforcement claims.[19]

D. Defendants in Private Competition Proceedings

With respect to the identification and treatment of potential defendants, most legal systems adopt similar approaches. Most notably, private competition enforcement regimes routinely impose joint and several liability on companies that have infringed competition law; couple joint and several liability with mechanisms allowing defendants to claim a contribution for damages among themselves; adopt rules that alleviate the burden on claimants to prove fault in antitrust private litigation so as not to make it excessively difficult or practically impossible for them to exercise the right to compensation; and adopt mechanisms to promote the settlement of cases out-of-court. There is also a widespread trend towards protecting public enforcement by limiting the liability of leniency applicants.

The main area of international divergence concerning defendants in competition claims regards who should be the addressee of a damage claim. Two main approaches can be found. According to the first approach, the autonomy of corporate bodies and legal forms must be respected. As a result, a damage claim should be brought against the exact corporate entity that committed an infringement, except where lifting the corporate veil is allowed and required. A second approach focuses on the economic reality underlying the corporate entity that committed the infraction and looks at the whole corporate group as a potential defendant. While this latter approach seems to be more prevalent around the world, at least in regard to competition matters,[20] no approach is inherently superior to the other. Instead, a choice between the two will often reflect a jurisdiction's general approach to the liability of legal persons for unlawful acts.

17 Case C-453/99, *Courage v. Crehan*, EU:C:2001:465, para. 26; Joined Cases C-295/04 to 298/04 *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA and others* (2006) EU:C:2006:461, para. 61.

18 This is particularly noticeable in compensation-based systems where standing to bring a claim may depend on an assessment of whether a competition infringement is able to cause damages to that claimant – see, for a start example, Case C-557/12, *Kone AG and others v. ÖBB-Infrastruktur AG*, EU:C:2014:1317. But it is also relevant even for those jurisdictions where only those directly and immediately affected by an antitrust infringement have standing to bring claims – see, for an example in the U.S., *Blue Shield of Virginia v. McCready* 457 U.S. 465 (1982), which set rules concerning remoteness of damage. On the relevance of this for standing, see Herbert Hovenkamp, "The Antitrust Enterprise," (Harvard, 2005), p. 59.

19 Pedro Caro de Sousa, "EU and National Approaches to Passing on and Causation in Competition Damages Cases," (2018) Common Market Law Review 55(6) 1751, p. 1759-1760.

20 International Competition Network (2017) "Setting of Fines for Cartels in ICN Jurisdictions," p. 13.

E. Establishing that an Infringement Occurred

A very important distinction for private competition enforcement concerns how competition infringements are established in individual private enforcement cases – depending on which damages claims will be either stand-alone or follow-on.

Private parties may present damages claims even in the absence of prior public enforcement. In these cases, the claimant will have to prove that an infringement occurred in order to obtain damages. A claimant will thus either have to prove that a conduct which is unlawful, either *per se* or by object, took place – which is difficult, since those conducts are usually secret – or that a conduct had negative effects on prices, output, or innovation in the relevant market. This poses significant difficulties in practice, as suggested by the time and resources that competition agencies devote to establishing that an infringement took place.

Allowing claimants to rely on the findings of a competition authority allows them to focus on showing that they suffered losses caused by the anti-competitive conduct in question, and on the quantification of such harms. This can be achieved by granting legally binding effect to competition authorities' decisions in follow-on private actions. Binding effects can take a variety of forms along a spectrum. On one end, an infringement decision may suffice to establish that an infringement has occurred in the context of claims for damages. Further along the spectrum, an infringement decision may have *prima facie* evidentiary value that an infringement occurred. Finally, at the other end of the spectrum an infringement decision may not have any additional evidentiary value in private competition cases – in which case claimants will have, in practice, to bring stand-alone cases in order to obtain compensation despite an infringement decision having been adopted.

Even if a decision by a competition authority has binding effect, relying on such decisions in damage claims is not necessarily straightforward.[21] As a rule, the effect of the infringement decision only extends to subsequent damages actions for the same antitrust violation as that found in the decision (i.e. same geographic scope, duration, etc.). However, decisions by the competition authority usually include extensive and detailed explanations of the competition law infringement sanctioned by the authority. Deciding which elements of the decision are binding, or have additional evidentiary value, are questions that can raise practical difficulties which may be eased through statutory provisions or case law.[22]

F. Statute of Limitations

When seeking damages for infringements to competition law, claimants must not only establish that a violation occurred – they must do so in a timely fashion. Rules limiting the timeframe during which a potential claimant can bring an action for damages create legal certainty, which is why they exist in all legal systems. However, limitation periods can also create considerable obstacles to the recovery of damages depending, on when they start, on their duration, and on whether or not the duration period can be suspended.[23]

In particular, short limitation periods that begin to run from the moment the infringement started and which cannot be suspended may render the right to seek compensation practically impossible. To ensure that the right to compensation can be enforced, limitation periods should not begin to run before the infringement of competition law has ceased, and the claimant knows, or can reasonably be expected to know: (a) of the behavior and the fact that it constitutes an infringement of competition law; (b) of the fact that the infringement of competition law has caused him harm; and (c) the identity of the infringer. Additionally, specific limitation periods can also be adopted concerning the bringing of follow-on claims after an infringement decision is adopted.[24]

21 OECD (2015), The Relationship between Public and Private Enforcement, WP3(2015)14, p. 18-19. In the EU, when national courts rule on matters relating to competition law which are already the subject of an infringement decision, those courts cannot take decisions running counter to that decision. Under section 5(a) of the Clayton Act, final judgments of U.S. federal antitrust investigations are *prima facie* evidence of a violation in private antitrust proceedings.

22 See, for examples, Recital 31 of the EU Damages Directive, s.59 of the UK's 1998 Competition Act and U.S. case law on collateral estoppel effect.

23 OECD (2015), The Relationship between Public and Private Enforcement, WP3(2015)14, p. 21.

24 OECD (2015), The Relationship between Public and Private Enforcement, WP3(2015)14, p. 3, 21-22.

G. Proving Causation and Quantum

There are particular difficulties in dealing with the amount and type of evidence necessary to establish that loss flowed from a competition infringement, and to quantify damages – i.e. causation and quantum.[25] Competition cases are particularly "fact-intensive." As a rule, the burden is on the claimant to prove causation and loss, if not the infringement. However, it can be extremely difficult for potential claimants, especially if they are merely final consumers, to have access to the factual elements required to demonstrate that they are entitled to antitrust damages. Evidence needed by the claimant to make its case is often in the hands of the defendants, of third parties, or of the competition authority. The difficulties faced by claimant in obtaining all the necessary evidence is widely viewed as a major obstacle to the success of damages actions.[26]

This helps explain why public versions of cartel decisions are very important for damage claimants. Damage claimants view the public version of the infringement decision as an important source of evidence, and have an interest in getting swift access to a version which is as detailed as possible.[27] At the same time, authorities often have to consider the legitimate interest of enterprises in the protection of their business secrets. As a result, the public interest in the disclosure of information contained in an infringement decision must be balanced against the right to confidentiality of the involved parties when publishing an infringement decision.[28]

In order to address the difficulties faced by claimants when bringing claims for competition law damages, private enforcement regimes have also developed mechanisms that allow potential claimants to gain access to the evidence necessary to plead a private damages case successfully. Such mechanisms include: (i) procedures for disclosure of evidence in the possession of defendants or third parties; (ii) access to competition agencies' files; (iii) access to settlement documents; and (iv) rules on expert evidence.[29]

As regards causation, courts may face significant difficulties when trying to establish it in competition cases. Markets are complex institutions; competition infringements very often impact on sophisticated supply chains working in highly complex market structures, which makes the identification of causal links particularly difficult. In order to address this, legal regimes around the world have adopted rules and mechanisms that are specific to the operation of causation in competition cases. These mechanisms vary across countries, and include the adoption of legal and evidentiary presumptions, modifications to the allocation of the burden of proof, relaxing the standard of proof, and borrowing from the content of infringement decisions.[30]

As regards *quantum*, i.e. the quantification of loss, this is subject to considerable limits as to the degree of certainty and precision that courts can achieve. This is despite there being a number of economic tools developed throughout the years for the purpose of estimating damages.

Given difficulties in quantifying harm, courts will usually be able to arrive only at best estimates relying on assumptions and approximations. Since it may be difficult to square such an approach with generally applicable rules on burden and standard of proof, it is unsurprising that jurisdictions around the world have adopted tools to facilitate damage quantification. On the one hand, there may be legal rules allowing or setting up mechanisms for the estimation of damages. Various jurisdictions adopt a number of additional tools to facilitate the quantification of harm, such as modifying the burden of proof, adopting presumptions of harm, or lowering the standard of proof required for the quantification of

25 In stand-alone claims, evidence will also be necessary to establish that an infringement took place.

26 European Commission, "White Paper on Damages Actions for Breach of EC Antitrust Rules," COM(2008) 165 final, para. 96.

27 Andreas Kafetzopoulos "European Commission policy on publication of cartel decisions," (2015) European Competition Law Review 36 295.

28 OECD (2015), The Relationship between Public and Private Enforcement WP3(2015)14, p. 34.

29 OECD (2018), "Individual and Collective Private Enforcement of Competition Law: Insights for Mexico," p. 132-149.

30 OECD (2018), "Individual and Collective Private Enforcement of Competition Law: Insights for Mexico," p. 164-167.

harm flowing from a competition infringement[31] – often going as far as allowing courts to estimate damages.[32] These mechanisms are justified by a general principle of effectiveness of judicial action, which requires that damages claims should not be rendered practically impossible or excessively difficult.

In practice, and in addition to the quantification of harm actually suffered, the amount that a claimant may obtain in damages proceedings will depend on a number of policy-related factors. A first such factor is the relationship between losses suffered and the amount of the damages awarded – and, particularly, whether damages are compensatory or punitive. A second factor concerns whether passing on is a relevant consideration and, if so, whether mechanisms have been adopted that address the difficulties created by having to take passing on into account. A third factor is interest and its impact on the final amount of damages. A fourth factor concerns rules that may reduce the amount of damages that an infringing party is liable for in order to promote and protect public enforcement.

IV. CONCLUSION

While each jurisdiction has its own approach to private competition enforcement that reflects that jurisdiction's overall approach to competition enforcement and its underlying legal culture, one can identify a number of common building blocks to every effective private enforcement regime.

Within this common framework, however, jurisdictions make a number of choices which usually reflect their general approach to competition enforcement and to non-contractual civil liability. A number of these choices are particularly important because they have knock-on effects on other parts of the private competition enforcement regime. Clear examples of this are choices regarding who can claim damages, whether damages are compensatory or punitive, and what defenses are available to those found guilty of infringing competition law. However, arguably the biggest choice is that of how to balance public and private enforcement – because such a decision informs overall competition enforcement, and the design and effectiveness of private competition enforcement.

31 See, for the U.S., *Zenith Radio Corp v. Hazeltine Research Inc* 395 U.S. 100, 123 (1969), according to which courts should take into account the "*practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries*" and acknowledge that "*damage issues in [antitrust] cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts.*" Art. 17 of the Damages Directive requires Member States to ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult.

32 Just to provide some examples: (i) German law expressly authorizes judges to estimate the amount of damages, as long as the results are economically reasonable and possible – see Zivilprozeßordnung [ZPO] [Code of Civil Procedure] Jan. 1877, Reichsgesetzblatt [RGBl] 30, § 287. See also judgment of July 12, 2016 – Case KZR 25/14; judgment of November 9, 2016 – Case 6 U 204/15 (Kart); judgment of December 21, 2016 – Case 8 O 90/14 (Kart); judgment of June 28, 2017 – Case 8 O 25/16. (ii) Art. 17 of the Damages Directive expressly provides for the possibility of courts to estimate damages. (iii) In the U.S., the jury "may make a just and reasonable estimate of the damage based on relevant data, so long as it is not based upon "speculation or guesswork" – see *Bigelow v. RKO Radio Pictures* 327 U.S. 251, 264-65 (1946).

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