

Enforcers debate their role in private enforcement

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08 May 2017

The head of the Dutch competition authority denied today that agencies have a role in private damages litigation, but antitrust enforcers from the EU, Germany and the US suggested that public and private enforcement should be more complementary in nature. *Sonya Lalli in Amsterdam*

Chris Fonteijn, chairman of the Netherlands' Authority for Consumer and Markets, said he does not see a "role for us as a public enforcer to strengthen and enhance private enforcement."

"It doesn't mean I don't like it or I'm not happy it's there, but the question is should I be doing things I otherwise would not in order to support it," he said of damages actions. Competition agencies have limited resources, he said; for the government to take thorough decisions, the private bar's role is to obtain compensation for consumers.

Fonteijn said that the EU's damages directive will likely create a culture change across the continent, and if that makes judges more receptive to hearing cases and it deters anticompetitive conduct, then "I support that."

But the culture of follow-on litigation has not yet arrived in Europe, Fonteijn said, and the fear is that the damages directive will bring about endless litigation. If it ultimately helps deter anticompetitive practices and helps judges and lawyers in the work, that's fine, "but if it doesn't help consumers, [that's] not something we would be happy about."

He added that it is "very tempting" for competition authorities to settle cases with cartelists, as this enables them to take shorter decisions and avoid the risk of losing a case after years of work. But settlements also keep "damaging data" out of the public domain, which is "not the best for claimants," he said.

Therefore while settlement decisions are attractive for authorities, Fonteijn said, "it is not entirely fair to do that simply for our own interests when other parties have a basis for a claim."

"Generally I like settlements," he added, "but there are also arguments against it, [and I am] starting to understand them."

Lisa Phelan, criminal enforcement chief of the US Department of Justice's antitrust division, said it's the DOJ's role to "facilitate" the goal of compensating victims, which has been traditionally achieved by the country's active plaintiff's bar.

The DoJ criminally prosecutes cartelists and holds them individually liable, which she said is one of the most important things for deterrence. Meanwhile, she said, the private bar has a long history of "stepping up" to bring class actions.

She noted that while follow-on damages claims used to be filed around the time of the criminal trial, in recent years plaintiffs have brought civil cases “the moment” a DoJ investigation is made public. Having claims ongoing “as we try to complete our investigation and do our job” has raised more conflict issues, she said.

Officials at both Germany’s Federal Cartel Office and the European Commission’s Directorate General for Competition also viewed EU public and private enforcement as complementary.

Kris Dekeyser, who is acting director of DG Comp’s policy and strategy directorate, said the authority “give[s] an enormous boost to private enforcement by taking as many decisions as possible.”

“We think by making sure as many cases as possible [are taken], you really give the opportunity to victims to be compensated,” he said. Although DG Comp has “no specific goal as regards private enforcement”, Dekeyser said he recognised that follow-on damages claims rely heavily on its decisions.

Dekeyser noted that DG Comp’s role is not to go into the effects of a cartel, and questioned how useful its case file really is for claimants.

As claimants can now use a competition authority infringement decision to prove the existence of a cartel, he said, they only have to prove the quantification of damages and the causal link of the harm. “This particular data is not necessarily in the file of the authority,” he said.

Federal Cartel Office vice president Konrad Ost also said an enforcer’s role should be to foster private enforcement, and agreed with Dekeyser that taking many antitrust decisions can help that.

The panellists spoke at the American Bar Association’s Global Private Litigation Conference. Frederieke Leeftang at Dentons Boekel in Amsterdam moderated the discussion.

The conference concludes today.