Private Actions for Damages

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Private actions for damages, as most of you are probably aware, is a very broad topic, especially for a short paper. Over the past decades, it has been extensively debated both in the US and in Europe. More recently, the European Commission has put it at the center of an intensive action plan1. Some Member States, including Germany2 and the UK3, have initiated legislative reforms to enhance private rights of action.

This issue paper will first provide a brief overview of private damage claims as they have developed and are currently practised in the US and in Europe. Afterwards, it will consider a few selected points, relating to three topics: The goals of private damage actions, the finding of an infringement, and the calculation of damages. The focus will be on less explored aspects, and the perspective more of a European one, since new developments in this area are more likely to occur in Europe.

I. Current Perspectives in the US and in Europe

A. United States

It has been observed that in many respects US antitrust law is a unique, historically determined experience, that cannot be easily duplicated elsewhere4. A key component of this uniqueness remains, even today in times of international convergence, its private rights of action and their role in shaping the system5. Over the past few decades, US antitrust may have become more agency-centered6, but private enforcement continues to play its historically central role.

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1 An overview of the Commission’s initiatives is available at http://ec.europa.eu/competition/antitrust/actionsdamages/index.html.
2 The 7th Reform of the German Competition Act (7. GWB-Novelle) entered into force on June 1, 2005.
4 D.J.Gerber, Global Competition. Law, Markets and Globalization, 156-158 (Oxford University Press, 2010).
5 Ibid., 137.
At its origins, the choice was not made deliberately, but rather evolved naturally from existing common law principles. While the importance of private damage claims goes back to a variety of factors. Some are antitrust-specific, such as the trebling of damages. Most are not or partly: the availability of class actions, contingency fees, jury trials, broad pre-trial discovery, an asymmetric loser-pays rule (i.e. no loser-pays rule in favor of the defendant) and an aggressive litigation culture.

Against this background, the idea of the private plaintiff as a ‘private attorney general’ emerged. This idea provided a general conceptual framework and influenced a number of legal developments.

The resulting enforcement system also has its shortcomings, and certain aspects are widely debated within the US legal community. In recent times, two Supreme Court decisions, ‘Trinko’ and ‘Twombly’, have placed limits on what, in the eyes of some, could be viewed as an excessive recourse to private damage claims.

B. EU and Member States

A radically different situation has characterized – as noted – the EU and the Member States. In the EU, a central role has always been played by public enforcement through the European Commission and the NCAs, while private enforcement, especially private damage claims, was quite rare. Furthermore, most private actions were either follow-on or shield actions. The situation was described, in fact, by a study commissioned by the EU as of ‘astonishing diversity and total underdevelopment’. Today, a change seems to be under way, with an increase in the number of private damage claims, including stand-alone actions. This may suggest an increased awareness on the part of the business community and the legal professions. Parallel to this, the European Commission has launched various actions.

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11 Bell Atlantic Corp. v. Twombly, 550 US 544 (2007) refining the ‘notice pleading’ standard for civil complaints (not merely possible or conceivable, but plausible).


public consultations that have resulted, among other things, in a White Paper “Damages Actions for the Breach of EC Antitrust Rules” (2008) that describes optimal policy options\(^\text{14}\), in a Draft Guidance Paper “Quantifying Harm in Actions for Damages Based on Breaches of Articles 101 or 102 TFEU” (2011)\(^\text{15}\), and in studies and resolutions on collective redress mechanisms, including class actions\(^\text{16}\). In this atmosphere, several Union Members have already enacted legislative reforms enhancing private rights of action, which partly anticipate the Commission’s proposed legislation.

II. Beyond Compensation?

In the US, the current understanding – as noted – is that private damage claims serve both compensation and deterrence. The notion of deterrence has indeed contributed to the shaping of the private enforcement system in various ways. Rather provocatively, some recent scholarship has put into question whether private damage claims, especially in stand-alone actions, are effective modes of deterrence\(^\text{17}\).

In the EU, on the other hand, the common understanding is that private damage actions should mainly serve for compensation, while deterrence is viewed only as a welcome side-effect of enhancing private rights of action. Thus, private actions for damages should only complement public enforcement.

Among the many issues that arise, are two that I would propose for further discussion:

i. The first issue is whether it would make sense for the EU and its Member States, notwithstanding the common European legal tradition, in view of the limited resources available to competition authorities, to consider more carefully the option of shaping private damage claims more directly as a means of deterrence. A more deterrence-oriented approach could apply, for instance, to the multiple damages issue (i.e. the desirability of adopting a rule similar to the trebling of damages under the Clayton Act), or to the question of whether a European-style class action should also rely on an opt-out mechanism, like its US counterpart.

ii. The second issue, if damage claims are to serve also the goal of deterrence, is whether the calculation of fines to be applied by the

\(^{14}\) Available at http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html.

\(^{15}\) Available at http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_en.html.

\(^{16}\) Available at http://ec.europa.eu/competition/antitrust/actionsdamages/collective_redress_en.html.

\(^{17}\) D.A.Crane, Optimizing Private Antitrust Enforcement, in 63 VANDERB. L. R., 675, 690 (2010).
Commission or the NCAs should be coordinated with the awarding of damages before civil courts, or after the outcome of private settlements\(^\text{18}\). And to what extent this can be achieved within the existing legal framework.

III. The Finding of an Infringement

A characteristic feature of antitrust litigation is its fact-intensiveness and its confrontation with complex assessments. This explains why even in the US, where broad pre-trial discovery is available to the plaintiff, private actions often side with public enforcement\(^\text{19}\).

In Europe, in the absence of US-style discovery, the finding of an infringement is even more likely to turn in a major obstacle for private actions. Hence the reliance of private plaintiffs on public enforcement initiatives. While the general attitude towards discovery as a means of obtaining evidence, as reflected in the Commission Green Paper, is very cautious. Therefore, issues that could be considered of particular relevance for the future development of private actions in Europe are: a) the binding effect of Commission and NCA decisions in follow-on actions, b) the interplay between leniency programs and private damage claims, and c) a possible differentiation of the standards of proof to be met respectively in administrative and civil proceedings (i.e. a larger recourse to presumptions and/or a more form-based approach in private actions).

A. About the Binding Effect of Commission and NCA Decisions

In the EU, established case law and Article 16 of Regulation 1/2003 provide that Commission decisions that find an infringement of Articles 101 or 102 TFEU shall be binding on national courts seized with a claim for damages. In its White Paper of 2008, the Commission strongly advocated the adoption of a similar rule for NCA decisions that apply Articles 101 or 102 TFEU. The proposal met with general acceptance. More recently, several Member States, including Germany, Hungary and the UK, have taken this recommendation a step further, by providing a binding effect to final decisions by competition and/or by regulatory authorities applying national law as well as NCA decisions from other Member States that apply EU law\(^\text{20}\).


\(^{20}\) See D.Dohrn, *Die Bindungswirkung kartellrechtlicher Entscheidungen der Kommission sowie deutscher und mitgliedschaftlicher Kartellbehörden und Gerichte im deutschen Zivilprozess* (Heymanns, 2010). See also, for particular
By now, the soundness of such a mechanism should in principle be a moot point. Nonetheless, a number of issues arise when it comes to the operation of Article 16 of Regulation 1/2003 or comparable rules that are found at the Member State level.

i. What binding effect, if any, can be placed on Commission or NCA decisions such as settlements and interim measures, that is decisions other than the final finding of an infringement? Over the past few years the recourse to settlements has increased substantially, with Italy as a notable example. These types of decisions also entail a finding of facts, and it would perhaps go too far to deem them as irrelevant for subsequent civil actions.

ii. The binding effect of Commission or NCA decisions requires, as the Commission Staff Working Paper puts it, “same infringers and same practices”. The Commission also points out that the requirement should not be applied too strictly. Still, there can be divergence between the finding of an infringement before the Commission or an NCA and that before a civil court in private damage actions (e.g., the plaintiff’s injury was not the result of the illegal business strategy, but rather a random incident). What kind of divergences may occur, and which should be considered acceptable? Should the Commission or the NCAs try to make their finding of facts also in view of future civil actions?

iii. Finally, a binding effect can be provided also to NCA decisions from other Member States, as is already the case in Germany. What additional judicial scrutiny should foreign NCA decisions be subject to? Should the recognition be subject to the public order exemption as it is the case with foreign judicial decisions under Regulation 44/2001, as the Commission suggests?

B. A Different Standard of Proof for Private Damages Actions

An acknowledged trend in US antitrust law is towards a more extensive rule-of-reason approach, as opposed to traditional per-se rules. A key-factor for this development is the fact-intensiveness of US-style antitrust litigation. American antitrust cases are highly fact-intensive due in part to the American civil procedure and litigation culture. A motivating factor has been the extraordinary expansion of

focus on the situation in Italy, Ph. Fabbio, L’efficacia dei provvedimenti dell’Autorità Garante della Concorrenza e del Mercato nel processo civile, in CONC. MERC., (2013) forthcoming.

discovery rights that has taken place starting from the 1940’s. This wide access to facts, in turn, has led to legal doctrines that can be very nuanced and fact-specific and, in various ways, has encouraged economics-based analysis to play the role it currently plays.\(^{22}\)

In Europe there has been extensive discussion about an analogous distinction between a ‘form-based’ and an ‘effects-based’ approach. The discussion is strongly influenced by the American example. Being aware of the unique American legal environment, Europeans should perhaps venture more carefully, at least with respect to private enforcement actions, as the potential benefits of a more form-based approach, in terms of legal certainty and litigation costs, are quite considerable.\(^{23}\) A more form-based approach would also be more in line with the continental legal culture, with Germany’s historical experience in antitrust law as an interesting example.

IV. Calculation of Damages

In 2011, the European Commission issued its Draft Guidance Paper on quantifying damages. As the title suggests, the Paper should provide a basis for public discussion. Primarily, though, it is intended to provide guidance to national courts and to injured parties, and thus constitutes a form of soft law. The criteria recommended by the Commission are based on the traditional principles governing tort liability in the Member States. Here it may be appropriate to discuss two aspects unfortunately not covered in the Paper.

A. What Chances for a Multiple-Damages Rule in Europe?

Treble damages are a key-ingredient of private rights of action under US antitrust law. Under Section 4 of the Clayton Act “any person injured in his business or property by reason of anything forbidden in the antitrust laws” may sue for recovery in federal court. Section 4 further provides that i) the litigants are entitled to a trial by jury, and that ii) any damage awarded from the jury is automatically trebled by the court (‘mandatory trebling’). The merits of mandatory trebling have been extensively debated over the last century, most recently before the Antitrust Modernization Commission. In its report submitted to Congress in 2007, the

\(^{22}\) D.Gerber, Global Competition, cit., 137.

Commission reaches the conclusion that the treble damages remedy should be retained in all antitrust cases\textsuperscript{24}.

Historically, mandatory trebling in private antitrust actions has served four interrelated goals: compensation of victims, deterrence, forfeiture of ill-gotten gains and punishment\textsuperscript{25}. As to compensation, trebling may serve as a surrogate measure of actual damages, especially in cases where determining the actual damages and their exact amount can prove to be very difficult. Second, mandatory trebling increases the likelihood of detection, because it creates an incentive for private parties and lawyers to bring civil actions. In view of the increased likelihood of detection and the economic impact on the defender, treble damages serve to deter antitrust violations (this, however, may not always be the case with overt violations). Third, the plaintiff’s actual damages may not correspond to the defendant’s actual illicit gains. Hence, the treble-damages rule may help secure disgorgement. Also, the treble damages remedy has a punitive component, which is not unique to antitrust (see for example insider trading).

Should the EU or its Member States consider remedial schemes providing for multiple damages? If so, what would be an appropriate design?

Punitive damages have always been alien to European tort law, where the award of damages serves mainly or exclusively as compensation. Recently, the Italian Corte di Cassazione has, for instance, found a US court judgement awarding punitive damages in contradiction with the Italian public order clause, and has denied recognition\textsuperscript{26}. The reason why multiple damages have not been considered an option by the EU may lie in its skepticism toward the punitive element, but also in an underestimation of their compensatory function\textsuperscript{27}.

In some instances, multiple damages may appear particularly harsh. This is especially the case where the illegality of the relevant conduct is not self-evident. A selective enhancement of multiple damages could potentially compensate for it. Enhanced damages could, for example, be limited to ‘per-se’ or ‘hard-core’ restrictions. Also, enhancement of damages could be left to the discretion of the courts on a case-by-case basis. But this could result in the side-effect of lengthier


\textsuperscript{26} Cass. No 1183 of 2007.

and costlier litigation. Finally, the question would arise of what would be an appropriate multiplier.

B. The Role of Competition Agencies in the Calculation of Damages

An option that is of some interest from a European perspective, but that has so far been little explored, is to have competition agencies playing a role in the calculation of damages that are awarded to private plaintiffs in private actions.

The Commission and the NCAs, in determining the amount of the fine, will assess the gravity of the violation. For this purpose, they may also consider its actual impact on potential plaintiffs, for instance in terms of overcharges paid by consumers. In 2000, the Italian Autorità Garante fined a large cartel in the car insurance sector. In doing so, the Authority also estimated the cartel increased prices by about 20 per cent. Consumers later relied on this finding in a large number of follow-on actions that were filed before Italian small-claim courts. The wave of civil actions that resulted therefrom prompted the insurance industry to lobby for legislative changes. It also initiated a number of references for preliminary rulings to the European Court of Justice under Article 267 TFEU.

In any case, the Commission and the NCAs have the expertise to contribute to the calculation damages, and at the same time their greater proximity to the relevant facts can put them in a better position than private plaintiffs to make these calculations.

Given this, would it be a option to consider competition agencies as a viable source in contributing to the calculation of damages in individual cases? If so, what should their involvement look like? Also, what type of cases should be considered suitable? The need for this kind of support is probably higher in the case of dispersed and small damages suffered by large numbers of potential plaintiffs, like in the Italian case of the car insurance cartel.

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Overall, many new developments are underway in the practice and regulation of private damage claims in Europe. This brief paper could, obviously, touch upon only a few issues. But in its broaching of some of the less explored points it hopefully

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offers our distinguished group of highly qualified marathoners, who also happen to be antitrust experts, a starting line from which valuable insights can be won.