Class Actions to Claim Antitrust Damages

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Cartels cause a € 2.5 billion harm/year to consumers and Economies in EU.

US Class Actions are going global.

Potential of millions of injured individuals obtaining compensation

Antitrust arena.
Agenda

- Cartels and Class actions
- Public and Private Enforcement
- State of Play, Trends and Challenges in EU
- Legislative Instruments and Policy Choices
  - Directive
  - Recommendation
- Conclusions
PUBLIC AND PRIVATE ENFORCEMENT

Private/Public Choice. Trends

- US: Private Enforcement (Litigation).

- EU: Public Enforcement (Commission & NCAs)
  - Few damages claims for cartels.
  - Exceptions: pro-active Jurisdictions.
  - Encouraging private enforcement, (also by Collective Actions).
STATE OF PLAY, TRENDS AND CHALLENGES IN EU

• EU Legislative package on Collective damages actions: a decade long drive.

• Crossroads:
  - Insufficient Deterrence
  - Reluctance to introduce US-style Class Actions.

• The compromise solution: Collective Redress

• Two legal instruments:
  – Directive on damages actions (specific sector issues)
  – Recommendation on collective redress (horizontal)
STATE OF PLAY, TRENDS AND CHALLENGES IN EU

• Directive and Recommendation draw up the EU regime of private collective actions in antitrust law.

• Far-reaching effects:
  - A real system of collective actions would change antitrust damages actions.
  - 360° degree change for victims of cartel agreements
POLICY CHOICES

• The Commission says it wants to promote private enforcement by positive harmonization (Directive)
• Discussion: Cost-benefit (efficiency) ratio.
• Key to success: efficient coordination and complementarity.
• EU rules seek to fine-tune the interplay between the two enforcement systems.
Directive on Actions for Damages for Infringements of Competition Law.

- Two main purposes
  - Giving *victims* an easier *access to justice*
  - Fine-tuning interplay between *private* actions and *public* enforcement (preserving the key role of CAs).

- Basis: Right to claim Compensation for the harm suffered
  - Full compensation.
  - No punitive damages (treble).
DIRECTIVE PROVISIONS. DISCLOSURE OF EVIDENCE

- **Right to obtain disclosure** by the defendant and even by third parties, including public authorities.
  
  a) No need to specify individual items of evidence.
  
  b) Balance of interests.
     
     • allowing disclosure of categories of evidence
     • avoiding “fishing expeditions”.

- **Right to obtain disclosure of evidences included in the FILE of a COMPETITION AUTHORITY**

  Different levels of protection:
  
  - **Black** list (Absolute). Leniency statements + Settlement submissions
  
  - **Grey** list (Temporary): Information related to an investigation.
  
  - **White** list (No protection): All other
DIRECTIVE PROVISIONS.
PROOF OF HARM

- Effects of final infringement decision by NCAs
  - Same State: full proof (binding)
  - Other States: prima facie evidence.

- Proof of infringement ⇐ ⇒ Proof of harm

- 2 Rebuttable presumptions
  - Cartels cause harm
  - Passing on

LIABILITY

- Joint and several liability regime
- Exception: immunity
RECOMMENDATION on Common Principles for Collective Redress

- **Procedural safeguards.** Getting different things mixed up

4 key issues:

- **1st. Legal STANDING** to bring a collective action: (“genuinely European solution”) limited to officially designated entities (associations).
- **2nd. OPT-IN / OPT-OUT** choice.
- **3rd. FUNDING (DISINCENTIVES):** unprecedented system of checks and balances. **Loser Pays.**
- **4th. CONTINGENCY FEES:** prohibited (while allowed in some Member States).
On paper: trying to ease private claims (by collective actions) as a way to achieve a more effective enforcement of this core policy of the EU overall, and preserving the efficiency of CAs, in particular leniency and settlement programs.

In practice: very likely to dissuade claimants to bring anticartel damages actions.

Under the umbrella of preventing the abusive US-style litigation, the EU undermines its intended objectives.
CONCLUSIONS

✓ No “level playing field”: Some Jurisdictions (such as the UK) are likely to remain being forum of choice for antitrust damages claims.

✓ With the shape given to collective actions, it seems that only follow-on actions are being actually promoted (very hard or simply impossible to build the case in an stand-alone action in the European system).
CONCLUSIONS

In a nutshell,

✓ I’m **skeptical** about the capacity of this EU initiative to achieve a robust collective action system in private antitrust enforcement. Let’s wait and see.

✓ The antitrust damages actions will be the **touchstone** for assessing the development of class actions in Europe. It may **pave the road** for class action litigation in other areas of Law in Europe...
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✓ “Copernican revolution”? lip service?
  “Much ado about nothing”?
CONCLUSIONS

The fight against cartels and the Class Actions will be always ongoing challenges worth of all and our best efforts.

Thanks for your attention.