Kluwer Competition Law Blog

A Solution To Europe's Leniency Problem: Combining Private Enforcement Leniency Exemptions With Fair Funds

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Europe's leniency programs face a problem. Creating an incentive for private enforcement with the 2014 Damages Directive came at the expense of leniency applications all over the EU. A further balance of public and private enforcement will be necessary. Many approaches have been discussed.

Recently, calls for exemptions or limitations of civil liability for leniency applicants have been on the forefront. However, such measures alone would be questionable with regard to an injured person's right to full compensation for the harm caused by an infringement of competition law. A solution could be the combination of exemptions for immunity recipients with the introduction of so-called 'Fair Funds' known from US securities law. With these Fair Funds, the US Securities and Exchange Commission (SEC) distributes collected public fines to compensate victims of securities law violations. In EU competition law, Fair Funds could be used to offset the loss of a possible defendant through leniency exemptions for follow-on damages actions.

This blog post contains first ideas of a research project envisaged to ascertain the use of Fair Funds for private enforcement of EU competition law.

Europe's leniency problem and private enforcement of competition law

Across the EU, the number of leniency applications has been dropping significantly in the last few years. The German Federal Cartel Authority, for example, recognised a sharp decline in its leniency applications. The GCR Rating Enforcement statistics paint a similar picture for other competition authorities of the ECN, including the European Commission. The general decline in applications is a cause for concern given the paramount importance of leniency programmes for exposing cartels. Before the decline, a majority of cartel investigations were initiated through leniency applications.

The significant decrease of leniency applications coincides with an important period of time for EU private enforcement law: the end of the transposition period of the EU

Damages Directive in 2016. Indeed, the increase of the previously almost non-existent private actions for damages for infringements of the competition law provisions is widely held to be the main reason for the decline in leniency applications. (Other mainly jurisdictional and coordination problems seem to have been at least partially solved with the ECN+ Directive.) While leniency applicants obtain full or partial immunity from fines, they are not protected from follow-on damages actions, which can surpass public enforcement in terms of the compensation as well as the duration and overall complexity of procedures in different Member States across Europe. The Trucks cartel serves as a prime example. Furthermore, specifically, the immunity applicants have no incentive to appeal the infringement decision, which renders the decision final towards them first.

Indeed, the Damages Directive only contains minimum rules to protect leniency applicants in follow-on damages claims. First, Chapter II of the Damages Directive foresees rules on disclosure of evidence, which exempts leniency statements themselves. The exemption covers all documents and records containing these statements, including verbatim quotations. Yet, it does not cover fining decisions that do not cite leniency applications but refer to them. Furthermore, the exemption does not include other evidence that must be offered together with the leniency statement within the framework of the leniency programme's duty to cooperate. Second, Article 11 of the Damages Directive marginally limits the joint and several liability of immunity recipients. An immunity recipient is fully jointly and severally liable to its direct or indirect purchasers or providers and to other injured parties only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement. In the latter case, the amount of contribution of an infringer that has been granted immunity from fines under a leniency programme shall not exceed the amount of the harm it caused to its own direct or indirect purchasers or providers.

A leniency exemption for follow-on private enforcement actions?

Consequently, academia but recently also the president of the German Federal Cartel Authority and head of the International Competition Network Andreas Mundt suggested limiting the civil liability of leniency applicants by exempting them from follow-on damages actions to a large part or even altogether. Such a concept would be particularly sensible for immunity recipients to incentivise a quick notification of cartel behaviour. To benefit from the two-sided immunity for public and private enforcement, you have to be the first one.

In Europe, full statutory exclusions of civil liability are known, but they are rare. Largely they coincide with some degree of own fault on the part of the injured person or other reasons why the injured person does not need protection through damages claims. A limitation of civil liability could, for example, involve a further expansion of the concept of subordinated liability in Article 11 of the Damages Directive. Before transposing the Damages Directive, Art.88D of the Hungarian Competition Act, for example, already foresaw that immunity applicants are only liable if the other cartel members were unable to pay the damages awarded to the claimants in private

enforcement actions. (In the meantime, the rule was abandoned in favour of the Damages Directive transposition). The former Hungarian rule went beyond Article 11 Damages Directive, as the Directive's provision only entails that immunity recipients are subordinately liable outside of their full liability towards direct or indirect purchasers or providers.

Without being able to rely on empirical evidence, circumstantial evidence suggests that exclusion or limitation of civil liability could certainly incentivise cartelists to file for leniency (again). If cartelists no longer have to fear not only fines but also the whole panoply of private enforcement actions, they might again be encouraged to disclose their illegal behaviour to be fully protected from negative consequences. Even limitations through an enhanced subsequent liability could give the leniency programme a new push. Leniency applicants would at least not see themselves as the first follow-on victims of the respective infringement decision that, as discussed, often becomes binding against them first. Furthermore, their liability would, in practice, only arise in case of bankruptcy of the other cartelists.

What about the injured's right to compensation?

Nevertheless, there is a reason why statutory exclusions and limitations of civil liability in European liability law are usually rare and coincide with an own degree of fault or special circumstances on the part of the injured person. Excluding or limiting liability deprives the injured persant of a possible defendant against whom a claim could be introduced. In private enforcement of competition law, in particular, exclusions and limits of liability could impact and limit the chance to obtain full compensation for the harm caused by an infringement of competition law.

Article 3 Damages Directive explicitly mentions the right to full compensation for injured parties. Yet, the right to effective, full compensation for victims of infringements of EU competition law stems directly from primary law – Articles 101 and 102 TFEU – itself. Multiple judgments of the European Court of Justice – from Courage, Manfredi, Kone, Otis, Skanska, Sumal – have emphasised this basic principle time and again. Full compensation of cartel victims is the core underlying principle of EU private enforcement of competition law. It cannot and must not be easily restricted.

However, this also means that restrictions on the principle of full compensation in favour of leniency applicants should not be taken lightly. Any exclusion of full compensation in favour of the effectiveness of leniency applications must be carefully considered and respect the general principles of primary law as interpreted by the CJEU. A limitation of the liability of leniency applicants must, in any case, comply with the principle of proportionality. Ultimately, one comes back to the classical divide and balancing between public and private enforcement of competition law.

Finding a balance with Fair Funds? Transposing an example from US securities law

A balanced and proportionate approach could include the combination of an exclusion or limitation of civil liability for leniency applicants with the introduction of public administered so-called 'Fair Funds' for the compensation of cartel victims.

What are Fair Funds? Fair Funds are known from US financial and securities law. Comparable to public enforcement of competition law in the EU today, fines obtained by the SEC were previously paid to the United States Treasury and not distributed to investors harmed by securities law violation, such as fraud. Sec 308(a) of the 2002 Sarbanes–Oxley Act changed this and introduced the concept of Fair Funds. The SEC can now compensate the harmed investors of securities violations by distributing collected fines through these Fair Funds. Today's provision in 15 US Code § 7246(a) reads: 'If, in any judicial or administrative action brought by the Commission under the securities laws, the Commission obtains a civil penalty against any person for a violation of such laws, or such person agrees, in settlement of any such action, to such civil penalty, the amount of such civil penalty shall, on the motion or at the direction of the Commission, be added to and become part of a disgorgement fund or other fund established for the benefit of the victims of such violation.'

Empirical research has shown that these Fair Funds are quite successful. Not only is the average Fair Fund disbursement roughly the same size as the average – in the US contrary to the EU available – class action disbursement. Moreover, Fair Funds seem to compensate investors for different kinds of misconduct more effectively than private securities litigation, especially where a private lawsuit is either unavailable or impractical.

Transposed to EU competition law, the introduction of such a concept would mean that fines collected by the Commission or National Competition Authorities would not go into the EU or Member State budget but would be dispersed to natural or legal persons who have suffered harm caused by an infringement of competition law. Several cases of application of Fair Funds in US securities law even involved competition law or competition law-akin cases, such as bid-rigging cartels, false advertising or collusive arrangements between investment funds and broker-dealers.

Actually, several parallels exist between competition and securities law enforcement through private and public actors in the US and the EU. The SEC's and the European Commissions primary purpose is deterrence. More precisely, the SEC's primary goal is the enforcement of securities law by, inter alia, imposing administrative fines. The Fair Fund system is only an addendum to the primary public enforcement. This objective is quite similar to the Commission's and National Competition Authorities' primary goal of enforcing EU competition law through the imposition of fines. An introduction of a Fair Fund in EU competition law would equally only coincide with an anyway occurring public enforcement. Another similarity is present when it comes to the amount of fines collectable and damages obtainable both in US securities and EU competition law. Both US securities and EU competition law know fine ceilings, but damages are in principle limitless. Other parallels exist when it comes to practicalities and procedures. First, neither the SEC nor the EU Commission quantifies losses to injured parties during their investigations. Yet, the SEC still distributes the fine to harmed parties afterwards. Second, usually, the SEC oversees and administers the distribution through the Fair Fund via distribution consultants. On the European level,

a similar concept is available with merger remedy trustees who oversee the implementation of commitments in EU merger control.

So, how could Fair Funds be used in the interplay between public and private enforcement to give leniency programmes another boost and maintain the injured person's right to compensation? The trick is the combination of an exemption or limitation of civil liability for immunity recipients with a Fair Fund distribution through competition authorities. As discussed above, circumstantial evidence implies that immunity from fines and damages for immunity recipients could incentivise leniency applications. If any, immunity recipients should only be subordinately liable in follow-on damages in case the other cartel members would be unable to pay the damages. At the same time, the parallel Fair Funds distribution of the collected public fines – from which the immunity recipient is also naturally exempted – to injured parties could compensate for the loss of a defendant in the follow-on action in the form of the exempted immunity recipient. Therefore, the Fair Fund distribution would be parallel to the already possible follow-on damages actions, from which an immunity recipient would be exempted or whose liability would be subordinate. Similarly to US securities law, the Fair Fund would serve to augment the pool of funds available to compensate harmed persons of competition law violations. Naturally, some coordination would be necessary to avoid overcompensation. Equally similarly to US securities law, it would need to be possible to dismiss a parallel private enforcement action if the Fair Fund distribution fully compensates an injured party.

Conclusion

The blog post has shown how the combination of liability exemptions and liability limits for immunity recipients and the introduction of Fair Funds for the distribution of fines to injured parties could revive the dormant European leniency programmes. However, the research is just at the beginning. Only first ideas for the diverse use of Fair Funds in EU competition law have been presented here. They could not only clear up Europe's leniency problem. Furthermore, they could also solve issues with damages calculation and the – at least on a broad and uniform level – lack of collective redress in cartel damages compensation. Stay tuned for more!

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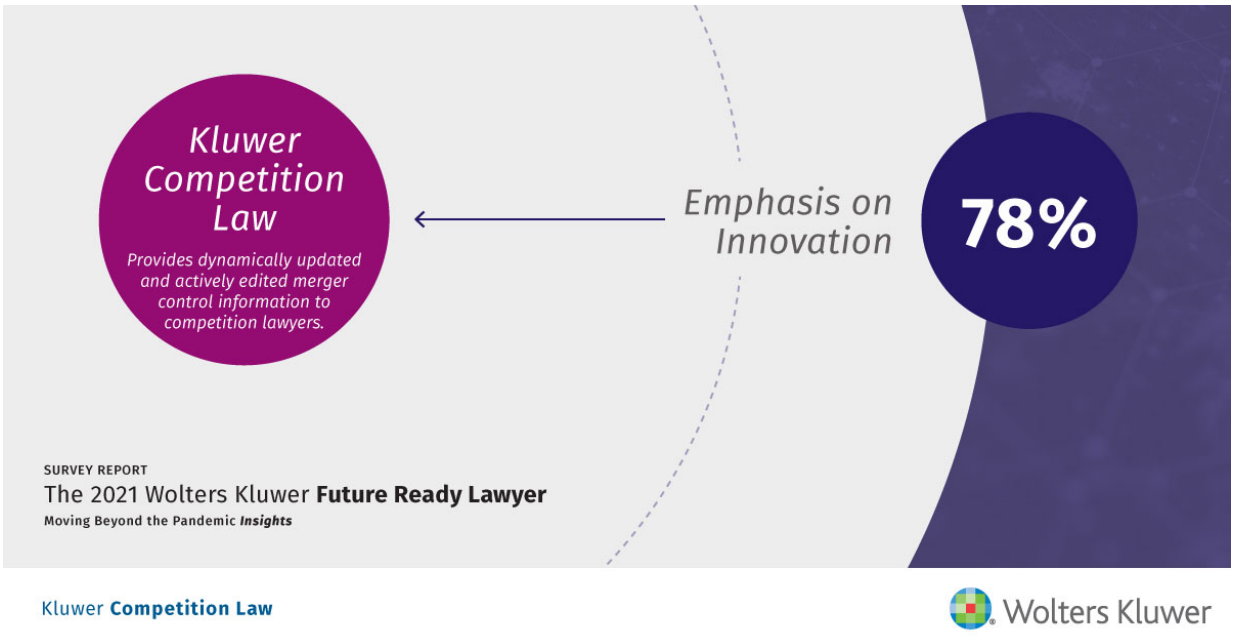

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