

Private actions for damages: deterrence and compensation

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* All views expressed are strictly personal.

private enforcement of Articles 81 and 82 EC

- defensive use ('as a shield'):
 - in contractual litigation
 - in intellectual property litigation
- offensive use ('as a sword'):
 - injunctive relief
 - actions for damages

- p.m.: role of private parties as informants / complainants in public enforcement

two rival views on private actions for damages

objective / function =
deterrence



same purpose as
public antitrust
enforcement



(potential) substitutes

objective / function =
compensation



different purpose



no substitutes

superiority of public enforcement as to deterrence and punishment

compared to

- follow-on actions for damages
- stand-alone actions for damages
 - more effective investigative and sanctioning powers
 - fundamental divergence between private and public interests

deterrence approach in USA

= understandable in historic context:
deterrence gap because of deficient
public enforcement:

- ❁ (1623 English Statute of Monopolies:
against King's Favourites)
- ❁ 1890 Sherman Act: no budget allocation
- ❁ US until 1974: maximum fine \$ 50,000
- ❁ US still today: no 'civil fines'
(cf. Antitrust Modernization Commission (April 2007):
Recommendation 48: no need for civil fines because treble
damage recoveries by private plaintiffs)

European Commission Green Paper (December 2005)

- ★ Green Paper, page 3:
'public and private enforcement [...] serve the same aims: to deter anticompetitive practices [...]'
- ★ European Commission representative at OECD roundtable on private remedies (Febr. 2006): 'compensation of victims should not be seen as an end in itself, but part of an overall strategy to enhance deterrence' (DAF/COMP(2006)34, p. 271)

European Commission White Paper (April 2008): guiding principles

1. 'full compensation' ('compensatory justice')
is 'the first and foremost guiding principle'
(inherently also produces beneficial effects in terms of deterrence')
2. 'balanced measures that are rooted in
European legal culture and tradition'
3. 'preserve strong public enforcement' ('not
replace or jeopardise public enforcement')

difference in practice?

yes !

- 🌸 multiple damages
- 🌸 passing-on defence & standing of indirect purchasers
- 🌸 class actions
- 🌸 ...

John Locke, The Second Treatise on Civil Government (1690) Chapter II, para 11

« From these two distinct rights (the one of punishing the crime, for restraint and preventing the like offence, which right is in everybody, the other of taking reparation, which belongs only to the injured party) comes it to pass that the magistrate, who by being magistrate hath the common right of punishing put into his hands, can often, where the public good demands not the execution of the law, remit the punishment of criminal offences by his own authority, but yet cannot remit the satisfaction due to any private man for the damage he has received. That he who hath suffered the damage has a right to demand in his own name, and he alone can remit. »

more in writing ...

paper 'The relationship between public
antitrust enforcement and private
actions for damages'

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<http://ssrn.com/abstract=1296458>