The 'Right to Damages' under EU Competition Law

From *Courage v. Crehan* to the White Paper and Beyond

by
Veljko Milutinović

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Preface

When one writes a doctoral thesis, one writes mostly for himself and, at best, one's thesis supervisor. The point of the exercise is to demonstrate prowess in research and, as a result, rivers of investigative thought seem to flow to and from infinite directions. Ideas often start from the middle and this often goes unnoticed, as the reader is a specialist in the subject, who quickly catches on and reads his own prior knowledge into the text.

Not so, obviously, with a book aimed at a wider audience. Although my doctoral thesis, defended at the Law Department of the European University Institute in January 2009, contains the bulk of the research and analysis used in this book, the text has been substantially revised to take this factor into account. Thoughts that were often attractive but without a perceptible end in sight were largely cut out, to make room for structure and explanation. The parts of the thesis that underwent hardly any trimming down were those concerning pass-on/indirect purchasers and the binding effect of a decision of a competition authority. While extending my apologies to the reader for what may seem as overly lengthy and detailed treatment of these topics, I must stress that these topics contain the most controversial and complex issues facing private enforcement of competition law in the EU today. Simultaneously, these are the topics that are, perhaps, most clearly dependent on or influenced by action at EU level. As this is primarily a work on EU law (and not comparative law), I felt that it was only fair that they receive the closest attention.

More important, perhaps, than this stylistic/didactic exercise is the development of the law and my perception of it during the time period that has elapsed since the submission of the thesis in September 2008. Although most of the main ideas are still there, some have been modified to take into account second thoughts that arose out of experience from legal practice and from following current scholarly work and policy debates.

To my regret, the lapse of time between submission of the thesis and submission of the manuscript for the book did not bring about any legislative change relevant to the present work. The Commission has yet to publish any proposal for legislation on damages actions based on its 2008 *White Paper*. After the publication of a proposal, plenty of time would likely elapse before a final text was adopted by the EU legislators, during which it would be likely to undergo further significant changes.

Indeed, the only significant change in the intervening period was the coming into force of the Treaty of Lisbon that, as far as the fields treated in the present work are concerned, entailed, for the most part, a mere re-numbering of the Treaty articles. The new numbering will be used throughout the book, with references to pre-Lisbon numbering where necessary. Where the Lisbon Treaty has changed the substance of a provision, this will be indicated. As the European Community has now finally been succeeded by the European Union, previous references to the 'Community' and 'Community law' have been changed to the 'Union', or the 'EU', with corresponding references to 'Union law' or 'EU law'.

The delay in the adoption of legislation in the field of damages actions should not be regretted excessively, however. The policy direction and thinking process of the Commission were amply evident in the 2008 *White Paper* and even, arguably, in the much older 2005 *Green Paper on Damages*. The political compromises that will likely have to be made, if and when the Commission's ideas were to become law, are equally evident from the wealth of responses from interested parties that have already reached Brussels.

Most importantly, much of what is discussed in this book is unlikely to change substantially through legislation; instead, as the reader will become aware, most of what is special and 'problematic' about damages actions in the EU is the result of gradual judicial development, which the new EU legislation would, at best, codify. Some issues, such as causation and standing, are a matter of experience and evolution that the Commission (wisely) omits to address fully.

Finally, it must be stressed (and this is not stressed often enough, in my opinion) that the job of the legal scholar is not only to criticize the existing work of others but, rather, it is primarily to create and consider his own thoughts for addressing socio-legal phenomena. It is with these thoughts that I proceeded to publish this book, confident in the belief that the analysis contained therein will remain topical, not just regardless of the enactment of EU legislation but also, perhaps, thanks to it, as a means of interpreting and understanding the dry and terse words of the legislator.

The law is as stated on 31 June 2010.

Foreword

It is usually awkward or even difficult to write the foreword of a book which is a competitor of one's own book. But in this case, it is an honour and a pleasure at the same time.

Veljko Milutinović has done an excellent job in engaging in an exhaustive analysis of individual civil liability for antitrust violations from a primary and secondary EU law point of view. The book comes at a very timely moment, just as the European Commission is prepared to air its draft Directive on rules governing actions for damages for infringements of Articles 101 and 102 of the Treaty. Milutinović follows a 'global' approach, seeing private antitrust enforcement in Europe as an integral part of the development of EU law. In so doing, he is right. The 'EU right to damages' is not just an antitrust discovery, which was inspired by the US system of antitrust enforcement. It is a purely 'European' development, inextricably connected with the changing nature of the EU-national law relationship. It is no coincidence that it received the powerful support of the European Court of Justice through landmark judgments such as *Courage* and *Manfredi* only after the Court's case law on EU law remedies was quite developed.

A basic function of the 'EU right to damages' is certainly to provide redress to those harmed by anti-competitive conduct, but there is no reason to deny the obvious: that, at the same time, the rise of private antitrust enforcement in Europe is an opportunity to strengthen deterrence and the effectiveness of the competition law prohibitions of the Treaty. This aim can be pursued without uncritically importing procedures and institutions which are foreign to the European legal culture. I view the initiatives of the European Commission as going in the right direction. Indeed, it would be unfair to criticize the Commission for anything more than putting in place a system with a distinctly 'European' flavour.

But the devil lies in the detail. And Milutinović pursues the detail in a masterly fashion. Questions about the requirement of fault, the passing-on defence, the

standing of indirect purchasers, the doctrine of 'antitrust injury' and the whole relationship between private and public enforcement, are superbly presented, usually following an analysis of the US position, but always keeping the 'European' roots of the right to damages in mind. This analysis serves as a great companion to the 2005 and 2008 Green and White Papers of the Commission and help explain and appreciate the prudent and balanced choices among many alternatives that the Commission had to make for its legislative proposal.

The present book has the good fortune to open a new decade in EU competition law enforcement, which, after a long digestion, is destined to be the first decade of a full-fledged system of private antitrust enforcement system in Europe. I wish it has the success it deserves.

Assimakis P. Komninos
Athens, 20 October 2010

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In preparing my doctoral thesis on which much of the present book is based, I spent four-and-a-half unforgettable years at the European Institute in Florence and half-a-year at the European Commission in Brussels. It would be impossible to list the very numerous people and conversations that have shaped, in one way or another, my thoughts and work. It is, however, possible, to mention those individuals whose influence was most direct, perceptible and enduring.

In particular, I would like to thank my thesis supervisor, Professor Hanns Ullrich, who taught me or, perhaps, hoped to teach me, to think critically of contemporary developments in EU law, in particular EU competition law. It is in the attempt to apply a critical eye that I have, perhaps, uncovered more problems than I have solved or could ever solve.

I must also thank Assimakis Komninos, a friend and former colleague from the European Institute. Over the past decade, his research has contributed enormously to the understanding of private enforcement of EU competition law. We exchanged ideas on many occasions, hopefully to our mutual benefit but certainly to my own. Among my friends and colleagues, I must also thank, in particular, Axelle Reiter, whose knowledge of legal theory and, in particular, the theory of rights, has allowed me to step outside, at least for a little bit, from the narrow world of the 'economic law' specialist and to view the issues at hand from a much broader perspective. Indeed, if there is one thing I found to be really amazing in the course of my research is how often similar problems to those I found in EU competition law can be found in international law and European human rights law and how the dilemmas and tensions troubling EU law today draw their roots at least to the early Enlightenment period. That, however, is another (long) story, which remains to be written.

A pivotal event in the development of my work came towards the end of my thesis research, during my traineeship at DG Competition in Brussels, from

October 2007 until March 2008. There, I obtained first-hand experience in drafting and defending what became the 2008 *White Paper on Damages*. I must thank Rainer Becker, Nicolas Bessot, Kris De Keyser, Eddy De Smijter and Donnacadh Woods for being the best colleagues and superiors one could ever wish for. Although it is my task, among others, to criticize the Commission in this work, I cannot criticize the proposals in the 2008 *White Paper* lightly, knowing how much knowledge, effort and dedication has gone into them. Criticism goes, therefore, only where it is really due.

In addition to the people already mentioned, I must thank my colleagues at the European Institute and in Brussels, for helping me shape my ideas, keeping my spirits up during hard times and setting an extremely high standard for what friends and colleagues should be, a standard that I can only hope to sustain in the future.

Lastly and most importantly, I must thank my parents for their enduring love and support over three (often tumultuous) decades. Without them, none of this would have been possible. They are responsible for everything which is good in me.

As always, the errors and omissions are to be attributed solely to the author.

Belgrade, July 2010

Frequently Used Abbreviations and Acronyms

Antitr. L. J	*Antitrust Law Journal*
CMLR	Common Market Law Reports
CMLRev.	*Common Market Law Review*
COM	European Commission Documents (Non-Legislative)
CUP	Cambridge University Press
ECR	European Court Reports
ECLR	European Competition Law Review
EJLS	European Journal of Legal Studies
ELJ	European Law Journal
ELR	European Law Review
EUI	European University Institute
OECD	Organization for Cooperation and Development in Europe
OJ	Official Journal of the European Communities/Union
OJLS	Oxford Journal of Legal Studies
OUP	Oxford University Press
SSRN	Social Science Research Network
YEL	Yearbook of European Law

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