Kluwer Competition Law Blog

Is it State Aid NOT to Sue Cartelists for Damages? Public Inaction in the Age of Private Enforcement

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Unless you've been living under a rock the last decade, you'll know that private enforcement of antitrust is now big business, spurred on by the Damages Directive and industrious claimant-side law firms. Yet, one key player remains curiously passive in many Member States: the State itself.

While public procurement markets are among the most vulnerable to cartel behavior – and, in some cases, to excessive pricing abuse – governments are oddly absent in the courts' dockets when it comes to follow-on action for damages.

Why is this? Don't all government bodies have a fiduciary duty to protect the tax payers' money? And if the government is indeed passively waiving these claims, isn't that illegal State aid granted to the cartelists?

This article explores whether such government inaction constitutes unlawful State aid. Drawing on the CJEU's case-law, the article examines this underexplored intersection between private competition enforcement and State aid control. What emerges is a legal landscape that not only permits but may, in some cases, require public bodies to act—not just in the name of deterrence, but to avoid breaching their Treaty obligations.

A legal environment that favours government claimants

One of the main defences put forward against a claimant seeking follow-on damages is the pass-on defense – i.e. that the claimant has passed on any overcharge to his own customers. But government does not really have customers. So, unless you want to embark on the argument that government had to raise taxes because of the cartel overcharge, the pass-on defense is likely to be of little help to you as defendant. The lack of a pass-on defense coupled with the presumption of harm in the Damages Directive makes for an attractive legal environment for government driven follow-on litigation.

So surely government must be granting State aid to antitrust offenders when it fails to sue them for follow-on damages?

Are the conditions of Imputability and State resources satisfied?

For a measure to constitute State aid, it must be granted through State resources and the measure must be imputable to the State. These criteria ensure that only actions of the State's doing & financing fall within scope of State aid rules. And the conditions are likely to be met when it comes to contracts awarded and financed by any government entity; whether central, regional or local.

As for imputability, it becomes more complex when the victim of a competition law infringement is a public undertaking – say, a private company owned and controlled by the Member State. For example, imagine a State-owned utilities company holding tender procedures as required by the Utilities Directive. Could the company's failure to sue bid riggers be imputable to the Member State and thus be a candidate measure for State aid?

As for public undertakings, the case-law as reflected in the Notion of Aid Notice provides a set of "*indicators for imputability*" which include very vague factors such as an assessment of "*the presence of factors of an organic nature which link the public undertaking to the State*". A considerable element of uncertainty therefore remains on this question.

The Advantage Condition – Action vs. Inaction

A central question is whether government inaction—i.e. the failure to sue for damages—can be equated with a 'measure' amounting to State aid. In other words, whether 'doing nothing' qualifies as granting an advantage.

The CJEU and the European Commission have long accepted that **waiving revenue** is a transfer of State resources. The Notion of Aid Notice states that:

"Waiving revenue which would otherwise have been paid to the State constitutes a transfer of State resources. […] Not only the granting of positive economic advantages is relevant for the notion of State aid, but relief from economic burdens can also constitute an advantage."

Still, a government body *actively* waiving, say, an undisputed tax or contractual claim, is not the same as the State simply doing nothing.

But building on the principles underpinning the Market Economy Operator (MEO) test, the standard is not whether the government *did something*, but whether it acted (or failed to act) in a manner consistent with how a **rational private operator** would.

So, the key question is not whether it was action or inaction that occurred, but rather whether the (in)action is justified by sound economic reasoning. And the fact is, that if a private company learns today, in 2025, that it's a victim of a cartel, it is economically rational for it to consider whether it should bring follow-on action.

Therefore, if a Member State, without even considering it, fails to pursue a claim for follow-on damages, this could constitute a transfer of State resources resulting in an economic benefit for the colluding culprits.

The State must show that not suing is economically rational

Of course, we shouldn't conflate the duty to consider bringing litigation with an obligation to sue. Public authorities may have legitimate reasons for not bringing a claim: litigation costs, evidentiary difficulties, resource constraints, or uncertainty about the outcome.

But these are precisely the factors a private operator would weigh when deciding whether to pursue a claim. The MEO test acknowledges that litigation is a costly and uncertain endeavour. In this context, discretion is not denied—but it is not unfettered either. The State must be able to demonstrate that its inaction was economically rational.

And importantly, in cases where we have a presumption of harm and defences like pass-on are moot, inaction requires a more robust justification. In such scenarios, a private operator might well conclude: "I hold all the cards here—why wouldn't I sue?"

What about Selectivity?

Finding of State aid requires that the advantage granted through state resources *"favours certain undertakings or the production of certain goods"* – known commonly as the 'selectivity' criterion. Unless the Member State has a clear policy of not pursuing any (competition law related) damages claims, selectivity is likely to be satisfied. And you could still argue selectivity even if that policy exists.

An interesting aspect in this regard is the interplay with the requirement of joint and several liability as required under Article 11 of the Damages Directive. If government decides to sue the cartelist with the deepest pockets – but not the other five colluding offenders – could the undertakings being sued argue that (redress aside) those not sued have been selectively advantaged? Again, the Market Economy Operator test may come into play.

…and Distortion of Competition & Effect on Trade?

Only measures that threaten to distort competition and are liable to affect trade between Member States can qualify as State aid. As for distortion of competition, the Notion of Aid Notice provides that it is normally sufficient that the aid relieves the beneficiary of expenses it would otherwise have had to bear during its day-to-day business operations. So, a pretty low bar.

As for effect on intra-EU trade, the Notion of Aid Notice provides that this does not depend on market definition in the traditional sense. And although the intra-EU trade assessments under Articles 101 and 107 TFEU are in principle distinct, it would be harder – all other things being equal – to find State aid in cases where an NCA bases its decision exclusively on the domestic equivalent to Article 101 TFEU and not on Article 101 TFEU itself. For example, in cases of very local bid rigging for a construction works contract at a municipal school. That said, the Commission's decision from March 2025 in case SA.108990 – Valchiavenna shows the very strict standard for excluding State aid based on the intra-EU trade condition.

Agreed penalties in contracts: A Forward-Looking Tool

In conclusion, governments may have a duty under State aid law to sue cartelists and other antitrust infringers for damages. More broadly, they may even take a proactive stance like some multinational companies are increasingly doing in their procurement departments: adopting agreed penalty clauses that trigger, if it emerges that the contractor has colluded.

For example, a standard clause could provide that the contractor pays 15 % of the contract value as fixed, liquidated damages if a competition authority or court finds that the contractor infringed competition law on the relevant market and during a time-frame relevant to the contract.

This 'agreed penalty' approach would sidestep the need to prove actual overcharge and eliminate pass-on arguments altogether – or at the very least alleviate them considerably. Even in jurisdictions where such clauses are reviewed for fairness & equity, they would significantly smooth the path for successful follow-on action.

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