What Role for Private Enforcement in EU Competition Law? A Religion in Quest of Founder[1]

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The movement for EU competition law's private enforcement emerged about two decades ago. Although invalidity is specifically provided for in Article 101(2), actions for damages had remained, for the most part, a mere theoretical possibility. In the CJEU's jurisprudence, the discussion arose in the context of English tort law, in *Courage v Crehan*,[2] which had to be reconciled with the continental thinking of fault-based liability limited by unjust enrichment.[3] This ushered a judicial quest for a workable solution amalgamating the different national approaches. In parallel to these developments in the case-law, the European Commission's Green Paper on Damages Actions for Breach of the EC Antitrust Rules, followed by the White Paper of the same title, opened a new era. Although, perversely, this movement has produced much more scholarly pieces than court judgments, it gradually turned private enforcement from a theoretical possibility into a practical reality.

Interestingly, however, private enforcement has ducked the central question of its existence. What is its ultimate purpose? Is it merely meant to make compensation a reality or is it destined to deter from violating competition rules? Is it to compensate and reinforce public enforcement, is it to compensate and supplement public enforcement or is it to punish and, to some extent, replace public enforcement? Although this may appear only a theoretical question, the answer has very important implications. It determines the use and usefulness of comparisons (to US antitrust), the selection of benchmarks for the evaluation, the limits of regulatory playing-field and, finally, the prism of legal interpretation. In US antitrust law, private enforcement serves a public purpose and, hence, comparisons are of a limited value, if EU private enforcement is considered to serve a predominantly compensatory function. If private enforcement's purpose is conceived as supplementing or even partially replacing public enforcement, the number of actions for damages may appear to be disappointingly low, but if conceived as mere compensation and, as a side-effect, reinforcement of public enforcement, it might be regarded as less disappointing.

The difficult theoretical question is exacerbated by the fact that compensation and deterrence are inseparable and interlinked: compensatory damages deter (though less effectively than super-compensatory damages do) and super-compensatory damages compensate (though much more lavishly than compensatory damages do). Still, this does not detract from the importance of the question: which one is the main purpose, and which one is the side-effect?

EU legislation and the CJEU's case-law gives mixed signals when it comes to the teleology of private enforcement.

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[2] C-453/99 *Courage v Crehan*, ECLI:EU:C:2001:465.

[3] C-295/04 to C-298/04 *Manfredi*, ECLI:EU:C:2006:461.

The Commission's Recommendation on Collective Redress, in Recitals 1 and 10, defines collective actions as a means to "facilitate access to justice in relation to violations of rights under Union law" and to reinforce the effectiveness of EU law. The Recommendation is based on the premise that collective actions are needed because they enhance both the effectiveness of the law (through stopping and preventing unlawful practices) and the chance to obtain a real legal remedy (compensation). Nonetheless, while the Recommendation lists access to justice and effectiveness of the law as aims equally important to compensation, in Recital 15 and paragraph 31, it also makes clear that the purview of these is strictly limited by what is permitted by the compensatory function.

The EU Private Enforcement Directive[4] also features the above multiplicity of aims. Recitals 3 and 13 identifies the full effectiveness of EU competition rules as the Directive's aim but at the same time limits the extent of the deterrent and victim-friendly rules by ruling out overcompensation and unjust enrichment. The above mindset finds reflection in the detailed rules. While the Directive contains a list of victim-friendly rules in terms of presumptions and reversed burden of proof, these do not question the basic civil law tenet that the injured person may be compensated only for the loss he suffered and cannot become richer as a result of the compensation.

Contrary, however, to the above legislative signals, the CJEU's ruling in *Skanska*[5] signals the prevalence of the public policy function (deterrence). In this approach, private enforcement increases institutional capacity as the decentralized application does and private actors (and courts) are providing free assistance for public enforcement as NCAs do. In *Skanska*, AG Wahl considered private and public enforcement to be part of the same unitary enforcement system and private enforcement's function to be predominantly deterrence, to which the compensatory function is subordinate (paragraph 50). This policy consideration shaped his proposed interpretation of EU law. Although the CJEU did not expressly take up this notion, it endorsed the idea that public and private enforcement make up a unitary system. This conceptual kinship between public and private enforcement may suggest that deterrence may be one of the primary roles, if not the primary role, of private enforcement and is legally construed based on an extended concept of effectiveness. This notion was taken up by the Private Enforcement Directive (in Recital 6).

It is easy to analogize this stance with US antitrust law's reliance on the "private attorney general." Although, in the EU, private enforcement does not and cannot have the kind of weight it has in the US, the explicit articulation of its public policy rationale, which took root as early as *Courage*,[6] is a major development. It is questionable, however, what this view about the teleology of private enforcement may mean in practice. The use of private enforcement for the advancement of public policy purposes creates a challenge for civil law.

Though this statement could call for a reconsideration of the prevailing paradigm of compensation and the introduction of super-compensatory damages, such as punitive or treble damages, in my view these statements do not question the traditional civil law foundations and the principle that the compensation is not meant to enrich the victim but to duly compensate him. Instead, it simply confirms that the main reason why civil liability is so important for EU law is that it also has a deterrent effect. The idea to use and, to the extent possible, maximize

[4] Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ [2014] L 349/1.
[5] C-724/17 *Skanska and others*, ECLI:EU:C:2019:204.
[6] Case C-453/99 *Courage and Crehan* [2001] ECR I-6297.

the side-effects of private enforcement on public enforcement is a recurring element of the CJEU's case-law.[7]

Victim-friendly rules may extend until the point where they are tolerable by civil law's compensatory logic. This does not imply that EU competition law's private enforcement rules cannot be more victim-friendly than general tort law. It only means that private enforcement may make use of the grey zone between compensatory and super-compensatory damages but cannot transgress this. Legal presumptions concerning damages, the reversal of the burden of proof as to the passing-on defense, to mention a couple of them, do not question of civil law's basic tenet that compensation must be limited to the loss suffered. They go beyond general tort law and facilitate actions for damages but conceptually still comply with the principle of full compensation.

Article 3 of the EU Private Enforcement Directive pronounces that victims shall be entitled to full compensation, extending to the actual loss and lost profit (and interests); however, it makes it explicit that "[f]ull compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages." Article 17 alleviates the burden of quantifying the harm suffered. The treatment of passing-on defense and the claim of indirect purchasers features a similar compromise between the public policy function and traditional compensatory thinking: the EU Private Enforcement Directive stretches the victim-friendly rules until the point where they, though more generous than traditional tort law, can still be conceived as compensatory (and not punitive).

The passing-on defense accrues from the compensatory logic of damages: the injured person cannot be compensated for a harm he did not suffer; if the harm was partially or fully passed on, it was not or not fully suffered by the injured person but by the indirect purchasers, who bought the products from the direct purchaser. At the same time, the passing-on defense may be an effective defensive tactic, because of the problems of proof it raises. In US antitrust law, these policy considerations warranted the discarding of the passing-on defense[8] and, as a consequence, the denial of indirect purchasers' standing.[9] The principle that passing-on may not be used either defensively against a direct purchaser, or offensively against an antitrust violator is justified by the effectiveness of enforcement. The passing-on defense may highly encumber the enforcement of the claims of direct purchasers, while it is highly unlikely that indirect purchasers could effectively prove the loss they suffered and enforce their claims. Hence, the policy consideration of enhancing the effectiveness of private enforcement suppressed the private law considerations emerging from the notion of compensation.

While this policy-oriented construction could not be reconciled with the European legal mindset, policy considerations did shape the rules on passing on. The EU Private Enforcement Directive refused to step out of the shadow of the compensatory logic and endorsed the passing-on defense and the standing of indirect purchasers (Articles 12(1) & 14), but – with a view to enhancing the effectiveness of private enforcement – placed the burden of proof on the wrongdoer (Article 13).

All in all, it seems that while private enforcement has multiple purposes in EU competition law, it features an idiosyncratic compromise between policy-oriented deterrence and the traditional

[7] *See* C-882/19 *Sumal*, ECLI:EU:C:2021:800, para 36, C-163/21 *PACCAR*, ECLI:EU:C:2022:863, para 56, C-312/21 *Tráficos*, ECLI:EU:C:2023:99, para 42.
[8] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).
[9] *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

notions of civil law (full compensation, prohibition of unjust enrichment). While serving a public policy purpose and making use of the grey zone between compensatory and super-compensatory damages, EU "private competition law" does not go beyond that and remains within the confines of "compensation."[10] The fact that it is the deterrent side effects that make private enforcement relevant for EU competition law and subject to special legislative attention does not question its compensation-oriented DNA.

[10] For instance, the preservation of the ex turpi causa principle in *Courage v Crehan*, though limited by the possibility to prove that the innocent part was dragged into the anticompetitive arrangement, impairs the effectiveness but is a limitation justified by civil law principles.