Damages actions for breach of the EC antitrust rules
Suggestions to the EC Commission’s green paper

Research project sponsored by the Italian University Minister on Regulation 1/2003

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Question A

The Commission pointed out the need of guaranteeing the availability of all the pieces of evidence which are necessary to the victim (potential claimant). If this does not happen, victims could be highly deterred from suing for damages.

That problem can influence even different branches of law; specifically, situations which are similar to the one mentioned above are related to class actions for restoration of damages which affected a group of people and to minority shareholder suits against directors for misconduct.

One could imagine a solution which could be similar to the one adopted in relation to TRIPS: when plaintiff succeeds in furnishing some probation elements which suggest (1) that the request is grounded in facts; (2) that some pieces of evidence are in possession of the defendant, the judge is enabled to order the defendant to exhibit them. In this way it would be possible to pose a presumption rule in case of denial of the request. Obviously right to privacy should be respected.

In addition it would be advisable to enable the judge to order an inspection, in order to collect any piece of evidence, entering the headquarters of the firm and, if necessary, any other premise.

These assessments should be coordinated with the problem of the relevance of civil law decisions in Antitrust judgements in front of the Authorities.

On this point, a useful suggestion can be found in Regulation 1/2003, par.21, about Commission inspection powers in order to establish the violation of articles 81 and 82 of the Treaty.

In that case, the Authority would act in order to repress an anti-competitive conduct; therefore problems related to its third party neutral position are not involved as in the case of compensation of damages. Despite this, both EU Commission and the Judiciary Authority of the State involved should authorize the inspection.

When there is a reasonable suspicion of the existence of books or other records which may be relevant to prove a serious violation of Articles 81 and 82 of the Treaty, Regulation 1/2003, par. 21, allows to access to other places than the headquarter. From this point of view, European legal national traditions are different: on one side, this role has already been played by French and German judges in the judgment in front of National Authorities. On the other side, this is completely new to Italian judges.

Situations in which judicial attachment could be requested should be pointed out.

Honestly, results which have been predicted above are easy to achieve in U.S. law, where notice pleading and discovery rule allow anyone to sue for damages just on the ground of a reasonable suspicion.

After having sued for damages, the plaintiff should be allowed to enter books and other records of the defendant. Judiciary Authority control would be necessary in order to protect confidential information. In addition, the judge would filter specious legal actions.

All the reasons mentioned above lead us to consider the first option being the most favourable one. In short, inquisitional powers of civil judge should be increased (as for example in Italian labour law process).

Question B.
The parties should be enabled to obtain documents which are in possession of National Authority and Commission. Alternatives are assigning the power of requesting the disclosure (a) to the judge (b) to the parties in the case.

Solution (a) guarantees in a better way procedural fairness and privacy rights. Solution (b) protects citizens’ action rights and Authority transparency.

The choice depends on what solution is adopted for question A: if civil procedure had to assure full disclosure even after legal action has been taken, demanding for documents to National Authority or Commission wouldn’t be one of judge’s tasks. Option (6) should be the most favourable one. Therefore, judge should be enabled to enter directly National Authority file. National Authority should furnish him with information in its possession and should provide its assessment even from an economics point of view.

Parties in the case should be allowed to enter those documents in National Authority’s possession which could be useful for judgement.

An alternative should be the right to obtain directly from the defendant all documents which have to be filed. In case of denial the Authority could order the consignment.

In some cases (eg. when inquiry still hasn’t begun) the judge could coordinate his action with National Authority, in order to acquire elements of evidence, especially from an economics point of view. He could even be allowed to exploit National Authority technical investigations (in Italy, for example, the same mechanism is used for Guardia di Finanza).

National Authority could be considered co-litigant.

Anyway, this solution could be quite difficult to implement, because it implies an expansion of Italian Authority staff.

Opening a new file on the ground of the elements of evidence mentioned above should remain possible for National Authority.

Question C

With regard to the burden of proof, and more specifically to the hypothesis of shifting or lowering said burden, the different procedural rules in each Member State are deemed crucial. Once the disclosure works well, it could be said that shifting the burden of proof including the damages is not necessary. From a consumer point of view, the answer n. 8 appears to be the easiest way but it implies some problems with regard to the boundaries of the antitrust decision. In particular, it is not clear whether said decision could be used in damages actions or it could be used also in other civil actions in which the claim for damages is not the main request.

According to sec. 5 of the Clayton Act, in the US courts’ experience the decisions stemming from the Antitrust Division are considered prima facie evidence in the private actions. However, it has to be mentioned that in said circumstances judges have to take into account whether or not the parties have had sufficient guarantees during the proceeding before the Antitrust Authority.

In the case of stand alone actions we can’t solve the problem relying on the Authority decision and, therefore, provided that answer n. 9 seems to be excessive, we would express our preference in favour of answer n. 8.

In general terms, as provided by art. 2600 of the Italian civil code, it seems to be appropriate in those cases in which there are breaches of the competition rules, that shifting the burden of proof should be accepted with specific regard to the fault. On the contrary, alleviation of burden of proof should not affect the fact, the damage and the causality relationship. As an example, it could be
provided that the liability is presumed in cases of abuse of dominant position which are economically inconsistent (Said point indirectly answers the question D with specific preference to option n. 12). In any case, whereas the market situation is not easy to understand, Judges should be empowered to mitigate the damages.

Question D

Among the law systems of the Member States there are different rules concerning the fault with regard to damages. Said difference could lay to forum shopping problems. On this point one important issue is whether it is possible to get a level playing field among the civil procedure rules. In general, we would prefer answer n. 12.

Question E

The role that we attribute to damages is one of the main problems we are facing. There are two different options: damages awarded with reference to the loss suffered by the claimant (compensatory damages), or damages awarded according with different rules in order to assure an incentive to sue. As it is well known, Member States mainly recognize a compensatory role to the damages.

In antitrust private actions stemming from an infringement of competition rules our opinion is that damages should play a discouraging role according to which the compensation should be awarded with reference to the consequences of the antitrust infringement, the entity of the obtained illegal gain, and the degree of the fault. In few cases (e.g. decisions of associations of enterprises and abuses of dominant position) the damages should be awarded with reference both to the loss suffered and to the illegal gain.

In most of the damages actions there are difficulties to calculate the loss and, therefore, Judges should be empowered to discretional assessment.

The new Italian intellectual property code (art. 125) now provides a new method of damages quantification, which implements a law and economics approach. In fact, it is possible that Judges award damages not only with reference to the loss suffered by the claimant but also with reference to the illegal gain made by the infringer in order to create a clear incentive to bring the action (the common law disgorgement and the German Eingriffskondition). In addition, the second part of said law provides that the judges, according to a specific request by the claimant, have the possibility to award damages relying on the legal proceedings and the presumptions thereof.

A second issue relates the possible existence in the European law of treble or double damages in order to achieve an optimal deterrence. On this point, answer n. 16 suggests the use of double damages depending on different conditions. In our opinion the suggestion has to be assessed with reference to the risk of over deterrence (wide economic literature is available on this point) and, in addition, with reference to the private function we assign to the damages claim. In other words we would say that the economic sanction, whose aim is to preserve competition as a public good, should be inflict by the Antitrust Authority rather than a private judge.

Notwithstanding, provided that double damages were present in the 1624 Statute of Monopolies, in our opinion it is definitely useful providing wider damages in cases of horizontal cartels and, more generally, in per se rule cases.

Obviously the “Italian option” mentioned upon (losses plus illegal gains) represents an alternative option to the double damages.

A strictly related issue relates the need of certainty that who has been condemned being bound to pay damages. It is well known that through extraordinary dealings (such as a transfer of the business or all the assets to another person) one might try to avoid the payment. As a means to prevent that problem, we would suggest a provision provided in the recent Italian law on the
corporate liability (l. 231/2001) according to which in such a case the acquiring person has to pay the damages regardless of the account books’ contents.

As to the prejudgement interest, in our opinion it should be coupled with the currency appreciation and it should be fixed at a “punitive” rate. In addition, we would consider fair that the award of interest should be calculated from the date of infringement.

Question F

The method for calculating the quantum of damages represents a quite difficult task in a civil action. It could be extremely useful that the Commission issue guidelines on the damages declaratory including the main criteria (comparison between past and present, yardstick, etc.). The judge should implement said criteria or, otherwise, should be bound to justify his different choice. In addition, in enforcing competition laws, Commission and National Authorities could be bound to investigate even on the possible losses stemming from the anticompetitive behaviour.

Question G

The passing-on defence should not be admitted.

The final consumer might suffer damage as well as the first purchaser, if the latter passes the damaged he suffered down the supply chain. This overcharge lowers the marginal utility curve of the final consumer, who could also choose not to purchase the overcharged good.

The standing of the final consumer has been debated for long in USA law. Since the ’40 US courts admitted only the first purchaser to sue for antitrust damages, rejecting actions brought by final consumers, but some statutes provide for exceptions admitting final consumers to sue. Some legal scholars have criticised the strict rule shaped by the courts, arguing that final consumers should be admitted to sue through class actions.

In our view, option 23 is to be chosen, although we think the rule proposed should be slightly modified. On the one hand, the claimant should not pay twice for the same damage; on the other hand, it seems proper to restore the damage suffered by any purchaser in the supply chain. Therefore, it seems proper to provide for a rule in order to dive the damage between the first purchaser and the final consumer. Even if we admit the passing-on defence, it seems not being easy to measure the prejudice suffered by the first purchaser and the overcharge passed on to the consumer and to evaluate the different demand curves.

Question H

This question addresses the case for collective actions aimed at restoring damages suffered by a high number of individuals. If no collective action is available, potential claimant probably would consider bringing suit as not convenient.

Shaping class action into the civil procedure law of EU member states could be difficult and, moreover, we could also wonder if class action are really a proper device: on the one hand, through class actions it is possible to proceed against mass torts; on the other hand, class actions give claimants the possibility to blackmail the defendant firms.

The outcome of class action mechanisms depends mostly on judge’s powers not admitting the claim and on the regulation of the claim’s settlement. We should nonetheless bear in mind that in USA attorneys have great economic incentives to bring class actions and to look after potential claimants,
because they can be paid through a percentage of the whole damage (s.c. “quota lite agreement”), but in many Member States this is not allowed.

If we make a class action mechanism available in EU for antitrust damages, it seems to be more appropriated to give the claiming power both to consumers’ associations and to individuals, as is the case in US law.

Question I

The rules on expenses allotment can embody one of the main incentives for claimants. These rules should be aimed at dismantling a disincentive for potential claimants.

In order to reach this goal, it seems to us appropriate to refund all expenses made by the claimants even if the claim was settled or rejected. The judge, therefore, should reject to refund the claimant’s expenses only if the latter took the action with malice or in a manifestly unreasonable manner.

In antitrust cases, the claimants will suffer high expenses for experts and adviser, who should proof the facts alleged by the claimant. In our view, the judge should have the power to decide that the defendant should pay these expenses, if there is evidence that the claim is not unreasonable.

Question K

In order to establish the jurisdiction, we can apply the rule of the proposed “Rome II” regulation. In our view it is necessary to clarify that the place where the damage occurred is where the claimant has the main interests or activities (generally it is the domicile or the firm’s seat). It is necessary to clarify the rule in a specific manner, in order to avoid forum shopping.

The claimant should in every case ask the judge to apply the “lex fori”, if the defendant does not proof that in the judge’s country no part of the anti-competitive practice has been made. As a general rule for establishing the applicable law, it seems appropriate to apply Article 5 of the proposed “Rome II” regulation.

Question L

In our view, courts should have the power to appoint experts, even if not required by the parties, and also consulting-firms for gaining the proof of the facts alleged by the parties (in this case, the law should provide for specific rules for the fees). The persons to be appointed should be chosen out of a list of high-qualified experts.

The judge should shape the query to the expert only relating to their own lacks in technical knowledge and should be present during the appraisal.

The expert appointed by the court should use also documents which was not alleged by the parties, but only for evaluating the technical and economics issues and only if the parties could view them and reply to them.