National Courts: Commission Statement

Subject: National courts
Private enforcement
Civil proceedings

Industry: All industries

Source: Commission Document SPEECH/01/258, being the text of a Speech by Mr. Mario Monti, Commissioner for Competition Policy, Commission of the European Communities, entitled "Effective Private Enforcement of EC Antitrust Law", delivered at the Sixth EU Competition Law and Policy Workshop, held in Florence, on 1-2 June 2001

(Note. The text reproduced below is a slightly edited version of the speech: it concentrates on the important effects which are expected to flow from the proposed Council Regulation on Competition Policy. By far the greatest effect, in the present context, will be to stimulate the enforcement of competition policy by means of civil proceedings in the Member States' national courts. In Europe this concept is far less developed than it has been for many years in the United States, where civil actions, with their powerful remedy of triple damages, have been an important factor in shaping anti-trust laws. How far the proposed Regulation will encourage a similar development in national jurisdictions, in which civil remedies for "breach of statutory duty" may not be known, is uncertain: the Regulation will not directly harmonise national laws in this field. It may, however, be reasonably expected that indirect harmonisation will follow.)

The case for more private enforcement

As you are aware, the Commission has proposed a major reform of the way the Community competition rules are applied. One important objective of the reform is to pave the way for more effective private enforcement of the EC competition rules. Obviously, we do not expect crowds of lawyers to flock in front of the court buildings in order to file lawsuits on the day the new Council Regulation enters into force. However, it is our aim that companies and individuals should increasingly feel encouraged to make use of private action before national courts to defend the subjective rights conferred on them by the EC competition rules.

The intentions behind this aspect of the reform are threefold. First, the combined enforcement action by the Commission, the national competition authorities and the national courts will strengthen the impact of the rules as such. The competition rules are there to ensure that consumers benefit from lower prices and better products as a result of effective competition in markets. Effective remedies must be available to stop infringements and to ensure that parties harmed by a violation obtain compensation. Consumers should also have more

access to remedial action in the form of private enforcement to protect their rights and to obtain damages in compensation for losses suffered.

Second, the reform, by fostering *decentralised* application, should bring the EC competition rules closer to citizens and undertakings throughout the Internal Market. For a future enlarged Community, with 27 or 28 Member States, it is not a desirable or even a viable concept that the application of the EC competition rules should largely be reserved to administrations acting as public enforcers. Companies or individuals harmed by an infringement of the EC competition rules should, as a general rule, be able to seek redress in the locally competent civil or commercial court, possibly before a locally competent specialised court or specialised chamber of a court. The Commission, for its part, should focus on the functions it is best placed to carry out due to its central position. This includes the development of Community competition policy through the legislative framework as well as through individual decisions that can serve as precedents. This also includes a function as a resource centre for the national courts as foreseen in Article 15 of the proposed Regulation.

Third, the reform should enable us to make the most of the complementary functions of public and private enforcement of the competition rules. Public enforcers are particularly well equipped to investigate serious, typically secret infringements, making use of their investigative powers. In addition, they can be well placed to bring cases in areas where the application of the rules is not yet entirely clarified (and where it is therefore unlikely for private parties to take the risk of litigating), thereby contributing to further clarification of the rules through precedent.

National courts on the other hand are particularly well placed to solve contractual conflicts between the parties to an agreement. So far, this function of the national courts has been hampered by the Commission's monopoly on the application of Article 81(3), as the courts were often obliged to suspend proceedings in accordance with the *Delimitis* case law of the Court of Justice. In addition, national courts have the power to grant damages to a party that is the victim of an infringement in compensation for the losses it has suffered. Action before national courts in this respect should increase.

A range of elements must come together to make private enforcement more effective. The Commission has proposed to give national courts the power to apply Article 81 as a whole, thereby abolishing the current division of jurisdiction under which the national courts can only apply Article 81(1) whereas the Commission has exclusive power to apply Article 81(3). The reform of the implementing rules for Articles 81 and 82, as proposed by the Commission, is a basic condition for national courts to play their *full* role in the application of the competition rules as they have done for a long time in other areas of Community law.

The abolition of the Commission's monopoly to apply Article 81(3), however fundamental it is, may not by itself suffice to boost private enforcement of the competition rules in Europe. The Commission is proposing a range of other

elements in the text of the draft Regulation or in the wider framework of the overall reform effort.

Facilitating the application of Article 81(3) by national judges

The discussion of the role of national judges after the reform has so far largely focussed on the question, whether judges will be able to apply Article 81(3). I do not want to linger on this aspect today, but would like to recall three points. Article 81(3) is a legal rule which must be applied when its four conditions are fulfilled. The application of these conditions can require economic analysis and balancing of interests. However, the provision is not fundamentally different in nature from other rules applied by judges. The Commission is therefore confident that they will not in general face insurmountable problems in this respect.

The proposed new Regulation maintains the instrument of block exemption regulations. They retain their constitutive nature and must be applied by national courts if their conditions are fulfilled, subject to control by the Court of Justice. This is an important element to give guidance to companies and distinguishes the European system from US anti-trust law.

In addition to the block exemption regulations, the Commission has promised to continue working on further elements to provide guidance to companies and judges, such as guidelines and Notices, such as the *De minimis* Notice. The Commission has in particular committed itself to producing guidelines on the methodology for the application of Article 81(3) to provide all national courts in the Community with an analytical framework.

Private enforcement raises further questions

When dealing with a case requiring the application of the EC competition rules, however, the national courts are not only confronted with the task of interpreting Article 81(3) in a legally correct and coherent manner. They also face a range of questions related to the facts of the case or situated at the borderline between fact-finding and legal analysis. This aspect takes on particular importance with regard to claims for damages. In this field, expansion of private enforcement is particularly desirable in order to ensure effective remedies for parties harmed by infringements. At the same time, there is a general impression that there can be problems under national law and procedures with regard to proving the infringement and the causal link between the alleged infringement and the damage suffered as well as with regard to the determination of the extent of the damage to be compensated. Arguably, in the light of this complexity, additional elements must come together in order to instil real life into the judges' power to apply Articles 81 and 82.

Elements in the Regulation

The proposed Regulation essentially contains two very specific elements addressing this borderline area of EC competition law and civil procedures: the rule on burden of proof and the rule on cooperation with national courts.

First, the proposed Regulation expressly maintains the repartition of the burden of proof for the two different parts of Article 81. The party alleging an infringement has to demonstrate that the conditions of the prohibition rule in Article 81(1) are fulfilled. The party wanting to invoke the exception laid down in Article 81(3) has to demonstrate that the conditions of that provision are met.

Second, the proposal provides for a framework for the Commission (and the national competition authorities) to interact with national courts. The proposed Article 15 formalises the current practice of providing opinions to national courts if they so request. This instrument can be useful in the new system. The time has come where more cooperation between courts and administrations is required as a result of the complexity of certain matters to be decided by courts. Administrations can help by providing certain factual information in their possession or by giving expert opinions to judges, always subject to legal challenge.

This instrument is not conceived as a substitute for the preliminary reference procedure of Article 234 of the Treaty. Whereas references to the Court of Justice concern questions of legal interpretation, national courts may, in particular, want to address themselves to the Commission with questions on economic issues, such as questions relating to market definition. Article 15 can therefore typically be of help in the borderline area between facts and law.

The *amicus curiae* proposal

The Commission also envisages that it and the national competition authorities should have the power to make written or oral submissions as *amicus curiae* before national courts. In the case of the Commission this power would be limited to cases presenting a Community public interest. Such an interest would in particular exist in cases raising important issues of coherence as regards competition policy. The Commission would not intervene on behalf of one of the parties but would present its opinion in the interest of a coherent application of the law.

The potential contribution by judges

In fact it appears that the procedural rules for civil courts, though highly complex, are a flexible tool. Judges generally have a large margin of appreciation as to how they conduct the proceedings in a case. They can adapt the course of the procedures to the varying subjects that come before them. Questions to be explored include to what extent and in what ways civil courts can, on the basis of the principles governing their procedures, take account of the specific requirements of cases involving the application of the EC competition rules. The toolbox of national courts presents a potential to tackle the apparent problems, in particular with regard to claims for damages. National courts should make full use of the tools available to them in order to give effect to the competition rules. When they find themselves blocked from effectively applying the EC competition rules due to aspects of their national procedures, national courts should look

carefully into the existing case law of the Court of Justice for guidance; and they should not hesitate to request preliminary rulings from the Court on issues they find unresolved. The answers by the Court of Justice can provide Community-wide solutions for such questions.

National judges also increasingly look outside the confines of their own Member State. Cooperation between judges across borders is an important tool for the collection of evidence. An increase in such cooperation and exchange of ideas may also provide judges with opportunities to be inspired by solutions found elsewhere.

In summary, I believe that national judges have some tools to contribute to more effective private enforcement of the EC competition rules. In-depth research of the factors at work in the different national systems can pave the way for a gradual development of solutions by the courts of the Member States. We should bear in mind that, the system of private enforcement in the United States,in the form of claims for damages, has developed only gradually.

The possible need for Community legislation on civil procedures

It is a matter for consideration whether EC legislation on specific issues at the interface between EC competition law, the law of torts and civil court procedures could help to enhance the effectiveness of private enforcement. This is a delicate question to deal with. The Commission's proposals for reform already introduce substantial changes. We should not try to achieve too much at the same time if we want to obtain real progress in reasonable time. This is not to exclude, at a later stage, an exploration of this course of action.

The possible need for criminal sanctions for infringements

This discussion is an expression of the growing awareness of the harm caused to consumers by violations of the competition rules. However, at this stage, the introduction of criminal sanctions is not the only way forward to make enforcement of the EC competition rules more efficient. Criminal sanctions involve a large range of questions. Where they could help to solve certain specific problems they also risk creating others.

More efficient enforcement in the EC at this stage can best be achieved by persevering in the course that the Commission has already started. First, the reform of the implementing rules will permit the Commission, as well as the national enforcers, to concentrate more on the prosecution of serious infringements. Together with amended investigation powers, this will increase the risk of detection for companies that infringe the law. Second, there is a potential for further adapting fines on companies at European as well as at national level to reflect better the harm done by violations of the competition rules. Third, the increasing risk of private claims for damages should contribute to the deterrent effect of the competition rules. These elements taken together will make an impact on companies in real terms. They will also show that the Commission is serious about combating violations which damage consumers. ■