

Damages for breach of the EC antitrust rules: harmonising Tort Law through the back door?

Francisco Marcos

Director of the Service for the Defence of Competition, Competition Tribunal

Albert Sánchez Graells

EconLaw Strategic Consulting. Instituto de Empresa Business School

*Abstract*¹

Tort Law is not harmonised at a European level. Substantive and procedural regulations vary substantially across EU Member States in most of the facets and dimensions of damages actions. These differences derive, amongst other causes, from different legal traditions. However, significant efforts are being made in order to find common ground for the approximation or even harmonisation of these laws across the EU –building on the Principles of European Tort Law and other projects, such as the European Code of Civil Procedure-. However, harmonisation of Tort Law and the corresponding Civil Procedure regulations is still open to debate and the process is envisaged to take a significant delay before any formal legal instruments are approved.

Such regulatory diversity is inevitably reflected in the field of antitrust private enforcement – based on claims for harm inflicted as a result of the anticompetitive behaviour-, which the European Commission is trying to encourage and promote as a key element of the modernisation process of the EC antitrust rules undertaken in 2003. In this regard, a Green Paper on damages actions for breach of the EC antitrust rules was published in December 2005 with the purpose of opening up a reform process that could facilitate private damages actions across the EU. Most remarkably, the Green Paper put forward most of the divergences in national Tort Law and Civil Procedure regulations that jeopardize the effectiveness of a privately enforced competition system. These differences in national regulations contrast with the nearly-full *de facto* harmonisation existing in antitrust law and its public enforcement. Consequently, the Commission proposed harmonisation alternatives that imply deep reforms in national Tort Law and Civil Procedure regulations. Those proposals are to be developed and further analysed in a forthcoming White Paper –foreseen to be adopted around the turn of the year 2007-.

At this stage, and before the Commission puts forward new harmonisation proposals, this paper analyses its need and adequacy and wonders whether the efforts of the Commission for the harmonisation of antitrust damages actions constitutes a “backdoor harmonisation” of fundamental aspects of Tort Law and Civil Procedure with much broader implications and effects in fields of Law other than antitrust.

Keywords: Tort Law; Civil Procedure; Law Enforcement; EC Competition Law; Damages Actions; Harmonisation

¹ Presented at the IV International Congress EUROPEAN PRIVATE LAW BEYOND THE CFR – Lleida (Spain), 25th & 26th October 2007.

Francisco Marcos francisco.marcos.fernandez@madrid.org. Director of the Service for the Defence of Competition, Competition Tribunal, Madrid Autonomous Community (Spain). Ph.D. in Law, Professor of Law, Instituto de Empresa Business School.

Albert Sánchez albertsanchez@econlaw.es. Lawyer and Consultant at EconLaw Strategic Consulting, Madrid (Spain). BA in Law and BA in Business Management. Ph.D. Candidate in Law (UAM), Research Assistant, Instituto de Empresa Business School.

Summary

1. Introduction: Tort Law and Civil Procedure regulations' diversity in the EU and harmonization efforts
2. The apparent peculiarities of antitrust harm: damaging the market
3. The complex case for the double function of antitrust damages claims: private antitrust enforcement and compensation of the victims
4. Harmonising Tort Law and Civil Procedure regulations as a means to promoting private antitrust enforcement: does the end justify the means?
5. Is a "sectoral" harmonisation of Tort Law and Civil Procedure regulations possible or desirable in the field of antitrust claims?
6. Conclusions
7. References

1. Introduction: Tort Law and Civil Procedure regulations' diversity in the EU and harmonization efforts

Tort Law is not harmonised at a European level. Substantive and procedural regulations vary substantially across EU Member States in most of the facets and dimensions of damages actions. These differences derive, amongst other causes, from different legal traditions. Curiously, although there is a common background or origin in Roman Law (Lex Aquilia²), later evolution and development of national legal systems have led to major distinctions among them (even amongst those that can be ascribed to either common law or civil law traditions). Although the founding principle of liability for harm caused by a wilful or negligent misconduct remains common in all of them, its practical applications differ considerably from one system to another.

All attempts to harmonise tortious liability regimes conducted so far in the EU have failed, except in the area of products liability³. The need to protect consumers from torts that may be inflicted by products massively manufactured and placed in the market has prompted the action of the EU on that specific area. We will question later on whether the same action should be pursued regarding damages claims for antitrust violations (*infra* §5).

Tort Law is also excluded from the main current harmonization initiative in EU Private Law, as it falls outside the scope of the Common Frame of Reference on European Contract Law (CFR) that is being developed under the auspices of the European Commission⁴. The relevance of contracts for market transactions and consumer protection in market settings provides a solid source of action of the EU in this area, while non-contractual liability seems to be considered of secondary importance in this regard.

Nevertheless, consideration is given to the area of non-contractual liability in the broader project of harmonisation of the legislation of the Member States in civil matters⁵, particularly as regards

² 286 BC. Lex Aquilia was concerned with *damnum iniuria datum* ("harm unlawfully inflicted") See BUCKLAND and STEIN (1968, pages 585-589). See also MADDEN (2005).

³ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (Amended by Directive 1999/34/EC of 10 May 1999) [OJ L210, 07/08/1985, p. 29].

⁴ *Communication from the Commission to the European Parliament and the Council – A more coherent European contract law – An action plan*. COM/2003/0068 final [OJ C063, 15/03/2003, p. 1]. More information on the CFR is available at the European Commission's webpage at http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/common_frame_ref_en.htm (visited 25.9.2007).

⁵ European Parliament resolution of 15 November 2001 on the approximation of the civil and commercial law of the Member States [OJ C140, 13/06/2002, p. 538] §13. Previous mentions on the need to bring into line Member States' Tort Laws were made in the European Parliament resolution of 26 May 1989 on action to bring into line the private law of the Member States [OJ C158, 26/06/1989, p. 400] and in the European Parliament resolution of 6 May 1994 on the harmonisation of certain sectors of the private law of the Member States [OJ C 205,

its relation with contractual law (*i.e.* as regards the so called “interference” of the non-contractual and contractual liability regimes)⁶. Significant efforts are being made in order to find common ground for the approximation or even harmonisation of these laws across the EU –building on the Principles of European Tort Law⁷ and other projects, such as the European Code of Civil Procedure⁸-. However, harmonisation of Tort Law and the corresponding Civil Procedure regulations is still open to debate and the process is envisaged to take a significant delay before any formal legal instruments are approved.

Notwithstanding such general efforts to explore the possibilities of approaching –and even harmonizing- Tort Law at the European level, the advances in other areas of European policy are exerting significant pressure towards the development of a unified “sectoral” regulation of tortious liability. Most noteworthy, the initiative of the European Commission (hereafter, the “Commission”) to promote private enforcement of EU antitrust rules has major implications as regards the approximation of Member States’ Tort Laws and Civil Procedure regulations.

Antitrust private enforcement is based on claims for damages inflicted as a result of the anticompetitive behaviour (*i.e.* antitrust harm), and it is an enforcement device that the Commission is trying to encourage and promote as a key element of the modernisation process of the EU antitrust rules undertaken in 2003. In this regard, a Green Paper on damages actions for breach of the EC antitrust rules was published on 19 December 2005 (hereafter, the “Green Paper”) with the purpose of opening up a reform process that could facilitate private damages actions across the European Union⁹.

25/07/1994, p. 518]. This need to promote private law harmonization as a means to furthering the development of the internal market was also stressed in the conclusions of the Council meeting in Tampere on the 15th and 16th October 1999 (para. 39). See also Report by the Council of 16 November 2001 on the need to harmonise the legislation of the Member States in civil matters.

http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/council_decision.pdf (visited 25.9.2007).

⁶ VON BAR and DROBNIG (2004). Most noteworthy, the Study found that “A harmonization of only those parts of non-contractual liability law which are applicable as between parties to a contractual or pre-contractual relationship would admittedly promote the unification of contract law. However, it would expose tort law to the danger of an irresponsible artificial fragmentation” (p. 27). Even more, it is remarked that “Tort law in general develops from a few basic maxims which are applied equally in all of its component areas. [...] From this derives the fear that a sectoral harmonisation of tort law limited to particular fields of activity or particular risks might not as a rule promise long-term success” (p. 42).

⁷ EUROPEAN GROUP ON TORT LAW (2005).

⁸ STORME (1994).

⁹ Green Paper – *Damages actions for breach of the EC antitrust rules*. COM/2005/0672 final. Available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0672en01.pdf (visited 25.9.2007). The Green Paper was completed by a Commission Staff Working Paper where some of the proposals and issues raised by the Green Paper were further developed and background to the alternatives envisaged in the Green Paper was provided. SEC/2005/1732 final, available at

Most remarkably, the Green Paper put forward most of the divergences in Member States' Tort Law and Civil Procedure regulations that jeopardize the effectiveness of a privately enforced competition system. These differences in national regulations contrast with the nearly-full *de facto* harmonisation existing in antitrust law –a gap that the Commission is trying to bridge, in order to foster development of private claims and, additionally, to construct a level playing field for companies operating across the EU-. Consequently, the Commission proposed harmonisation alternatives that imply deep reforms in domestic Tort Law and Civil Procedure regulations. Those proposals are to be developed and further analysed in a forthcoming White Paper on EC antitrust damages actions –foreseen to be adopted around the turn of the year 2007.

This paper analyses the need and adequacy of the proposals brought forward by the Commission and wonders whether its efforts for the harmonisation of antitrust damages actions constitute a “backdoor harmonisation” of fundamental aspects of Tort Law and Civil Procedure with much broader implications and effects in fields of Law other than antitrust.

The rest of the document is structured as follows: Section 2 analyses the apparent peculiarities of antitrust injury as pure economic losses with a broad set of victims (or, more generally, as harm to the market). Section 3 focuses on the complexities deriving from the use of damages claims as an enforcement device for EU antitrust laws, while Section 4 questions whether the end (promotion of antitrust private enforcement) justifies the means (partial harmonisation of Tort Law and Civil Procedure regulations). Section 5 goes a step further and discusses whether such a “sectoral” harmonisation of Tort Law and Civil Procedure regulations in the antitrust field –even if justified- would be possible or desirable. Section 6 concludes.

2. The apparent peculiarities of antitrust harm: damaging the market

The main goal of antitrust regulations is to foster competition as a means to protect consumer interest through lower market prices, increased variety and quality of products and services, dynamic innovation processes, etc. The public interest prevalent in antitrust prohibitions has led to emphasizing public enforcement of these rules. In many legal systems it has even made antitrust infractions part of the most serious and egregious violations in the social community: Criminal law. In that situation an antitrust violation would be a crime and the violator could be sent to prison, or the fines imposed might be of a criminal nature (*ad. ex.* United Kingdom, Lithuania, Ireland, and to some extent France, Spain or Germany may consider antitrust violations crimes). However, that is not the situation at the EU level (no criminal sanctions can be imposed by EU institutions), nor in a majority of European countries. In most of them, as well as

http://ec.europa.eu/comm/competition/antitrust/actionsdamages/sp_en.pdf (visited 25.9.2007). Both documents had been preceded by a study carried out for the Commission to identify and analyse the obstacles to successful damages actions in the Member States of the EU; which found that levels of private enforcement through damages claims in Europe are currently very low, and that this area is characterised by “total underdevelopment” and an “astonishing diversity” in the approaches taken by the Member States. ASHURST (2004).

at EU level, antitrust violations are considered administrative violations and the fines and remedies imposed are of an administrative nature.

Apart from the public interest dimension inherent in the antitrust infringements, which motivates the public sanction (be it criminal or administrative), there is also a private dimension of the infringing conduct. Indeed, as it regularly happens with crimes and other administrative violations, antitrust infringements may additionally cause harm to private agents. These damages need to be made good and antitrust rules normally rely on general Tort Law for that task¹⁰. In this vein, private claims for damages caused by antitrust violations provide a complement for public enforcement¹¹, but the goals of both enforcement devices might not be common, as they protect different interests (see *infra* §3).

As it occurs with crimes, and with liability *ex delicto*, the foundation of the tort claim against the violator lays not only in his harmful action but also in its unlawfulness. Besides, the non-contractual character of the tort is explained due to the widespread effects of the antitrust violation on all market participants.

Given their immediate effect on the market, nearly all antitrust infringements automatically result in economic harm to other market participants, which may or not be contractually related with the antitrust violator¹². Overall, antitrust violations result in diminished market competition and this implies that market participants are harmed through higher prices, reduced quality and less variety of products. Market dynamism is also negatively affected by restraints to competition and this also reduces consumer welfare, although it may be more difficult to quantify in economic terms. As we will see, this may reduce the probability of success of the tort claims of those victims indirectly harmed by the antitrust violator.

Therefore, antitrust harm has, generally, the nature of pure economic losses, as their main effects are: i) increases in prices and/or ii) loss of business opportunities for the competitors of the antitrust violator. These negative effects of antitrust misbehaviour are generally direct damages and the victims are relatively easily identified. Nonetheless, there are other dimensions of

¹⁰ It is a task for EU Member States national Laws to do that. As far as EC Law is concerned, the European Court of Justice (hereafter "ECJ") expressly affirmed in its Judgment of 20 September 2001 in Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I, the full effectiveness of Article 81 of the EC Treaty would be put at risk if it were not open to "any individual" to claim damages for losses caused to firms by a contract or conduct liable to restrict or distort competition (see para. 26 and ff.). Afterwards, the Judgment of the ECJ of 13 July 2006 in Cases C-295/04 to C.298/04 *Vincenzo Manfredi and others v. Lloyd Adriatico Assicurazioni SpA and others* [2006] ECR 6619, not only confirmed that holding (para. 91) but also clarified that compensation sought must cover "not only for actual loss (damnus emergens) but also for loss of profit (lucrum cessans) plus interest" (para. 95).

¹¹ See BECKER and STIGLER (1974, p. 15).

¹² Also, the contractual nature of the antitrust harm suffered by contractual partners of the infringer is rather doubtful (at least under certain national Laws), reinforcing the tortious nature of claims for antitrust damages.

antitrust harm which may be more difficult to calculate (*i.e.*, deadweight losses, loss of quality, loss of variety, reduced innovation, etc). These additional negative effects are to a certain extent indirect and, consequently, harder to appraise. Quantifying those damages can be difficult in certain instances and market conditions, when the interplay and reaction of direct antitrust victims transfers most of the harm to indirect claimants (via prices or reduced quality in downstream or neighbouring markets).

Forensic economics can help overcome that difficulty –as most of the information relative to such distortions of market functioning is embodied in the prevailing prices-¹³. Evidence of the harm caused by antitrust violations is generally easily illustrated by an increase in market prices, but other business and market variables that determine demand and offer in the market also suffer as a consequence of antitrust violations.

It follows that, even if a direct harm on certain players' economic interests can be identified, indirect harm on other players and, more generally, on the structure and functioning of the market also exist. The existence of such indirect harm complicates the exercise of damages claims, as the standing of the affected parties might be difficult to prove in certain cases –particularly because of the pure economic nature of the losses and complicated passing-on issues-.

Therefore, the specific economic nature of antitrust harm and the problem of its spread throughout the market to many market participants, remotely related to the antitrust violator, could lead to consider that antitrust injuries are of a special nature –or, at least that they generate very specific problems- that would permit the construction of antitrust torts as an special category¹⁴. This could be the foundation for the creation of particular substantive tort and procedural rules¹⁵.

However, when analysed under the general principles of Tort Law, damage measurement and the position of indirect antitrust victims do not seem to deviate significantly from the situation associated to other types of harm to intangible goods –which, in this case, are of a purely economic nature-. The only peculiarity is that, due to the spread and diffuse nature of harm, it

¹³ Remarkably, the difficulties faced in accurately quantifying the damages caused by antitrust violations are not greater than those encountered in other mass torts and, indeed, it may well be easier to prove them, given the economic nature of the harm caused –as compared to the moral and physical harm that is inflicted to human beings in many other torts and accidents-.

¹⁴ There is, however, nothing fundamentally special about antitrust harm and damages actions related to it, and –of course- some of the specificities may well have to do with the fact that despite the violation, there may not be a harm deserving compensation, see AREEDA (1976, p. 1126-1139) (concluding that “*an antitrust damage assessment cannot be divorced from thoughtful attention to the rationale for liability and the internal logic of the liability holding*”).

¹⁵ It is true that the economics underlying antitrust violations and their impact in markets and consumer behaviour may require in-depth analysis for measuring and calculating antitrust damages [see, for example, SIDACK (1981, p. 328-352)]. These requirements might, however, only claim for special procedural provisions, but fall short of justifying a separate tort.

might be difficult to locate and identify relevant private agents entitled to damage claims (and, in the extreme, harm might be so widely disseminated that no particular claimant is entitled to a proper compensation). However, this specific feature of massive harm spread in the market due to the antitrust violations (*i.e.* damage to the market) can hardly be properly addressed by Tort Law; and it is more plausibly addressed by the punishing function exclusively attributed to public enforcement, as punitive or treble damages are generally not available in EU jurisdictions¹⁶.

3. The complex case for the double function of antitrust damages claims: private antitrust enforcement and compensation of the victims

However, the insufficiency of traditional Tort Law to tackle all compensatory aspects of antitrust harm –and, particularly, its inability to compensate damage to the market– seems to have been overlooked by the Commission. The Green Paper has indicated that private antitrust enforcement serves a double function as regards consumer protection. On the one hand, damages actions shall compensate the victims for the antitrust harm they have suffered. On the other hand, private enforcement is a complement of the enforcement efforts made by the public authorities vested with antitrust competencies –at the European level, mainly, the Commission and the National Competition Authorities of Member States (hereafter, “NCA”)-¹⁷.

These two main functions (compensation and deterrence) should not be completely equalled, as the only function of private antitrust actions shall be that of compensating the victims of the anticompetitive behaviour (whenever possible, given the difficulties inherent in compensating general damages to the market), while the deterrent function (or the reinforcement of the public

¹⁶ This feature of antitrust damages reflects the different scope and aims of Tort Law in civil and common law jurisdictions. Civil law jurisdictions consider tort as an exclusively compensatory device, aimed at indemnifying victims of harmful illegal behaviour. Common law jurisdictions incorporate an additional deterrent and disciplining element in Tort Law, which becomes a punitive instrument. Given that this additional element is absent in most EU jurisdictions, harmonisation of antitrust damages claims shall be based on the civil law approach to Tort Law and reserve all punishing, disciplining and deterrent implications to competition law and public enforcement.

The decision to award (and in what amount) antitrust damages with a punitive goal more than probably leads to an outcome different from the implied in traditional Tort Law (in civil law jurisdictions), exclusively focused on compensation; see, among others, FISCHER (2006, p. 383-394) and SIDACK (1981, p. 328-352) (it is true, for example, that here we do not only look at compensating the victim –restoring him/her to *statu quo ex ante*- but also at preventing the antitrust defendant from obtaining benefits of his violation).

¹⁷ According to the Green Paper: “Damages actions for infringement of antitrust law serve several purposes, namely to compensate those who have suffered a loss as a consequence of anti-competitive behaviour and to ensure the full effectiveness of the antitrust rules of the Treaty by discouraging anti-competitive behaviour, thus contributing significantly to the maintenance of effective competition in the Community (deterrence)” (footnote omitted). Green Paper – Damages actions for breach of the EC antitrust rules, *ob. cit.*, p. 4.

enforcement efforts by competition authorities) should only be considered a positive “collateral” effect or a secondary function.

However, if more and more emphasis is put on the enforcement function of antitrust damages actions (*i.e.* if Tort Law regulations are used to discipline and punish antitrust infringers), there is a risk of “contamination” of the rules and proceedings applicable to antitrust private tort claims (it is to be recalled that a civil proceeding is quite different than an administrative sanctioning proceeding and that certain reforms of civil procedure in order to allow its functioning as a nearly-public procedure might undermine its essence and basic functions).

The accomplishment of both functions in a single civil (or private) procedure could be complicated in certain instances, and impediments to attain the main goal (*i.e.* compensation) will reduce the deterrent effect (imagine a case to be dismissed because of procedural flaws exclusively related to the claimant, regardless of a patent public offence having been discovered during the probatory phase). Also, even if compensation was achieved (and in the absence of treble and punitive damages), the deterrent function might be jeopardized or its effectiveness reduced (as infringers would always prefer and be better off when facing a private proceeding, as compared to an administrative procedure, where additional fines could be imposed on them).

Even more, the administrative procedure is equally ill-designed to accomplish both aims simultaneously and completely. So far, public administrative enforcement complemented with leniency programs has proved quite effective, and mixing compensation issues in administrative proceedings may endanger the deterrent goal (remarkably, an excessive emphasis on compensation of the victims might reduce the effectiveness of administrative devices such as leniency programmes, as far as immunity cannot be granted to exonerate violators from payments for damages).

Besides, a development of a model of private antitrust enforcement incorporating deterrent mechanisms (and, particularly, the possibility of imposing treble or punitive damages) would generate a risk of over-compensation of the victims; particularly in cases involving particularly severe offences of antitrust laws, or where deterrent considerations were particularly relevant (for instance, in case of recidivism by the antitrust violator)¹⁸. As we have already discussed (*supra* §2), antitrust infringements generate damages of both a direct and an indirect nature. Tort actions are generally suited only to the satisfaction of direct victims of the antitrust violator, while the system is virtually unable to provide for an effective compensation of diffuse damages to the market. The introduction of punitive or treble damages and their award to private plaintiffs (*i.e.* direct victims) would most probably result in an excessive compensation and, therefore, generate their unfair enrichment –which is an undesirable effect-. The bottom line is that antitrust regulations should guarantee the absence of any unfair enrichment of offenders (via criminal or administrative sanctions, plus private damages compensation) but, at the same time,

¹⁸ Other arguments against fostering private antitrust enforcement in the EU, be they economic or cultural, in WILS (2003, p. 473-488).

shall impede the unfair enrichment of the victims of any antitrust violations (*rectius*, of the plaintiffs in private enforcement cases).

Again, the difficulty in locating and identifying relevant private agents entitled to damage claims comes to diminish the effectiveness and adequacy of private enforcement to tackle the whole myriad of economic effects generated by antitrust infringements. To be sure, private enforcement can only tackle private compensation, while the public interest embedded in the proper functioning of the market and the maintenance of an effective competition is better served through public enforcement of the antitrust rules.

4. Harmonising Tort Law and Civil Procedure regulations as a means to promoting private antitrust enforcement: does the end justify the means?

As we have already analysed (*supra* §3), the promotion of antitrust damages actions is seen by the Commission as a means of strengthening the enforcement of EU competition rules¹⁹. Given the limited resources of competition authorities, the involvement of other players in the market through private enforcement could help the Commission and NCAs to focus on the most severe offences to EU antitrust laws (and particularly hard core cartels), while the aggregate effectiveness of these rules would be increased²⁰. Therefore, promotion of private antitrust enforcement constituted one of the main objectives of the modernisation of EU antitrust rules undertaken in 2003 with the approval of Regulation 1/2003 on the implementation of EU antitrust rules²¹.

By promoting private enforcement of EU antitrust rules, and mirroring business strategies, the Commission would be (efficiently) *outsourcing* some of its enforcement tasks to private individuals through promoting the use of antitrust damage claims. In a sense, the effort put in the

¹⁹ This is, in fact, the main argument in favour of the development of private antitrust enforcement. See WOODS, SINCLAIR and ASHTON (2004, p. 32-37). See also the speeches of former Commissioner for Competition Policy Mario MONTI and of current Commissioner Neelie KROES. Notably, MONTI Speech (2004) (*“more private enforcement of the EC competition rules in parallel to public enforcement by the Commission and the National Competition Authorities should lead to even greater compliance with EC competition rules. Greater enforcement of EC competition law would also act as a catalyst unleashing more competition across Europe”*); and KROES (2005). See also, more elaborated, JONES (2004, p. 13-24).

²⁰ This positive effect of private enforcement on the effectiveness of EU antitrust rules has been expressly acknowledged by the ECJ in its Judgment of 20 September 2001 in Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001 ECR I], where the Court stressed that *“actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community”* (para. 27). However, as we have already mentioned, it should only be considered an additional positive effect of private enforcement, but not its main goal.

²¹ Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty [OJ L1, 04/01/2003].

development of these enforcement devices might be the result of the inability of the Commission to handle administrative proceedings above a certain annual volume, rather than the reaction to a real need to cover a lacuna in national Tort Law to allow antitrust victims to get compensation (and, in this sense, the Commission would be improperly attributing deterrent objectives to private antitrust enforcement).

It is hard to see how private enforcement could substitute public enforcement in complex cases or how sufficient and proper incentives can exist for private action in less significant cases²². It is particularly remarkable that the cases of private damages actions are to date mostly based on previous administrative decisions of either the Commission or NCAs (the so called follow-on actions), while the lesser number of private damages cases are built from scratch by private plaintiffs (stand-alone actions). This empirical fact is not accidental, but a result of different scope and goals of public and private enforcement (*i.e.* punishment and deterrence, versus compensation of the victims).

In fact, there seems to be a strong case for private enforcement to be limited to follow-on actions and, only residually, to stand-alone claims (in cases where the victim and the infringer held a direct, and probably contractual, relationship and where substantial economic interests are involved) –in which case the need for harmonisation of Tort Law and Civil Procedure regulations is far more restricted than it would appear-. Indeed, if fostering antitrust private claims leads to an increase of stand-alone claims that would also diminish somehow the control that the Commission and NCAs hold over the docket of cases (*i.e.*, the antitrust violations) which are been pursued (and probably give rise to duplication and miscoordination of enforcement efforts), at the extreme, there may be an excess of private rights of action resulting in inadequate or overenforcement of the EU antitrust rules²³.

Also, in this setting, it is hard to see a real “complementary” function of both types of enforcement, as public enforcement seems to constitute a *de facto prius* for the exercise of private antitrust actions, at least in a substantial array of cases. Therefore, it can hardly be promoted on deterrent grounds, but should be developed in order to increase the probability of attaining compensatory goals (wherever, and only if, needed).

Finally, as pointed out above (see *supra* §3), the interaction and coordination problems between private and public enforcement actions may multiply, and greater exposure of antitrust violators

²² It has been shown that pure private enforcement would exclusively be efficient if multiple damages are awarded and if they are decoupled (*i.e.* if the plaintiff only obtains a share of the damages award and the rest goes to society), see MCAFEE, MIALON, and MIALON (2005). Similarly, public intervention in private enforcement and redistribution of the multiple damages awarded have been proposed in the US setting. See ROSENBERG and SULLIVAN (2005). However, such redistribution of the damages awarded in a civil proceeding seems very difficult to implement in civil law jurisdictions, and probably also in a common law setting.

²³ Generally, on the problems and efficiency losses generated by overenforcement situations, BIERSCHBACH and STEIN (2005, p. 1743–1781).

to private antitrust claims certainly increases the amount of compensation for antitrust infringements, but may reduce the total probability of misconduct being detected as it impoverishes the incentive to use leniency programs.

Regardless of those considerations (which are somehow implicit in the Green Paper), the “bet” for the promotion of private antitrust enforcement is one of the main courses of action of the Commission in trying to increase compliance with antitrust rules and to promote free business competition in the EU. In order to achieve that aim, the Commission would have to “reshape” national Tort Laws and Civil Procedure regulations and adjust them to private antitrust enforcement particular needs.

However, the Commission has already acknowledged the need to proceed cautiously as regards amending national rules²⁴, but has maybe underestimated the argument that private antitrust enforcement might be a weak justification to harmonise Tort Law and Civil Procedure regulations (inasmuch as the compensatory goals can already be satisfactorily achieved in EU jurisdictions).

Indeed, proper foundation is required for EU actions and none of the comparative reports conducted so far supports the conclusion that Member States’ Tort Law and Civil Procedure regulations jeopardize the effectiveness of the substantive rights conferred by the EC Treaty, as all Member States have effective tort systems. And that holds even if they are not homogeneous and particular aspects most directly related to private antitrust enforcement may vary significantly.

In fact, as can be inferred from the Green Paper, national regulations can be insufficient for a punishing and deterrent private enforcement of antitrust rules (*i.e.* for the exercise of stand-alone actions), but the difficulties in obtaining compensation for a previously declared antitrust violation (*i.e.* for obtaining a damages award, which is the proper goal of private antitrust enforcement) are far more restricted.

The so-called “distortions” that the diversity of Tort laws and Civil Procedure regulations generate in the field of private antitrust enforcement are only apparent as they constitute variations that arise naturally from the differences in national legal rules themselves. There is nothing wrong with that and the Commission should refrain from further actions directly aimed at ending with such diversity. Besides, differences in tort legal rules may reflect different legal

²⁴ In fact, the Commission has indicated that: “*the initiative is not about unnecessarily harmonising national procedural rules applicable to tort actions. The Commission wants to guarantee the effectiveness of the rights conferred by the Treaty. The lack of effectiveness often lies in the procedural rules of the Member States. But that does not mean we should tear them up completely. Instead, if, and only to the extent that, the procedural rules of the Member States do not guarantee effectively the substantive rights conferred by the Treaty, the Commission may seek some approximation of these rules. [...any proposals] will have to meet the strict tests of subsidiarity, proportionality and necessity*”. KROES (2007).

cultures and traditions, which are the result of a complex and valuable process of norms production adapted to national peculiarities and problems²⁵.

To a certain extent, it is true that the variations on substantive and procedural tort rules affect antitrust defendants (that would prefer to have homogeneous conditions or a level playing field across the EU) more than they affect claimants (as they will generally be able to effectively enforce their rights under the rules of they jurisdiction or, at least, to enforce them to the same extent that they could enforce any other rights, be they contractual or non-contractual)²⁶ but this does not provide justification for any Commission's initiative on this area. There is not a single hint of severe obstacles in national tort regimes that prevent antitrust damages claims to proceed and succeed, and the underdevelopment situation presented by the Green Paper has more to do with cultural factors and specific procedural difficulties, especially regarding proof and discovery²⁷.

In this vein, the efforts put in the approximation of Member States' Tort Law and Civil Procedure regulations do not seem to be primarily justified on the need of guaranteeing the effectiveness of articles 81 and 82 of the EC Treaty as regards consumers' and companies' right to obtain compensation for antitrust misbehaviour –but on the will to promote equal conditions for companies active in the EU (*i.e.* for the potential infringers of antitrust laws) and, also, aimed at discharging the Commission from certain enforcement duties-. Even if there is room for advances in improving consumers' ability to claim antitrust compensation, the effectiveness of articles 81 and 82 of the EC Treaty is not jeopardized and, consequently, any Commission proposals on these grounds might fall short of the proportionality and necessity principles.

In a sense, the harmonisation of Member States' Tort Law and Civil Procedure regulations falls more naturally in the development of the European internal market and the furthering of consumer protection than in promoting compliance to competition laws –as clearly indicates the fact that the development of a European Private Law has traditionally been part of the agenda of DG Health and Consumer Protection and DG Internal Market-. This consideration is backed by the fact that the competencies of the European institutions for the approximation or harmonization of this area of Private Law are subject to them being instrumental to the development and adequate functioning of the internal market (art. 65 EC Treaty)²⁸.

²⁵ See, CAFAGGI (2006, p. 1-2).

²⁶ This is implicit in the Commission Staff Working Paper. *“Enforcement of competition rules plays a key role in ensuring a level playing field for companies in the EU. It keeps private barriers to competition (e.g. cartels and the exclusionary abuses of dominant firms) in check by using competition law instruments to tackle individual cases. Facilitating and increasing private enforcement of EC antitrust rules would further add to the efficiency of competition law enforcement, and make an important contribution to the key objective of ensuring open and competitive markets in the EU's internal market”* (para. 10) *Commission Staff Working Paper, ob. cit.*, p. 7.

²⁷ See SIRAGUSA and D'OSTUNI in EHLERMANN and ATANASIU (2007).

²⁸ Article 65 of the EC Treaty clearly establishes that: *“Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and in so far as necessary for the proper*

According to Articles 67(5) *in fine*, 95(1) and 251 of the EC Treaty, and probably because a weaker community interest is found in this area (as compared to others, more directly related to consumer protection), the initiatives for the approximation or harmonization of Tort Law are subject to the codecision procedure. This implies that the role of the Council (and, indirectly, of Member States) and the European Parliament is key in this area and, consequently, the harmonization process is far more complicated and slow than in other areas in which the European institutions are vested with more ample competences (*i.e.* Community powers).

The approximation of Member States' Tort Law and Civil Procedure regulations is already underway and follows this path with another pace. The issue of whether to completely harmonize this field of Private Law, and to what extent, is still open to debate. Also, it requires a process that allows complex analyses and a sequential development of steps (it is difficult to see a viable strategy to move "from nothing to a European Civil Code").

It would be wise to wait for the natural development of this procedure, as it will more than probably bring about some of the improvements on antitrust damages claims wished for by the Commission. The Green Paper might be a precipitated attempt to obtain "fast-track" Tort Law and Civil Procedure regulations' harmonization and, as we analyze in the following section, it seems not advisable to proceed with a specific harmonization of substantive and procedural rules dealing with antitrust damage claims.

5. Is a "sectoral" harmonisation of Tort Law and Civil Procedure regulations possible or desirable in the field of antitrust claims?

Even if the improvement of damages actions was key to guarantee the effectiveness of articles 81 and 82 of the EC Treaty, and could justify the harmonization of Tort Laws and Civil Procedure regulations, a "sectoral" or fragmentary approach would be undesirable.

In general, the creation of specific procedures and substantive requirements for claims regarding each (or for several) type of tortious events is not desirable. It runs afoul the basic principles that inspire the development of a unified, structured and harmonized European Private (Tort) Law²⁹.

This danger is even more acute when we see that such piece-meal harmonization efforts lack any planning and are somehow related to the goal-orientation of Public Law (a concern which remains strange to Private Law). Indeed, a unified approach towards non-contractual claims (regardless of the specific event giving rise to such liability, be it antitrust infringements,

functioning of the internal market, shall include: [...] (c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States".

²⁹ See, in general, CAFFAGI and MUIR WATT (2007).

defective products, breach of a duty of care, etc.) seems preferable and might contribute to a larger extent to keep the necessary coherence of the rules applicable in a given jurisdiction.

However, strong Community interests and evidence of distortions provoked by national rules may lead to harmonization efforts addressing only specific torts, as it happened with products liability. In that case, if a relevant community objective demanded protection and public or administrative devices proved inadequate or insufficient or when evidence of inefficiency of national rules regarding specific torts (mainly because they do not deter the tortious conduct making the damaging party to internalize the harm caused) or they provide incentives for profiting from variation in Member States' tort regimes (transferring their activities to more lenient regimes in a clear forum shopping strategy)³⁰ the Commission initiative might be justified. However, it is not the case of antitrust tort claims³¹.

Finally, the experience and the lessons that can be drawn from the disparate effectiveness of Directive 85/374/EEC in Member States may itself be telling. Despite harmonization aimed at substantive and procedural rules, it did not foresee how institutional variations within the background of each Member State could lead to different enforcement outcomes³², as it has effectively been the case. If that is the result of sectoral tort harmonization, the resources spent in the task may not be worthwhile. A structured and overall strategy of harmonizing certain aspects of tort rules at the EU level may well overcome that difficulties, as it should take into account the how the institutional background affects the implementation of the harmonized rules in different national settings.

6. Conclusions

In light of the complex *enforcement puzzle* briefly sketched in this paper, as well as the deficiencies of private enforcement to cover all compensatory requirements of an antitrust infringement, the Commission and antitrust enforcement itself would be better off if the former restrained itself out of the private enforcement domain, abandoning any specific initiative on that area.

To date, with different degrees of use and success, national tort rules provide a channel for compensatory claims arising from antitrust violations. Meddling with antitrust private tort claims without paying attention to the significant specificities and varieties of Member States' Tort Laws may well not be worth the costs associated to a partial and/or defective harmonization of these fields of Private Law.

³⁰ It is difficult to imagine how this interstate externality may occur in the antitrust context.

³¹ It was alleged that this happened with consumer protection and product safety/liability rules, although the Commission might have it wrong, see FAURE (2000, p. 467-508). See also MOTTUR (1994, p. 983).

³² See CAFAGGI (2006, p. 33).

Indeed, if the Commission wants to give a greater role to private individuals in antitrust enforcement, it may -instead of pursuing the difficult road of promoting and harmonizing private damages actions- benefit from their cooperation in detecting antitrust violations. As it has been proposed elsewhere, it may award individuals that help in discovering a cartel which is successfully punished with a share of the fine finally imposed³³. If *insider whistleblowers* implicated in the antitrust violation can get an economic benefit when they collaborate in the detection and sanction of the antitrust offence (via immunity or reduction of the corresponding fines), why should *outsider whistleblowers* not get an equivalent incentive? However, exploring this alternative does not seem to be in the Commission's agenda.

Under a more conservative, and maybe more realistic approach, instead of pursuing the complex path of harmonization of tort rules dealing with antitrust injuries, the Commission could better focus on public enforcement and sanctions, trying to detect and punish most severe antitrust violations. Occasionally it may help or assist private enforcement claims (mainly follow-on actions), and devices could be built for that aim, particularly if data or administrative reports fruit of the Commission investigations could be useful or adapted for their use in antitrust damage claims, specially in order to calculate the amount of damages³⁴.

7. References

European Institutions

Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (Amended by Directive 1999/34/EC of 10 May 1999) [OJ L210, 07/08/1985, p. 29].

European Parliament resolution of 26 May 1989 on action to bring into line the private law of the Member States [OJ C158, 26/06/1989, p. 400].

European Parliament resolution of 6 May 1994 on the harmonisation of certain sectors of the private law of the Member States [OJ C 205, 25/07/1994, p. 518].

European Parliament resolution of 15 November 2001 on the approximation of the civil and commercial law of the Member States [OJ C140, 13/06/2002, p. 538].

³³ This is called the "*qui tam quam mechanism*" and it has been operative in the U.S. Civil False Claims Act (1863) as a reward for individuals who inform the DOJ of frauds involving government money (v. gr., violations of procurement laws). The proposal of extending such a device to promote detection of antitrust laws is made by KOVACIC (2001, p. 792-797), also in KOVACIC (2007).

³⁴ A comprehensive proposal of this type is made with details (and especially aimed at solving the problem of excessive fragmentation of claims) by SCHINKEL and RÜGGEBERG (2006).

Report by the Council of 16 November 2001 on the need to harmonise the legislation of the Member States in civil matters.

http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/council_decision.pdf (visited 25.9.2007)

Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty [OJ L1, 04/01/2003].

Communication from the Commission to the European Parliament and the Council – A more coherent European contract law – An action plan. COM/2003/0068 final [OJ C063, 15/03/2003, p. 1].

Green Paper – Damages actions for breach of the EC antitrust rules. COM/2005/0672 final. Available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0672en01.pdf (visited 25.9.2007).

Commission Staff Working Document. SEC/2005/1732 final, available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/sp_en.pdf (visited 25.9.2007).

N. KROES (2005) Speech/05/533: “Enhancing Actions for Damages for Breach of Competition Rules in Europe”, Dinner Speech at the Harvard Club. New York, 22 September 2005.

- - (2007), Speech/07/128: “Reinforcing the fight against cartels and developing private antitrust damage actions: two tools for a more competitive Europe”, Commission/IBA Joint Conference on EC Competition Policy. Brussels, 8 March 2007.

M. MONTI (2004), Speech/04/403: “Private litigation as a key complement to public enforcement of competition rules and the first conclusions on the implementation of the new Merger Regulation”, IBA – 8th Annual Competition Conference. Fiesole, 17 September 2004.

Case Law

Judgment of the ECJ of 20 September 2001 in Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I.

Judgment of the ECJ of 13 July 2006 in Cases C-295/04 to C.298/04 *Vincenzo Manfredi and others v. Lloyd Adriático Assicurazioni SpA and others* [2006] ECR 6619.

Legal Scholarship and Other Studies

Phillip AREEDA (1976), “Antitrust violations without damage recoveries”, *Harvard L. Rev.* 89, p. 1126-1139.

ASHURST, *Study on the conditions of claims for damages in case of infringement of EC competition rules*. August 2004. At http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/study.html (visited 25.9.2007).

Garyt BECKER & George J. STIGLER (1974), "Law Enforcement, Malfeasance, and Compensation of Enforcers", *J. Legal Stud.* 3, p. 1-18.

R. BIERSCHBACH and A. STEIN (2005), "Overenforcement". *Georgetown Law Journal*, Vol. 93 (6), p. 1743-1781.

W.W. BUCKLAND and P.G. STEIN (1968), *A Text-Book of Roman Law*. 3rd Ed., Cambridge University Press, Cambridge-New York.

Fabrizio CAFAGGI (2006), "Introduction" in *The Institutional framework of European private Law*, ed. F. Cafaggi, Oxford University Press, p. 1-33.

Fabrizio CAFFAGI and Horatia MUIR WATT (2007), "The Making of European Private Law: Regulation and Governance Design", *European Governance Papers* (EUROGOV) N° N-07-02. Available at <http://www.connex-network.org/eurogov/pdf/egp-newgov-N-07-02.pdf> (visited 25.9.2007).

EUROPEAN GROUP ON TORT LAW (2005), *Principles of European Tort Law. Text and Commentary*. Springer, Wien - New York, 2005. Also available at www.egtl.org (visited 25.9.2007).

Michael FAURE (2000), "Product Liability and Product Safety in Europe: Harmonization or Differentiation?", *Kyklos* 53/4, p. 467-508.

Franklin M. FISCHER (2006), "Economic Analysis and Antitrust Damages", *World Competition* 29/3, p. 383-394.

Clifford A. JONES (2004), "Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check", *World Competition* 27/1, p. 13-24.

William E. KOVACIC (2001), "Private Monitoring and Antitrust Enforcement: Paying Informants to Reveal Cartels", *Geo. Wash. L. Rev.* 69, p.766-797.

- - (2007), "Bounties as Inducements to Identify Cartels", in Claus-Dieter Ehlermann and Isabela Atanasiu (eds.), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels*, Hart Publishing, Oxford/Portland (OR), forthcoming. Also available at [http://www.iue.it/RSCAS/Research/Competition/2006\(pdf\)/200610-COMPed-Kovacic.pdf](http://www.iue.it/RSCAS/Research/Competition/2006(pdf)/200610-COMPed-Kovacic.pdf) (visited 25.9.2007).

Stuart MADDEN (2005), Stuart. "The Graeco-Roman Antecedents of Modern Tort Law". *Bepress Legal Series*. Working Paper 823 (available at <http://law.bepress.com/expresso/eps/823>, visited 9.10.07).

R.P. MCAFEE, H.M. MIALON, and S.H. MIALON (2005), "Private v. Public Antitrust Enforcement: A Strategic Analysis". Department of Economics, Emory University (Atlanta), Emory Economics Working Papers No. 0523. (Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=775245, visited 25.10.2007).

Alfred E. MOTTUR (1994), "The European Product Liability Directive: A Comparison with U.S. Law, an Analysis of Its Impact on Trade, and a Recommendation for Reform So as to Accomplish Harmonization and Consumer Protection", *Law and Policy in International Business*, 25, p. 983.

D. ROSENBERG and J.P SULLIVAN (2005), "Coordinating Private Class Action and Public Agency Enforcement of Antitrust Law". Harvard John M. Olin Center for Law, Economics and Business Discussion Paper No. 523. At http://www.law.harvard.edu/programs/olin_center/papers/pdf/Rosenberg_et%20al_523.pdf, (visited 25.10.2007).

Maarten Pieter SCHINKEL and Jakob RÜGGERBERG (2006), "Consolidating Antitrust Damages in Europe: A Proposal for Standing in Line With Efficient Private Enforcement" *World Competition: Law and Economics Review*, Vol. 29, No. 3, (2006) pp. 395-420, available at SSRN: <http://ssrn.com/abstract=903282> (visited 24.10.07).

Joseph Gregory SIDACK (1981), "Rethinking Antitrust Damages", *Stanford Law Review* 33, p. 328-352.

Mario SIRAGUSA and Marco D'OSTUNI (2007), "A Reflection on Some Private Antitrust Enforcement Issues", in Claus-Dieter EHLERMANN and Isabela ATANASIU (eds.), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels*, Hart Publishing, Oxford/Portland (OR) forthcoming. Also available at [http://www.iue.it/RSCAS/Research/Competition/2006\(pdf\)/200610-COMPed-Siragusa.pdf](http://www.iue.it/RSCAS/Research/Competition/2006(pdf)/200610-COMPed-Siragusa.pdf) (visited 25.10.2007).

M. STORME (Dir.) (1994), *Rapprochement du droit judiciaire de l'Union européenne / Approximation of Judiciary Law in the European Union*. Kluwer/Martinus Nijhoff Publishers, Antwerpen - Dordrecht.

C. VON BAR and U. DROBNIG. (Dir.) (2004), *Study on Property Law and Non-contractual Liability Law as they relate to Contract Law - Study prepared for SANCO*. Available at http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/study.pdf (visited 25.9.2007).

Wouter P.J. WILS (2003), Wouter P. J., "Should Private Antitrust Enforcement Be Encouraged?" *World Competition* 26, p, 473-488.

D. WOODS, A. SINCLAIR and D. ASHTON (2004), "Private enforcement of Community competition law: modernisation and the road ahead", at *Competition Policy Newsletter*, number 2, p. 32-37.