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ISSUES AND PROBLEMS REGARDING E.U. COMPETITION LAW PRIVATE ENFORCEMENT: DAMAGES AND NULLITY ACTIONS

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Abstract:
Traditionally public enforcement of competition law has been infinitely more important than private enforcement in the EU. However, the European Commission, at least since the beginning of this century, is highly interested in increasing the level of competition law private enforcement within the E.U. countries. Recently, the EC has tried to detect the causes of the European poor figures regarding private enforcement, and also to put appropriate remedies and design useful tools for improving those figures. This paper examines some of the legal tools and measures proposed by the EC with that aim.

Key words: Competition law, private enforcement, contract nullity, damages, civil courts, civil proceedings.

JEL classification: K00

I. INTRODUCTION

Basically, there are two possible ways of enforcing the competition law rules. These two ways of enforcing competition law are respectively called public enforcement and private enforcement.
Public enforcement is done by specific administrative authorities charged with this duty. These authorities receive the reports and complaints of competitors and consumers about conducts that breach the antitrust prohibitions (they can also act ex-officio –by virtue of one's office or charge-). They carry out the proceeding to enforce the law, investigate the conducts reported and, when appropriate, punish the wrongdoers with fines and other public sanctions.
On the contrary, private enforcement is carried out by the Courts by settling private law cases. The enterprises and citizens who had suffered or had been victims of a breach of the antitrust prohibitions provoke the enforcement of competition law by the Courts by filing a civil action against the author of the unlawful conduct. It could be either a damages action (claiming for the damages inflicted as a consequence of the antitrust conduct) or an action to declare the nullity of a contract (a contract could be considered null and void as long as some of its terms -or the whole of it- are against the antitrust law). That will happen when the contract infringes the prohibition of the article 101 of the Treaty on the Functioning of the EU (if it affects trade between Member States or have as its object or effect the prevention, restriction or distortion of competition).
Historically, within the EU, public enforcement of competition law has been infinitely more important than private enforcement. The enforcement of competition law has been basically a mission reserved for administrative authorities in the EU [see Jones, C., *Private Enforcement of the Antitrust Law in the EU, UK and USA*, Oxford Univ. Press, Oxford, 1999]. Even nowadays the number of private law cases involving issues related to the enforcement of competition law is very little. The authors of the «*Ashurst Report*» [Waelbroeck, D.; Slater, D.; Even-Shoshan, G., *Study on the conditions of claims for damages in case of infringement of EC competition rules: Comparative Report*, Ashurst, Brussels, 2004](1) found only 60 cases involving damages actions based on infringements of competition law all over the EU territory. Moreover, only 28 of those cases lead to an award of damages. I have not studied the current situation in Romania is, but in Spain there are no more than two or three cases settled by the Supreme Court, involving damages actions based on antitrust law (and about fifteen involving nullity of contract actions, most of them concerning agreements between petrol stations and their suppliers).
On the contrary, in the USA, private enforcement has been traditionally the most important way to enforce competition law. It has been said, that 90% of the antitrust cases in the USA are private law cases, and most of them civil liability cases. The US law grants a treble damages action (damages

awarded are three times the amount proved during the civil process) to any plaintiff claiming for damages for breach of the antitrust law. This obviously makes filing for damages quite attractive to the victims of the unlawful conducts. More than 2000 cases in a year have been reported to be settled only in a year in the USA.

Although the aforementioned less importance of private enforcement in comparison to public enforcement of the EU competition law, the truth is that our topic (the «less important» private enforcement) has been worrying the European authorities for a long time. But before going into that, we have to examine how is regulated in the EU law this private enforcement we are talking about.

II. THE LEGAL MERITS OF THE CIVIL REMEDIES FOR BREACH OF ANTITRUST LAW

As every regular European law student knows, the rules of the Treaties of the E.U. (the E.U. primary rules) produce direct effects (principle of direct effect, supremacy principle), that is, they give rise to rights and duties enforceable by citizens before any national court of a member State. Obviously that is the case of the rules included in articles 101 and 102 of the Treaty on Functioning of the European Union (Hereinafter TFEU).

The direct effect of the antitrust prohibitions (2) determines, on the one hand, that any individual is entitled to claim for damages derived from an antitrust practice; and, on the other hand, that respecting the EU antitrust law is a condition for any contract to be valid all over the territory of the Union. Moreover, as long as it could be said that anybody has the right of not to be victim of an antitrust practices, any person or enterprise may ask for an injunction against a specific unlawful practice performed by an undertaking, when the internal law provides for that remedy.

Anyhow, there are some differences between the private law consequences mentioned in the previous paragraph:

- The action to declare the nullity of contract is directly regarded by art. 101 TFEU. In fact, paragraph number 2 of this article establishes that: "*any agreements or decisions prohibited pursuant to this article shall be automatically void*". So this norm indicates clearly that any contract or unilateral binding decision adopted by one or more undertakings is null and void. Besides, it obviously indicates that there is a nullity action to be filed against that contract or decision.

- On the contrary, the damages action is not expressly contemplated in the Treaty, nor is the previous possible injunction to stop the performance of the unlawful conduct.

Despite that, the European Commission and the European Union Court of Justice have always considered that this remedy is available for any individual damaged by a conduct that breaches the antitrust prohibitions. In 2001 the European Court of Justice (currently EUCJ) stated expressly that: "*the prohibition laid down in article 81* (current art. 101) *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*" [EUCJ, *Courage Ltd. Vs. Crehan*, Case C-453/99 [2001], ECR I-6297, [2001] 5 CMLR 1058, para. 26]. This legal doctrine has been repeated in 2006 by the European Court of Justice in the *Manfredi* case [Cases C-295/04 etc. *Vicenzo Manfredi vs. Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619, [2006] 5CMLR 17, para. 61.].

Two years after the 2001 ECJ first decision about the damages action, the Regulation 1/2003 on the implementation of the rules laid down in articles 81 and 82 of the Treaty, established formally that: "*National courts shall have the power to apply Articles 81 and 82 of the treaty* (current 101 and 102)". This text also includes other rules of importance for private enforcement. We will analyze these rules later on.

All the private law remedies to enforce EU competition law (nullity action, damages action and injunction) must be carried out by national courts applying their national private law. There are not any European rules that regulate an –it could be called- «antitrust tort», or a special nullity action for breach of antitrust law. Thus, the way to make private enforcement real is different depending on the characteristics of each country legal system. Insofar as Romania and Spain have

similar legal systems (both belong to the civil law systems and their Civil Codes are derived from the Napoleonic Code) the issues and problems set out by the private enforcement of EU competition law are alike too.

In general, we must distinguish two types of civil proceedings to enforce the antitrust law. Both of them are possible in our legal systems and they set out different issues and problems to us: a) «Standalone proceedings». In these proceedings, the plaintiff has to proof the breach of the antitrust prohibitions. The civil court has to determine if an unlawful conduct has been committed or not. B) «Follow-on proceedings». These proceedings are characterized because the plaintiff alleges a previous decision of an antitrust authority or an administrative court declaring the existence of a breach of antitrust law. We will refer to the different problems derived from either proceeding in the following paragraphs.

III. LEGAL TOOLS AND MEASURES TO IMPROVE THE LEVEL OF EU COMPETITION LAW PRIVATE ENFORCEMENT

As it was mentioned previously, private enforcement of EU competition law has little importance and practical weight as compare to public enforcement. This little importance though is not a situation that European authorities like. On the contrary, the European Commission has been for a long time longing for an increase of the rates of competition law private enforcement within the E.U. countries. The resources of the EU Directorate General for competition are limited. And it is clear that private enforcement of EU competition law by national courts could alleviate the burden put on the backs of the EU antitrust authorities.

But not only reasons related to the resource scarcity of the EU and National antitrust authorities are involved in this issue we're analyzing. The E-Commission has recognized in 2008 that the lack of private enforcement has more consequences. In fact, without an appropriate level of private enforcement: a) The costs of the unlawful conducts are borne by the customers and law-abiding businesses, and not by the wrongdoers. b) Less competition restrictions are detected by the legal system. So the economy works is less competitive and produces poorer results. c) The deterrent effect of the enforcement of EU competition law is lower. This could lead to a higher level of unlawful conducts in the future. d) In the end, our internal market does not work as well as it could, so greater prices and less innovation have to be expected [about this issue, see Segal, I.R; Whinston, M.D, "Public vs. Private Enforcement of Antitrust Law: A Survey", *Stanford Law and Economics Olin Working Paper No. 335*, Dec. 15, 2006].

For these reasons, the European Commission has tried to detect the causes of the poor rates of competition law private enforcement and to design legal tools appropriate to encourage it and to make it easier for the courts and the involved parties. We will examine some of this legal tools and measures as we analyze the private law actions we are discussing about.

1. LEGAL ISSUES REGARDING THE CONTRACT NULLITY FOR BREACH OF ANTITRUST RULES

Spanish and Romanian are both «civil law» systems. Besides, both of our private law systems are based on the same legal tradition (the French tradition). Therefore, any contract whose terms breach an imperative rule contained in a statute (statute stands for *loi* in French and *ley* in Spanish), is null and void in both our legal systems.

As long as the antitrust prohibitions of the Treaty have direct effect all over the EU, they have to be considered as statutes for our purposes. Thus, any contract that breaches any of those rules is void. Anyway, we know yet that the paragraph second in article 101 establishes expressly that consequence for any agreement or decision. Moreover, nullity in both our legal systems could be use as a sword (any person affected by the contract is entitled to exercise an action to declare its voidness), or as a shield (any person asked to perform the contract could refuse to do that using nullity as a defence).

Though it is clear that any contract that infringes an antitrust prohibition is void, if we consider the real data concerning this issue, we have to conclude that European national courts does not like very much to apply the antitrust prohibitions in order to declare or consider a contract void. Several explanations have been given to this reality.

A) The antitrust law is a really complicated matter of law. The application of antitrust law to a specific case involves notions (such as, relevant market, market power, the same definition of undertaking) linked with the economic theory. These notions are difficult to understand and unknown by most of the private law judges. Nevertheless, it has to be considered that this is a problem that arises only in the standalone proceedings. Even in these proceeding t could be alleviated by the means of cooperation between antitrust authorities and civil courts established in the Regulation1/2003.

B) The party of the process alleging the nullity as a legal defence, use to be a party of the contract as well. In both our legal systems, the principle of good faith implies that nobody can take profit of an infraction he himself has committed before (and this happens not only in civil law countries). So, if I have negotiated a contract and I have agreed with all its terms, I can't refuse to perform my contract duties when the time comes to it, alleging that the contract is illegal.

Regarding this issue, the Spanish courts have begun to apply the sanction of nullity as a sword or as a shield, in two types of cases:

- When the contract has been declared unlawful by the antitrust authorities (follow-on proceedings). In this situation, it's understood that any party can ask the civil courts to determine the private law consequences of the breach of the antitrust prohibition.

- Whenever there is enough evidence to proof that the party alleging contract nullity has not negotiated the unlawful terms. In other words: when the contract terms have been imposed by one party to the other, the party that suffered the imposition is entitled to file for contract nullity. This has been settled frequently, for instance, in the field of exclusive supply agreements (petrol supply or beer supply contracts).

C) Another important problem for the court is to deal with the consequences of contract nullity. There are two basic problems here: first to determine the scope of the declared nullity, and second to provide for the restitution of benefits between the parties.

- Determining the scope of the nullity could be a complicated problem in some countries. In Spain, for instance, the general principle is that partial nullity can only be declared when it is specifically permitted by an Act or Statute (e.g. when one of the parties is a consumer). Otherwise, a partial nullity can only be decided if it is sure that both parties would have agreed with the contract without the void terms. If one of the parties wouldn't have agreed with the contract without the illegal terms, the whole contract must be declared void. With this legal background, many times, the party interested in suppressing the unlawful terms will not sue, because he is more interested in keeping the contract alive, than in eliminate the illegal terms.

- When a contract is void, the basic legal consequence is that the parties have to make a restitution of all the benefits received from the other party under the contract. The parties have to be put in a position as if the contract had never existed. This could lead not only to enormous difficulties for the parties to find the proper evidence to support their interest, but besides that, to extremely complicated calculations that have to be done by the court to settle the case.

2. LEGAL ISSUES REGARDING THE CIVIL LIABILITY DERIVED FROM A BREACH OF ANTITRUST PROHIBITIONS

In any Napoleonic legal system, anybody that causes damage to the interests of other person has the duty to repair that damage, if his/her conduct is negligent (negligence is my translation for "*faute*" in art. 1.382 Napoleonic Code, and "*culpa*" in art. 1.902 Spanish Civil Code). As long as the breach of an imperative statutory duty is obviously a negligence (a *faute*), there is no room for any doubt about the possibility of claiming for damages in our legal system in case of breach of antitrust prohibitions.

Though, this could seem clear in theory (and so it is), when we have to deal with real cases we found that it is really hard for a civil court to settle a damages action for breach of antitrust prohibitions. It involves even more difficulties than the action to declare the nullity of a contract.

In 2008, it was published the white paper on Damages Actions for Breach of Antitrust Rules [Brussels, 2.4.2008 COM (2008) 165 final]. The purpose of this white paper was to detect the existing obstacles and difficulties that prevent a more frequent private enforcement of EU competition law, as well as to set out several options available to promote this to happen.

In order to expose them properly, we could distinguish between two types of problems arising from the application of the civil liability rules to a breach of EU antitrust prohibitions

A) Problems that have to be tackled by the courts:

- The first issue is obviously to determine if a breach of antitrust prohibitions has taken place in the case submitted to the court. The court in «standalone cases» has to tackle a question similar to that involved in the settlement of nullity action cases. As we said regarding nullity actions, the court could employ the cooperation tools included in the Regulation 1/2003 to get some assistance for this difficult task.

- Other hard problem to deal with in these cases is to decide who have suffered the damage. This has to do with the classic problem of the direct and indirect victims in tort cases. It has to be considered that most of the times the victims of the unlawful conduct are not the direct customers of the tortfeasors. On the contrary, they are the customers of the tortfeasor's customers. This reality give rise to two important problems related to the person of the plaintiff.

a) If the plaintiff is the customer of the tortfeasor, the defendant could use the so called «passing-on» defence. In other words, the defendant could allege that the plaintiff has not suffered any damage at all because he has passed on the price excess (derived from the unlawful conduct) to his own customers. The 2008 white book is full aware of this possibility. It intends to avoid possible abuses derived from its use in judicial procedures, requiring that the standard of proof for this defence should be not lower than the standard imposed on the claimant to prove the damage.

b) If the plaintiff if the last link of the distribution chain (the consumer), it could also be very difficult for him to prove that he has suffered a damage caused by the antitrust rules breaching businessman. In those cases, determining which part of the final price (if any) paid by the consumer comes from the unlawful conduct could be really complicated. Moreover, the plaintiff could allege that the damage is too remote and, therefore, that there is no link of causality between his conduct and the damage. To alleviate the burden of the proof for the plaintiff the white book suggest that there must be a rebuttable presumption that the illegal overcharge was passed on to them totally.

- Finally, another complicated task for the court is to calculate the correct compensation for the damages in these cases. Making calculations about this issue requires a level of economic and mathematical knowledge that regular judges do not have. It requires determining the price level of the market in competitive conditions, in order to compare that price with the real price derived from the unlawful conduct. In order to deal with this major problem of the national courts the white book suggests drawing up a non binding guide for quantification of damages in antitrust cases, by means of approximate methods of calculation or simplified rules on estimating the loss.

B) Special problems that the plaintiff has to deal with in these cases.

- The amount of damages suffered. Most of the times, especially when the unlawful conduct is quite dangerous and harmful, the damage caused to each victim is little. If the Great Petrol Companies agree on the prices of the gasoline or gas oil, it could be only a few centimes damage for consumers each time they go to the petrol station. Nobody begins a judicial proceeding for this ridiculous amount of money. So, if we want to promote private enforcement in many cases (the most important restrictions, actually) we have to create legal mechanisms to deal with this problem.

The white book proposed the member states to enact new law rules to tackle this problem. These rules should establish representative actions brought by qualified entities (consumer associations, business associations, administrative bodies, etc.) or opt-in actions, in which victims could decide to combine their claims for harm they suffered into a single action. Anyway, at least in

Spain, neither the consumer associations nor the civil proceeding rules seem prepare to carry out such a difficult task.

- Evidences of the conduct unlawfulness are not available to plaintiffs. Proving the unlawfulness of the conducts that breach an antitrust prohibition is not easy. Almost every piece of evidence about the issues concerned in the case is in the hands of the wrongdoers. If there is not a minimum level of disclosure between parties during the process it could be impossible for the plaintiff to prove the existence of the tort. The white book is also aware of this problem and states that national courts must have the power to order parties to proceedings or third parties to disclose precise categories of relevant evidences, when the other party is unable to produce the requested evidence by himself.

- Finally other major concern regarding the plaintiffs in these cases is related to the limitation periods. For a correct understanding of this difficulty we have to take into account that the unlawful agreements or decisions usually remain hidden. The wrongdoers do not have any interest in disclosing what they have done. Therefore, if law makes start the prescription period when the unlawful conduct is just committed, or when the damage was caused for the first time, we are obstructing any hypothetical possibility of filing for damages. Again the white book has a suggestion to deal with this difficulty. It suggest that the prescription period in this kind of actions should begin when the plaintiff is aware of the existence of an unlawful conduct, or when it would be negligent not to know it.

ENDNOTES

(1) This report is downloadable at http://ec.europa.eu/competition/antitrust/actionsdamages/study.html.

(2) The antitrust prohibitions are: a) The prohibition of cooperation between undertakings -traders- that restricts or eliminates competition in the market concerned, by means of agreements, decisions and concerted practices (art. 101 of the Treaty on Functioning of the European Union); and b) The interdiction of abuse of a dominant position. An undertaking -or two or more collectively dominant undertakings- cannot use its market power in an abusive way restricting competition (art. 102 of the Treaty on Functioning of the European Union)

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