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RECENTI EVOLUZIONI NELLA DIALETTICA

TRA *PUBLIC* E *PRIVATE ENFORCEMENT*:

I PROGRAMMI DI CLEMENZA E LE DECISIONI CON IMPEGNI

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Abstract

Over the last few years antitrust law enforcement, both at the EU and national level, was characterized by two different trends: on the one hand, the introduction of new important enforcement tools to enhance the effectiveness of competition authorities that included leniency programmes, commitment decisions and settlements; on the other, competition law, spurred by the European Commission and European case law, is increasingly applied before national courts.

The above mentioned trends, however, may be difficult to reconcile. Indeed, the doctrine tends increasingly to refer to the complementary relationship between public enforcement by administrative agencies and private enforcement by way of damage actions: the first enables the detection and (eventually) sanctioning of an infringement; the second allows recovering damages suffered from competition law violations. As a consequence, potential exposure to civil actions, as well as administrative sanctions imposed by public enforcers, is capable to deter anti-competitive conducts by increasing the costs that wrongdoers may face for their illicit conduct. However, the new enforcement tools introduced at EU level, and more recently at national level – in particular, leniency programmes and commitments decisions – may interfere with the parallel application of private enforcement.

The dissertation aims to provide a critical overview of such tensions and to shed light on the different facets of this topic: a particular emphasis will be placed on incentives for undertakings to co-operate with respect to leniency programmes and commitment proceedings and on the impact that damages actions may have on such incentives.

Indeed, leniency programme are widely acknowledged as being one of the most effective investigative tools in the fight against hard-core cartels: although cartels are considered to be amongst the most serious infringements of competition law, they are “*by their very nature, [...] often difficult to detect and investigate without the cooperation of undertakings or individuals implicated in them*”¹. Thus, leniency programmes attempt to destabilise cartel activity by providing incentives in the form of an exemption from (or a reduced) penalty to those who cooperate by informing the authorities of the existence and extent of cartel conducts. As a result, company’s cooperation may increase its exposure to

¹ Cf. Commission Notice on Immunity from fines and reduction of fines in cartel cases, Official Journal C 298, 08/12/2006, para. 3.

damages actions, especially where cooperation is offered before an investigation has started: indeed, should the company not have applied for leniency, it is not sure whether the Authority or victims of the infringement would have ever discovered the illicit conduct.

On the contrary, commitment decisions enable companies to avoid a formal finding of an infringement which could lead to a fine, by offering commitments to remove the competition concerns identified in the antitrust investigation. Thus, in this case companies' incentives to collaborate in the administrative procedure converge both under public and private enforcement: accordingly, the conclusion of the public proceeding without a formal finding of a violation will make more burdensome the recovery of damages for victims.

Although in both cases it is important to ensure effective damages actions, a certain protection of cooperating companies may be required with respect to leniency programmes, in order to ensure the effectiveness of this administrative tool. The case law and the proposals for reform at EU level are currently focusing on the confidentiality of leniency submissions. However, an analysis of the solutions adopted in other jurisdictions shows that also other elements may be considered in order to increase companies' incentives to cooperate, such as improving the procedural position of the leniency recipients in proceedings for cartel damages.

With respect to commitment decisions, there is lesser need to protect cooperating companies: indeed, the conclusion of an antitrust proceeding by means of commitments follows and responds to the concerns expressed by the authority's competition. Thus, the risks of being sanctioned in the administrative proceeding should normally be a sufficient incentive for companies to offer corrective measures. Nonetheless, commitment decisions make private antitrust enforcement more difficult, as without a formal finding of an infringement recovery of damages may be more burdensome and difficult for injured parties: this raises the issue of the probatory value of commitment decisions. In this respect, some recent case law provides indications on the private enforceability of the decision accepting commitments from parties in national courts. Other evidence that may be used in civil actions may also be obtained through access to the file.