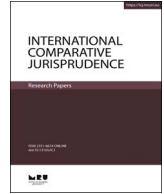
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The role of class actions in ensuring effective enforcement of competition law infringements in the European Union[☆]

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ABSTRACT

This article analyses the European Union competition law enforcement system and its developments. Data shows that the current European Union competition law enforcement system is ineffective. The systematic analysis by the author of the United States competition law enforcement system shows that an opt-out class action mechanism for competition law enforcement established in the United States enables effective enforcement of competition law. Whereas, there is no uniform collective redress system across the European Union. The national regimes of European Union Member States regarding collective redress are diverse. These considerations implies the need for a uniform collective redress system across the European Union.

“Two words describe the damages-actions landscape in Europe today: ineffective and uneven. Often the rules are so complex and uncertain that starting a damages action in court means embarking in an endless procedural battle. Insufficient, uneven and costly access to compensation is simply unacceptable in the Single Market; where the costs of an infringement should be borne by the infringers, not by the victims.”

(Joaquin Almunia, Vice President of the European Commission responsible for Competition Policy, 2013).

1. Introduction

In times of mass production and marketing, economic subordination and global communications, frequently many consumers are harmed by unlawful corporate practices, which bring large unlawful profits for undertakings. Whish and Bailey notes that the goal of competition law is to protect the interests of consumers, not (or not only) by protecting the competitive process itself, but by taking direct action against offending undertakings (Whish & Bailey, 2015, p. 20).

Competition law enforcement pursues three interconnected objectives: injunctive, punitive (deterrent) and compensatory (Komninos, 2008, p. 7). Berg notes that the focus on the compensation objective helps to design the optimal enforcement system

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(Berg, 2013, p. 15).² Many scholars consider that public enforcement is insufficient and it needs to be complemented with private enforcement – a potential infringer, while evaluating whether to engage in an anti-competitive practice, should consider the threat not only to be detected by the competition authorities but also the threat of an action for damages as a real cost (Migani, 2014, p. 85).

Jones and Sufrin notes that an effective private enforcement system creates a culture of competition among European Union citizens and a relief of pressure on competition authorities, able to save their resources for more complex cases (Jones & Sufrin, 2014, p. 1090). Whish and Bailey also notes that the competition authorities in the European Union have limited resources and they are unable to investigate every alleged infringement of the competition rules; private enforcement is a very important complement to their activities (Whish & Bailey, 2015, p. 312). Moreover, an effective private enforcement of competition law infringements can have an overall macroeconomic positive impact. It has been estimated that an effective enforcement system could result in annual social benefits of more than 100 billion euros in the European Union (Migani, 2014, 92 p).

The direct applicability of Articles 101 and 102 TFEU and the right to damages in the European Union have been established by the Court of Justice of the European Union in the milestone judgments of *Courage*³ (*Courage Ltd v Bernard Crehan*, 2001) and *Manfredi*⁴ (*Vincenzo Manfredi v Lloyd Adriatico Assicurazioni*, 2006).

However, former European Commissioner for Competition Joaquin Almunia notes that access to compensation is insufficient and unevenly spread in European Union (Almunia, 2013, p. 2). For instance, only 25% of Commission's decisions finding a cartel or other competition law infringement over the period 2008–2012 were followed by damages actions (Almunia, 2013, p. 2). Furthermore, those actions were mainly concentrated in three Member States – the United Kingdom, Germany and the Netherlands – and nearly all of them have been brought by large companies (Almunia, 2013, p. 2).

One of the main problems for effective private enforcement of competition law infringements (in particular for private individuals, small and medium sized businesses) is that there is no effective uniform class action system across the European Union (Bovis and Clarke, p. 61). The harm of the competition law infringement to one person may be small, and insufficient to merit the risk and cost of bringing an action for damages, consequently, the right to damages may be more theoretical than real in the absence of a possibility for a class action, a procedural mechanism enabling many single claims to be bundled into a single court action (Whish & Bailey, 2015, p. 319).

Whereas, private enforcement of competition law infringements is at the forefront of competition law enforcement in the United States – 90 per cent of all competition law cases in the United States involve private rather than public action (Whish & Bailey, 2015, p. 312). For instance, a total number of 1094 antitrust class actions were filed in the United States only during the period of 2013–2014 (Searby, 2015, p. 47).

Alexander notes that effective class action mechanism requires: (i) procedural law to authorize class actions; (ii) a supply of experienced lawyers; (iii) a way to finance the litigation; (iv) substantive law that recognizes consumers claims and does so in such a way that it will be efficient to litigate hundreds, thousands or even millions of claims together (Alexander, 2000, p. 2). Whereas, there is no uniform class action system across the European Union and the national regimes of European Union Member States are diverse.⁵

2. Private competition infringements enforcement developments in the European Union

In 2001, the Court of Justice of the European Union judgment in *Courage* established that Member States have an obligation, as a matter of European Union law, to provide a remedy in damages where harm has been inflicted because of an infringement of the competition rules (*Courage Ltd v Bernard Crehan*, 2001).

The Court of Justice of the European Union held that:

The full effectiveness of Articles 101 TFEU and, in particular, the practical effect of the prohibition laid down in Article 101(1) 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.

Indeed the existence of such a right strengthens the working of the EU competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the EU.

In a later judgment *Manfredi* the Court of Justice of the European Union recognized the compensation function of private enforcement (*Vincenzo Manfredi v Lloyd Adriatico Assicurazioni*, 2006).

² For example, in cases of price-fixing, overcharges are usually passed on along the supply chain: from manufacturers to wholesalers, from wholesalers to retailers, and from retailers to end-consumers. If the consumers have no standing, the law breaking undertakings will not have to pay the total size of the damages caused.

³ The Court of Justice of the European Union held that Articles 101 and 102 TFEU produce direct effects in relations between individuals and create rights for the individuals concerned which the national courts must safeguard.

⁴ The Court of Justice of the European Union recognized the compensation function of private enforcement.

⁵ For instance, no specific class action law exists in such significant European Union Member States as Germany and Austria.

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