# 14. Efficient and/or effective enforcement

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## 1 INTRODUCTION

I would like to treat the question of efficient and effective enforcement of competition law not only in technical terms, but also from a systemic perspective. This issue is eminently practical, because it concerns the concretization of legal rules and decisions in real life. It also expresses a sort of positivism, for which only an implemented rule is a real rule. But concrete enforcement depends on the relation between economy and the law, and between theory and practice.

Stated precisely, the question of the efficiency of enforcement is not only a question of practice, such as the coordination between independent authorities or classical states, but also a theoretical question, through a theory of inducement, involving incentives to reveal anticompetitive behaviour for example, or through the conception of public versus private.

The practical necessity of obtaining the most effective implementation of rules is common to all legal rules. Under this condition, it is economic theory that gives specific light to this efficiency in competition law. As such, economic theory transcends legal distinctions between public and private enforcement and helps us to focus our attention on effective implementation more than on the adoption of rules itself. The 'centre of gravity' is moving away from the creation of legal rules (the centre of the legal system) towards the concretization of legal rules and their effects on economic behaviour (the centre of the economic system).

In this sense, economic theory intersects with sociological concerns. In this sense, the Green Paper on damages actions for breach of the European Community antitrust rules[1] is the best expression of the aim to obtain

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[1] Green Paper – Damage actions for breach of the EC antitrust rules, 19

effective enforcement of competition law by satisfying private interests. I will focus my contribution on these developments.

In the second section of my contribution, I would like to consider the *homo economicus* inside the practice of competition-law enforcement, through its perception as an economic agent that calculates and pursues its own particular interest. The framework of economic conduct is the same for human beings and firms. In the third section, I shall emphasize the legal mechanisms that implement this consideration, namely by using the concept of rivalry between competitors and consequently the status of the victims of anticompetitive conduct, in the attempt to obtain effective market protection. In the fourth section, I shall finish with a remark about the time-frame concerned in the enforcement of competition law, especially regarding remedies, which are more a warning signal for every economic actor than a particular reaction to a particular violation. This makes the future the relevant time-frame for enforcement, and not the past of the violation that is meant to be punished. In these circumstances, the enforcement of competition law, as a signal and as an instrument lending credibility to legal rules, which influences economically rational undertakings, is not the consequence of competition law but competition law itself.

## 2 THE CONSIDERATION OF THE *HOMO ECONOMICUS* IN THE ADOPTION OF ENFORCEMENT RULES

In general, the enforcement of the law is not only the effective application of remedies, but also, before that, the declaration of the violation. At the end, in a very classical sense, the real enforcement of rules results in the absence of violation.

Why and how should we obtain this compliance with the provisions of these rules, presented as this superior form of efficiency? Is it natural or not? We will see how an approach to this efficiency could be made specific to competition law through the influence of economic analysis.

Classically, before the alliance between law and economy – one could perhaps say their intimacy – the citizen obeyed the law out of love for the law. It is Jean-Jacques Rousseau's conception of the *amour des lois*: everybody loves rules adopted by everybody (in the theory of the social contract, where citizens who express rules express reason), and respect for legal pro-

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visions is natural for everyone, even if it is contrary to the particular interest of a person who has the power not to follow the order of the law. Love of law is equivalent to love of reason. This is a sort of natural attitude. It is part of this political philosophy that the use of power by an individual in order to obtain an advantage contrary to legal provisions is considered pathological. From this perspective, the breach of the law as such is a rational surprise and the legal system reacts against this personal and perverse behaviour with detection and sanctions, in the sense of an ex-post reaction.

In the same general line of reasoning, but with corresponding legal and institutional tools, the law empowers public and special organizations, such as competition authorities or more generally administrative bodies, to intervene if, as another sort of 'love of law', a public interest is concerned. The protection of competitive markets belongs to this sort of interest.

In contrast, economic analysis is based on the concept of the firm that seeks its own interest if it has the power to obtain it. Firms 'love' their interest and not the law. If the legislature, the government or courts want firms to comply with the law, the latter must coincide with the individual interest of the market operators.

If this is not the case, the enforcement of competition law becomes the first problem for the system, not just a marginal consideration involving a pathological violation of legal rules. The efficiency of the enforcement needs special tools, essentially the use of private interest to serve general goals. Those who adopt the public-choice theory do not distinguish between state administration and undertakings in this regard. To stay within the less controversial theory of *homo economicus*, one accepts a differentiation between private and public interest and, in consequence, between private and public bodies, between private and public actions. This very well-known theoretical consideration, which transforms the violation of competition law into natural behaviour by firms that have the interest and the power to act in such a way, has significant implications for the enforcement of the law.

If we accept this concept, the correct understanding of legal rules of enforcement is to use this natural economic behaviour with the aim of obtaining its own efficiency. In short, the enforcement system can let the economic rationale and particular interests of the individual operators do the work in its place. This is the same idea as that behind the political *amour des lois* theory, because it is based on the conviction (perhaps it is an illusion) that the system will function naturally through the natural action of the agents.

The concept of a sort of natural enforcement of rules could be presented as a contradiction, because it is a sort of spontaneous enforcement, but it

is the concept of new legal rules or reflexions, and this is appropriate to globalization. The evolution of competition law is moving in this direction, giving powers to private victims to seek enforcement against other firms, not because the victims strive for the public and general interest, but on the contrary because they pursue their own particular interest. It is a sort of regulatory arrangement looked at through a liberal glass.

## 3 THE LEGAL TRANSLATION OF THE ECONOMIC CONCEPT OF BEHAVIOUR INTO COMPETITION-LAW PROVISIONS

In this part of my contribution, I would like to develop an idea of the relationship between enforcement, individual interest and information, and after that I will try to explain the new place of victims in competition law, organized – or able to be organized in the future – in this efficiency perspective.

First of all, it is fundamental to emphasize the crucial place of information in the enforcement of competition law and its connection with the *homo economicus* concept mentioned above. The legal mechanism is very simple: competition law is effectively and naturally enforced if this enforcement is based on the fulfilment of one or several individual interests that will serve to motivate particular firms, at different steps in the enforcement of competition law. These different steps are the detection of anticompetitive behaviour, the transmission of information about mergers, the search for and the treatment of evidence and eventually the decision to sanction or not.

Secrecy and information could be two sides of the same coin in efficient enforcement, and this explains the handling of business secrets and information, without contradiction, by the authorities and courts. At the same time, it explains why competition-law solutions are so different from classical legal concepts of enforcement.

The principle is to obtain information about a violation. In this sense, leniency programmes, for instance, are the right solution for effective implementation of legal rules. The transmission of information to the regulator should be secret. At the same time, information about enforcement action, widely published in newspapers, is an efficient tool to obtain respect for the law by others.

Another point is the use of the individual interest of competitors to activate legal rules through action before competition authorities or courts. It is usual to present this evolution as part of a 'civilizing' of competition law. However, this is not completely true for several reasons.

First, an action before a court, an administration or an agency could be viewed as a simple variation on the transmission of information, hence of

the case described before. The goal is not so much to repair damages but to obtain a sanction or to adopt an appropriate solution based on effective information. In this model, the effect of the action of other competitors must be the satisfaction of their particular interests. It could be the refusal of a merger, after their procedural participation in the merger proceeding as potential victims, or an attribution of damages.

This could create a contradiction between economic efficiency and legal principles such as due process, but I shall not develop this issue, because this topic will be dealt with in another chapter of this book.[2]

The European Green Paper on damages actions for breach of the European Community antitrust rules[3] implements the concept of 'civilizing' competition law with several consequences, although, rather than a direct consideration of bilateral relationships between competitors, it is a consideration of global efficiency, obtained through information and action, that can explain this general evolution towards private enforcement. In this sense, individual firms are used by the legal system, and through the legal system, as agents of legality and effectiveness, not only to punish or to repair. This is why the evolution towards private enforcement is closer to public law than private or civil law. The participation of private actors moved by private interests to realize common and systemic interests explains why Bruno Lasserre, president of the French Competition Council, has approved the prospect of class actions in competition law. Class actions appear as a global regulatory tool.

As a first consequence, private and public entities should cooperate, because their goals are the same. For the moment, however, institutional cooperation is organized between administrative bodies, especially through the European Commission and national competition agencies on one side. Civil actions are placed on another side, namely before the private law courts.

But we must consider that private actions contribute to the goal of effective enforcement of the entire system prohibiting anticompetitive behaviour. This is why the 'underdevelopment' of private actions to obtain damages for breach of competition law is a problem for competition law itself, and, in practice, this is why public and private entities must cooperate more with each other.[4] For example, administrative bodies should be able to step into private procedures opened by private actors. Another issue,

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2 *See* A Louvaris, 'A brief overview of some conflicts between economic efficiency and effectiveness of the administrative or judicial process in competition law', Chapter 15 in this volume.

3 *See supra* note 1.

4 Green Paper: 'Public and private enforcement complement each other and therefore should be coordinated in an optimal way'.

expressed by the European Green Paper, is the difficulty to obtain evidence of the breach of competition law. This opens the prospect of using the disclosure procedure in proceedings before private law courts.

In this sense, this movement of 'civilization' increases the level of enforcement rather than lowering it, because the rationale is to achieve a sort of natural functioning of the legal system by playing with particular interests of competitors and victims. In this sense, this development has adopted a regulatory perspective.

The second consequence could be the attribution to the European Commission of the power to allow damages awards. Perhaps it is not the right political moment to work on this solution, but it would be the logical consequence of the interpenetration between the public and private interest, the protection of competition and the protection of competitors.

On this point precisely, the third consequence is very important and concerns the usual distinction between the protection of competitors through liability for unfair acts, and the protection of competition through a more mechanical and economic implementation of competition rules. The distinction cannot be maintained so easily, because the work of enforcing competition law is now given to competitors and victims as agents of legality. This natural contribution to enforcement by actions, injunctive relief and damages, could be presented as a transmission of information to the regulators in exchange for the satisfaction of individual interests. This leads to a reconciliation between public interest and private interest, competition law and protection of competitors. If we are compelled – but perhaps we are not – to find another division, another *summa divisio*, we may take the distinction between 'simple' markets, which work with their own and sufficient forces, and regulated markets, for instance the energy markets, which need special and strong regulatory rules and legal certainty. For them, the necessity of effective enforcement is more crucial and the reasoning described here is justified even more.

To conclude this third section of my exposé, the greater the consideration of public interest is, the more appropriate is the legal path that seeks the satisfaction of individual interest by liability actions, class actions, damages, leniency programmes and so on. This is so not only because we can think that these sorts of interests are not in contradiction (philosophical point of view), but because the use of them is a way to achieve efficiency (pragmatic point of view). If we disagree with that, it is not necessary to adopt the rules of competition law in the first place (every rule is made to be enforced).

## 4 THE RELEVANT TIME-FRAME OF EFFICIENT ENFORCEMENT

In the fourth and final section of this contribution, I would like to say some words about another aspect of the topic: the relevant time-frame of efficient enforcement.

According to the classical concept, sanctions are understood as a reaction to a wrong that has occurred in the past. But if we look at them from the perspective of the economic theory of inducement and a theory of signalling, the relevant time is the future, because the goal of public and private enforcement is rather to prevent undertakings from anticompetitive behaviour.

This consideration has many practical consequences. First of all, the reaction to a breach of competition law must be quick and clear. The motivation of individual decisions through incentives has this function, and economic theory recognizes the benefit of this very classical legal rule. Moreover, in this sense, an individual decision is more useful than general rules because it lets each market participant anticipate the future.

In a last conclusion, the practical goal of effective enforcement as promoted by economic theory transcends classical legal distinctions such as public and private procedures, public and private bodies, public and private interest, prohibition of anticompetitive behaviour and prohibition of unfair competition. In a systemic way, it reconstitutes an integral and united concept of competition.