



The American Antitrust Institute

Private Enforcement: Adding to the Complexity?

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Professor Michal Gal opened the panel discussion by explaining the importance of understanding the nature of private enforcement of competition law in foreign jurisdictions since private enforcement in one jurisdiction may well affect another jurisdiction. Significant penalties in another market could reduce profitability for an international firm when enforced, or it might prevent some anti-competitive conduct that would have taken place otherwise and thus allow one's exporters to enter into foreign markets more easily. In addition, private enforcement might even alter an international firm's behavior in all jurisdictions in which it operates under the right circumstances, such as an inability to alter its conduct with respect to only one jurisdiction. However, the current economic crisis may have a restrictive effect on private enforcement as voices may be raised in governments worldwide to not adopt new rules that might adversely affect businesses and national economies.

Dr. Bojana Vrcek shared the results of AAI research indicating that approximately forty-four countries currently allow private enforcement in some form. According to Attorney Michael Hausfeld, globalization has necessitated the expansion of private enforcement from the United States to Europe. If there is a global cartel, it must be penalized everywhere in order to avoid the pitfalls of selective enforcement. In order to truly deter anticompetitive conduct there must be a uniform remedy for victims everywhere and greater access to enforcement.

In Dr. Vrcek's view, the reason most jurisdictions have only recently developed an interest in competition law is the European attitude that deems it to be the role of the government to enforce the rights and obligations arising from antitrust laws. Hausfeld pointed to the fact that cartels simply became so widespread that public authorities felt a need to respond. Some countries, however, sought to protect domestic firms due to the benefit to their economies; but in truth, there are more victims to protect than cartelists. Professor Gal added that private action has been slow to develop outside the United States due to the fact that antitrust law in general is still in its infancy in many jurisdictions, necessitating a greater understanding of resultant externalities prior to allowing for private enforcement. Additionally, there is fear of over-deterrence when private and public remedies are applied in tandem and fear of strategic abuse of the tool by competitors and customers alike. Finally, Professor Gal pointed to institutional limitations that have contributed to the slow development of private enforcement, as courts hearing private suits do not typically have the same level of expertise to make determinations on complex economic issues as antitrust authorities.

In order for European antitrust laws to succeed, Dr. Vrcek believes that a general solution is required in private enforcement, addressing institutional limitations and coordinating activity

between public and private authorities. According to Attorney Hausfeld, the effectiveness of Articles 81 and 82 has been mitigated by differing procedural rules among Member States, leading to delays of several years before a judgment in one jurisdiction is enforced in another. Furthermore, the desire to avoid a “culture of litigation” has eliminated true relief for anticompetitive conduct. The fact that there has been almost no private restitution outside the United States during the current global recession, a time when the public needs more money, is indicative of the inadequacy of procedural mechanisms currently available to plaintiffs. In his view, Europe must become more open to class actions, alter the micro-management which is currently a part of cost rules and relax contingency agreement regulations in order to effectively grant relief for competition infringements. Additionally, courts will require greater education in economics, not merely accounting, in order to ensure proper restitution is granted to victims. Dr. Vrcek, however, pointed out a definite trend towards some form of collective redress in numerous EU countries, particularly through the avenue of consumer associations. She also referred to some of the proposed changes in EU law that would reduce procedural barriers, such as the recommendation to allow opt-out representative actions.

With respect to private litigation in the United States, Hausfeld stated that recent Supreme Court cases such as *Twombly* have forced the plaintiffs’ bar to be more precise in pleading due to a demand for greater specificity. While acknowledging the existence of some abuse of private enforcement, he believes the system is overall an efficient and effective one which is often misunderstood by its critics.

Among the recent developments in the push for private enforcement in Europe are the Green Paper (2005), the White Paper (2008) and the forthcoming Council Directive on Rules Governing Damages Actions. The council directive will propose discovery mechanisms, group actions and representative actions by qualified entities and the use of binding decisions of the EC regarding competition infringements in private suits. Despite this progress, Dr. Vrcek believes the EU approach might still not create sufficient incentives for private enforcement. In particular, the United States approach that private enforcement should serve as a deterrent is more effective than the EU attitude that public enforcement should aim to clarify and develop the law in addition to deterring and punishing violations, while private enforcement is reserved for compensating victims.

Dr. Vrcek believes that private enforcement of competition law will remain complex, as the sovereignty of individual nations with their own legal systems and differing political and cultural values necessitates some degree of variation in policy. Nevertheless, she stated the importance of continually progressing in the private enforcement of competition infringements despite the inherent difficulties. Hausfeld closed the discussion by demonstrating the influence of trends towards consumerism and internationalization of businesses on the proliferation of private enforcement, as well as the surprising uniformity of competition laws in various jurisdictions despite differing interpretations. The panel discussion ultimately communicated the importance of the forthcoming *International Handbook on Private Enforcement of Competition Law* in informing jurisdictions considering the introduction or expansion of private enforcement, as well as attorneys seeking to utilize the tools currently available, in the intricacies of private enforcement..