Overview of Anti-Trust Enforcement Systems

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1 Introduction

Currently, most states around the world have adopted antitrust legal provisions. By comparing these provisions, we can observe a great deal of similarity in the language of the various texts. For example, sections one and two of the Sherman Act, Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), and Articles L420-1 and L420-2 of the French Commercial Code, all prohibit certain types of agreements between undertakings and the abuse of dominant position. Despite these similarities, the antitrust legal systems of the United States, the EU and France function in very different ways. These variations can be explained by the fact that the enforcement rules governing antitrust laws are different in each system.

In this paper, we begin by presenting a quick overview concerning antitrust enforcement rules which highlights the two main forms of antitrust enforcement, public and private. After that, we present some important American antitrust provisions and we highlight the means of by which those laws are enforced, including the role of federal agencies. Next, we present the European competition rules and we provide a quick overview of the European enforcement system. We conclude this paper by highlighting the importance of taking in consideration the interaction between public and private antitrust enforcement by the laws makers.

2 Overview of the enforcement of antitrust law

Generally speaking, law enforcement pursues various objectives, such as compensation, restitution, punishment, and prevention. The principal aim of competition law is to restore competition in the market. This objective may be conceived broadly, however, as including, most importantly, putting the specific infringement of competition rules to an end, compensating the victims and minimizing the recurrence of anticompetitive behavior in the future.

In order to achieve the various objectives of the antitrust enforcement, the majority of legal systems use both public and private enforcement. Public enforcement can be defined as the enforcement of antitrust legal rules by a public authority, for example by the government,

competition agency, or a public prosecutor, to detect and sanction violators of competition laws. The public authorities may impose criminal or monetary sanctions such as fines, which may compensate the general public for the distortion of the competitive process in the market. Public enforcement, the principal aims of which are deterrence and the protection of competition, not the compensation of the injured parties from the competition law infringement.

Private enforcement can generally be defined as litigation initiated by an individual, a legal entity, an organization, or a public entity whose goal is to have a court establish an antitrust infringement and order compensation for damages suffered, and in some cases to impose injunctive reliefs on the infringer of the competition law. Indeed, there are two forms of private enforcement action. The first form is stand-alone action. The other form is follow-on action, so called because it follows a public enforcement decision. Private enforcement of antitrust law, when it results from actions for damages, mainly fulfils a compensatory function for victims of anti-competition behavior, as victims resort to action for damages to assert their individual rights, on their own initiative and according to their own legitimate interests. Private enforcement can also help to raise the deterrent effect of antitrust enforcement.

Without a doubt, there are several arguments for a mixed system of antitrust law enforcement, instead of a purely public or private one. By contrast, special attention must to be paid to ensure the proper functioning of public and private enforcement of antitrust law. A good antitrust enforcement policy takes into consideration the interaction of public and private enforcement and integrates the so-called separate tasks approach, under which public enforcement and private enforcement are each assigned the tasks for which they are best suited.

3 Overview of American antitrust law and enforcement rules

Generally speaking, in the United States, there are three major Federal antitrust laws: the Sherman Antitrust Act, the Clayton Act[1] and the Federal Trade Commission Act[2]. The

[1] Clayton Act, 1914, 15 U.S.C.
[2] Federal Trade Commission Act, 1914, 15 U.S.C.

Sherman Antitrust Act is the American nation's oldest antitrust law. It has stood since 1890 as the principal antitrust rules. The American Congress felt so strongly about this commitment that there was only one vote against the Act. The Act makes it illegal for competitors to make agreements with each other that would limit competition. This includes agreements among competitors to fix prices, rig bids, and allocate customers. Violations under the Sherman Act, involving agreements between competitors are usually punished as criminal felonies. The Act also makes it illegal for a business to be a monopoly if that company is cheating or not competing fairly. The American Department of Justice alone is empowered to bring criminal prosecutions under the Sherman Act. In keeping with these rules, individual violators can be fined up to $1 million and sentenced to up to 10 years in prison for each offense, and the corporations concerned can be fined up to $100 million for each offense. In addition, under some circumstances, the maximum fines can go even higher than the Sherman Act maximums to twice the gain or loss involved by the infringement of the antitrust law.

The Clayton Act is a civil statute (carrying no criminal penalties) that was passed in 1914 and significantly amended in 1950. With the Sherman Act in place, and trusts being broken up, business practices were developing and some undertakings discovered mergers as a way to control prices and production (instead of forming trusts, competitors united into a single company). As a reaction to that behavior, the Clayton Act prohibits mergers or acquisitions that are likely to lessen competition and enables the US Government to challenge those mergers that a careful economic analysis shows are likely to increase prices for consumers. All persons considering a merger or acquisition above a certain size must notify both the American federal antitrust agencies. The Act also prohibits other business practices that under certain circumstances may harm competition.

The Federal Trade Commission Act (FTCA) was passed in 1914. The American Congress created a new federal agency, the Federal Trade Commission, to watch out for unfair business practices and gave the commission the authority to investigate and stop unfair methods of competition and deceptive practices in interstate commerce. The Act, however, did not put criminal penalties in place.

The Federal Trade Commission (FTC) and the Department of Justice (DOJ) are the main public bodies that enforce the federal antitrust laws. Both agencies enforce the three core federal American antitrust laws mentioned above. The FTC shares civil enforcement authority with the DOJ. In practice, the two antitrust agencies complement each other.

The American Office of the Attorney General was created by the Judiciary Act of 1789 as a one-person part-time position. In 1870, the Department of Justice officially came into existence and was empowered to handle all criminal prosecutions and civil suits in which the United States had an interest. The Sherman Antitrust Act was enforced by the Attorney General from the time of its passage in 1890 until the Office of the Assistant to the Attorney General was established in 1903. After its establishment, the Assistant to the Attorney General handled antitrust matters from 1903 until 1933. During this time, on October 15, 1914, the American Congress enacted the Clayton Act. Under the administration of President Roosevelt and Attorney General Cummings in 1933 the Antitrust Division was established, and Harold M. Stephens was appointed the first Assistant Attorney General in charge of the Antitrust Division. Indeed, from its beginning as a one-man, part-time position, the Department of Justice has evolved into the world's largest law office and the chief enforcer of antitrust law.

The Antitrust Division’s number one antitrust priority is criminal prosecution of cartel violations because of the harm that such violations cause to consumers and the economy in general. In fact, the DOJ uses a number of tools in investigating and prosecuting criminal antitrust violations. Attorneys of the Department of Justice often work with agents of the Federal Bureau of Investigation (FBI) or other investigative agencies to obtain evidence. Additionally, the DOJ in some cases may use court authorized searches of businesses and secret recordings by informants of telephone calls and meetings. Furthermore, the DOJ may grant immunity from prosecution to individuals or undertakings who provide timely information that is needed to prosecute others for antitrust violations.

On September 26, 1914, the Federal Trade Commission was created when President Woodrow Wilson signed the Federal Trade Commission Act into law. The FTC opened its doors on March 16, 1915. The FTC's mission is to protect consumers and promote competition in the US. Indeed, the FTC has enforcement or administrative responsibilities under more than 70 American laws. The primary statute of the commission is the Federal Trade Commission Act.

Under this Act, the FTC is empowered, among other things, to prevent unfair methods of competition, and unfair or deceptive acts or practices in or affecting commerce. The FTC also seeks monetary redress and other relief for conduct injurious to consumers. The FTC Act prohibits unfair methods of competition, which include, but are not limited to, any conduct that violates the Sherman Antitrust Act. The FTC also enforce the Clayton Act. The FTC is charged under Sections 3, 7 and 8 of this Act with preventing and eliminating unlawful tying contracts, corporate mergers and acquisitions, and interlocking directorates. The statute was amended by the Robinson-Patman Act under which the FTC is authorized to prevent certain specified practices involving discriminatory pricing and product promotion. Additionally, the FTC enforces the Hart-Scott-Rodino Antitrust Improvements Act of 1976. This Act amended the Clayton Act by requiring undertakings to file premerger notifications with the FTC and the DOJ.

The FTC has civil investigative and enforcement authority with respect to violations or potential violations of either the FTC Act or the Clayton Act. Its investigative powers include the power to issue subpoenas and civil investigative demands (CIDs). Like a subpoena, a CID may be used to obtain existing documents or oral testimony. Unlike a subpoena, a CID may also be used to require the recipient to file written reports or answers to questions. The FTC Act clearly authorizes the issuance of CIDs to entities not found within the territorial jurisdiction of any US court. In addition to these investigative tools, the FTC also relies on the voluntary submission of evidence and information from complainants, customers, suppliers and competitors of the undertaking under investigation. In the absence of a settlement, the FTC may commence an adjudicatory proceeding before an administrative law judge to remedy a violation. The FTC's administrative complaints initiate a formal proceeding that is much like a federal court trial but before an administrative law judge.

Additionally, every American state has antitrust laws and they are enforced by each state’s attorney general. There is an office in each state capitol that helps American consumers or businesses who might be hurt when businesses do not compete fairly. Indeed, state attorneys general can play a significant role in American antitrust enforcement on matters of particular concern to local businesses or consumers. An attorney general may bring an action to enforce the state's own antitrust laws. Additionally, state attorneys general may bring federal

antitrust suits on behalf of individuals residing within their states ("*parens patriae*" suits), or on behalf of the state as a purchaser.

Finally, the most significant role in enforcing the American antitrust law is that of private parties. Private parties can also bring suits to enforce the antitrust laws in the US. Indeed, most antitrust suits are brought by businesses and individuals seeking damages for violations of the Sherman or Clayton Act. Additionally, private parties can seek court orders preventing anticompetitive conduct (called "injunctive relief") or bring suits under state antitrust laws. A provision in the Clayton Act also permits private parties injured by an antitrust violation to sue in Federal court for three times their actual damages plus court costs and attorneys' fees.

American law also provides special instruments for private antitrust enforcement by further strengthening plaintiff-favoring litigation procedures. For example, broad discovery rules help plaintiffs to prepare more marginal cases for trial (or settlement) while also increasing defendants' unrecoverable litigation costs. Also, the cost rule, which prevents a successful defendant from recovering its litigation costs. Additionally, special instruments include opt-out class actions, use of entirely contingent fees, and the imposition of joint and several liability on defendants without any right of contribution from one defendant to another. By contrast, individuals and businesses cannot sue under the FTC Act.

4 Overview of European competition law and enforcement rules

Since the establishment of the European Community, competition policy has formed a cornerstone of European law. The purpose of the Treaty of Rome of 1957 is ensuring European Union Member States' economic and social progress through common action in eliminating the barriers which divide Europe with the goal of guaranteeing steady expansion, balanced trade, and fair competition. The Treaty prohibited certain types of agreements between undertakings in Article 85 and abuse of dominant position in Article 86. The first European legal provision implementing Articles 85 and 86 of the Treaty is Regulation No 17, which authorizes the European Commission, upon application or upon its own initiative, in case of infringement of Article 85 or Article 86 of the Rome Treaty, to bring such infringement to an end via a binding decision. The regulation specifies that those entitled to apply to the European Commission are: the European Member States and the natural or legal persons who claim a legitimate interest.

Additionally, this provision allows the Commission to avoid taking a binding decision by addressing a recommendation for termination of the infringement to the undertakings or associations of undertakings concerned. Without a doubt, the competition rules must be applied effectively and uniformly in the European Member States in order to establish a system which ensures that competition in the European common market is not distorted. In the start of the 21st century in the light of European lawmakers' experience, Regulation No 17 should be replaced by legislation designed to meet the challenges of a European integrated market and a future enlargement of the European Member States. The European legislature passed Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty of the Functioning of the European Union (TFEU)[3]. Up to the present time, this legal provision continues to govern large parts of European competition law enforcement.

The European legal provisions mentioned above gave the European Commission and the national competition authorities of the 28 European Member States a central place in the enforcement of European competition law. At present, around 90% of competition actions are provided by public authorities.

Private actions represent around 10% of all European competition law enforcement actions. To establish any action for damages, the claimants must sue the court of one of the 28 Member States. If it is appropriate, the national court will apply the European antitrust rules. Whatever rules that the court applies, it must respect some of the European rules and principles such as the principle of effectiveness and equivalence. The principle of effectiveness in this context means that each member state must guarantee the exercise of all rights that are conferred on individuals by the European law and not render the exercise of those rights excessively difficult or practically impossible. The principle of equivalence means that the European rules must not be less favorable than the domestic ones in term of their enforcement and application. The right of the victims to obtain compensation for any European competition law infringement was confirmed by the European Court of Justice (ECJ) in different cases such as

[3] Council of the European Union. Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 16 December 2002.

Courage Limited v. Crehan (2001)[4] and European Community v Otis NV and others (2012)[5]. According to these judgements, the European courts state that the national courts must guarantee that the consumers or companies receive compensation in case of any violation of European competition law. Additionally, in Manfredi v. others (2006)[6], the court held that in the absence of community rules governing that field, it is for the domestic legal system of each Member State to set the criteria for determining the extent of the damages for harm caused by an agreement or practice prohibited under Article 81 EC, provided that the principles of equivalence and effectiveness are observed. In 2005, the European Commission presented a Green Paper on damages actions for breach of the EC antitrust rules[7]. Additionally, in 2008 the White Paper on damages actions for breach of the EC antitrust rules was presented by the commission[8]. This paper underlined that any citizen or undertaking who suffers harm as a result of a breach of EC competition law must be able to claim reparation from the party who caused the damage.

A new stage of the private European competition law enforcement began 2014 with the passage of the European directive on certain rules governing actions for damages under national law[9]. The Directive imposes on European member States the responsibility to ensure that any natural or legal person who has suffered harm caused by an infringement of European competition rules is able to claim and to obtain full compensation for that harm. Full compensation of the victims, under the European rules, means placing a victim in the economic position in which that victim would have been had the infringement of competition law not been committed. The full compensation shall therefore cover the right to compensation for

[4] Court of Appeal (England and Wales) (Civil Division). Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others. 20 September 2001. EUR-Lex, European Union, 16 October 2018.
[5] European Court of Justice (Grand Chamber). Europese Gemeenschap v Otis NV and Others. 6 November 2012. EUR-Lex, European Union, 16 October 2018.
[6] CJEU, judgement, 3rd chamber. Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA and others. 13 Jul. 2006, EUR-Lex, European Union, 16 October 2018.
[7] Commission of the European Communities. *GREEN PAPER Damages actions for breach of the EC antitrust rules. EUR Lex,* European Union. 19 December 2005. Web. 16 October 2018.
[8] Commission of the European Communities. *White paper on damages actions for breach of the EC antitrust rules*. *EUR-Lex,* European Union. 2 April 2008.
[9] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance. 26 November 2014. European Parliament. Web. 16 October 2018.

actual loss and for loss of profit, plus the payment of interest. Full compensation shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages.

The object of new legal rules is to enhance the private enforcement of European antitrust law. Some of the ways to achieve this include facilitating access to the document and materials that are in the possession of private parties or public authorities, as these documents are helpful to approve the claimant's rights in action for damages. National courts must limit the disclosure of evidence to that which is proportionate in the case. The courts, in their determination of proportionality, should consider the legitimate interests of all parties and third parties concerned. National courts shall consider the need to safeguard the effectiveness of the public enforcement of competition law. The rules of the directive explained that, for the purpose of private actions for damages, national courts cannot order a competition authority to disclose any of the leniency statements and settlement submissions. Additionally, national courts request the disclosure from a competition authority of evidence only where no party or third party is reasonably able to provide evidence included in the file of the authority.

Furthermore, the new rules provide the claimant with some legal presumptions which enable him to prove his rights in a private action for damages. On one hand, according to the European competition rules, when national courts of the member states rule on settlements, decisions or practices under Article 101 or Article 102 of the TFEU which are already the subject of a European Commission decision, the national courts cannot take decisions running counter to the decision adopted by the Commission. On the other hand, an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under competition law. Furthermore, a final decision finding an infringement of competition law that was taken in another Member State must be presented before the national courts of other Member States as at least *prima facie* evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties.

5 The interaction between public and private antitrust enforcement

We conclude this paper by highlighting the importance of taking in consideration the interaction between public and private antitrust enforcement by the laws makers. The interaction between public and private enforcement is of particular interest for all jurisdictions that have made the choice of a dual enforcement system for their competition laws. This constitutes the majority of jurisdictions, which is why it is so important to explore the topic in antitrust enforcement studies. Furthermore, there are several arguments for a mixed system of enforcement, instead of a purely public or private one. By contrast, special attention must to be paid to ensure the proper functioning of public and private enforcement of antitrust law.

Private enforcement, in combination with public enforcement, can help to enhance the deterrent impact of antitrust enforcement on market players. This achievement could affect the quantitative and qualitative consequences of enforcement action. On one hand, the coexistence of stand-alone actions and public enforcement actions help to detect more anti-competition behaviors in the market. On the other hand, follow-on action after a public enforcement decision can help to increase the amount of monetary sanctions on the infringer of the antitrust rules. The relationship between public and private enforcement in these cases would be complementary. Under some antitrust enforcement systems, additional deterrence is beneficial and can led to an optimal level of deterrence. Public authorities must, however, pay special attention to avoid over-deterrence. Over-deterrence can negatively affect competition processes in the market and led to suboptimal results for social welfare.

Furthermore, private enforcement complements public enforcement because competition authorities often have limited resources and therefore must concentrate on cases which have the greatest impact on competition and the economy. In the absence of public enforcement action, private parties are offered the possibility of using private enforcement in order to protect their legitimate rights. In consequence, private enforcement fulfils a relief function when no public enforcement action has been taken against the infringement of antitrust law.

The fact that, since the recent development of private enforcement under the European rules, the interaction between public and private enforcement has become a reality in the European context. Therefore, crafting good policy to govern this type of interaction has become a serious and necessary topic of discussion.

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