Essays

General Remarks on Civil Liability in the European Context

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Abstract

This article considers the evolution of the civil liability system in Europe from the perspective of the establishment and application of rules deriving from regulations and directives that define special types of torts. Neither the EU rules nor the principles developed by the Court of Justice always identify all the necessary components of the tortious act. There are cases in which certain elements are prescribed, and others which are left to the national courts to establish. Furthermore, there are instances in which the case configured by the EU rules is complete but where the national legislators are accorded a certain leeway to fill in the regulatory gaps. National rules are not always uniform and, thus, are not without ambiguity. For this reason, attempts have been made to standardise the governance of civil liability, and the models proposed to break the impasse are still relevant. But time moves on, and the standardisation process is lagging behind the ever-increasing pace of change in EU law.

I. Introduction

When contemplating the evolution of the civil liability system in the European context, we should consider at least three different perspectives: i) the establishment and application of rules governing civil liability laid down directly by the Treaty on the Functioning the European Union (TFEU) for harm caused by its institutions or by its agents in the exercise of their functions (Art 340); ii) the establishment and application of rules regarding Member States' liability for infringement of EU rules, in accordance with the general rules of the Treaty (Art 4) and the principles developed by the Court of Justice; iii) the establishment and application of rules deriving from European sources that define special types of torts.

With respect to the latter, the rules may be provided either by regulations or directives. However, rules, in these cases, are not always 'complete': in other words, neither the EU rules nor the principles developed by the Court of Justice always identify *all* the necessary components of the tortious act, namely the criterion of imputation (wilfulness, fault, risk), the interest harmed, the link of causation between the act and the harmful effect, the injury. This remark

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presupposes the so-called 'doctrine of *Tatbestand*', which has three layers: objective element, unlawfulness and fault.[1]

There are cases in which certain elements are prescribed, and others which are left to the national courts to establish. Furthermore, there are instances in which the case configured by the EU rules is complete but where the national legislators are accorded a certain leeway to fill in the regulatory gaps.

In both situations one is faced with differing interpretations made by judges and by jurists in general who, reasoning in line with their respective cultures, do not take the same paths to solve the problems posed by the texts.

The terminology employed in the EU's normative texts corresponds – approximately – to that of national legislators or judges, but national rules are not always uniform and, thus, are not without ambiguity. For this reason, attempts have been made to standardise the governance of civil liability, and the models proposed to break the impasse are still relevant. But time moves on, and the standardisation process is lagging behind the ever-increasing pace of change in EU law.

On the general level, we should also take into consideration two phenomena that have progressively established themselves in recent decades: the 'Europeanisation' of the respective national legal systems[2] and the constitutionalisation of EU law.[3]

The first is the product of various factors.

In the European context, a common framework of values is being established in which civil liability, understood as a complex of rules for the defence of legally protected interests, occupies a privileged position. This may be through the normative technique of the regulations and directives, the decisions of the Court of Justice, the attempts at standardisation or, especially, the circulation of models, ideas, languages – and thus through the shaping of a EU legal culture.[4] The person, property, environment, savings, competition, to consider as the 'objects of protection', or consumers, savers, creditors, workers, family members, to consider as the 'subjects' of protection, delineate the operational scope of these rules, ordered in accordance with a scale of values that appears uniform in all the jurisdictions concerned. Indeed, amongst English jurists there has even been talk of a 'Europeanisation of tort law',[5] and of a 'European private law' *system*.[6]

[1] G. Brueggemeier, *Common Principles of Tort Law. A Pre-Statement of Law* (London: BIICL, 2004), 58.

[2] See eg S. Grundmann, *Constitutional Values and European Contract Law* (The Netherlands: Kluwer Law International, 2008).

[3] See H.W. Micklitz ed, *The Constitutionalization of European Law* (Oxford: Oxford University Press, 2014); G. Brueggemeier, n 1 above, 1; G. Alpa and M. Andenas, *Grundlagen des Europäischen Privatrechts* (Munich: Springer, 2009).

[4] The 'European language' is an *artificial* one: Senato della Repubblica italiana, *Il linguaggio giuridico nell'Europa delle pluralità. Lingua italiana e percorsi di produzione e circolazione del diritto dell'Unione europea*, Roma, 2016, available at https://tinyurl.com/yaat4pkh (last visited 30 June 2018).

[5] P. Giliker, *The Europeanisation of English Tort Law* (Oxford: Hart Publishing, 2014).

[6] G. Alpa and M. Andenas, *Fondamenti del diritto privato europeo* (Milano: Giuffrè, 2001); G. Alpa, *Diritto privato europeo* (Milano: Giuffrè, 2015); C. Castronovo and S. Mazzamuto,

The constitutionalisation of EU law results from the adoption of the Treaty of Nice which, consequent to the Lisbon Treaty, became a legally binding text as of 2009. Here the values of the person are exalted as the pivot of the entire EU jurisdiction; they are utilised to govern relations between individuals on an equal footing with the *Drittwirkung* of constitutional rules having come about in the various European States (particularly in continental Europe).[7]

II. The Protection of the Person in its Physical Dimension

If we consider legally protected interests, we must first of all consider the physical person, and therefore the safeguarding of physical integrity. Particularly significant here is the liability of manufacturers of consumer goods for harm caused to consumers and bystanders by products put on the market.

Directive no 374 of 1985 is now more than thirty years old and, although reinforced by product safety directive no 95 of 2001, its effect has not been judged altogether satisfactory by consumer associations. A recent BEUC (The European Consumer Organisation) document points out the most significant gaps or discrepancies in the text.[8] It is clear that the liability of the manufacturer is grounded in the business risk, and thus has an objective nature, but there are still too many doubts as to the exact scope of liability. The aim of the regime is restricted to products that are tangible in nature, thus it does not extend to digital goods. Moreover, the compensable loss does not always include moral injury, an aspect that seems particularly problematic in a system (such as that of the EU) wherein the moral integrity of the person and his or her sufferings are considered a fundamental right (Art 3, European Charter).

Some of the BEUC proposals may be readily accepted. Others call for discussion.

The BEUC seeks elimination of the limitation of liability for defects not known at the time when a given product was put on the market (risk of development). This is a quite complex topic, for it seems difficult to resort to insurance since the risk cannot be easily estimated. The experience of cases of harm from asbestos (asbestosis) is an example here.

The BEUC also calls for assistance at the evidentiary level. Indeed, proving a defect is not simple for the consumer, and an acceptable facilitation might consist in deeming faulty a product proving dissimilar to those of the same production series. Also, the possibility of obtaining all the documentation concerning a given product, including any studies on its harmful nature, seems a helpful suggestion, just as it seems helpful to eliminate the exemption regarding

Manuale di diritto europeo (Milano: Giuffrè, 2007).

[7] H.W. Micklitz ed, *Constitutionalization of European Private Law* n 3 above.

[8] BEUC, 'Review of product liability rules', Position Paper, Brussels, 2017, available at https://tinyurl.com/ycnt3q8e (last visited 30 June 2018).

harm amounting to less than five hundred euros. I should, on the other hand, be doubtful about doing away with the ten-year limit for claims, because today products – in a market of ever faster change and innovation – become obsolete sooner than was the case thirty years ago.

Also, in my opinion, the recommendations to extend the directive on *injunctions* to products' defects, and to establish a system for information (such as RAPEX for dangerous products) regarding the genuine and inoffensive character of products put on the market, should be accepted.

However, the directive does not specify whether the rules apply to the liability of the supplier, to whom an injured party will turn when neither the maker nor the importer is identifiable. In the various jurisdictions, the courts will apply rules taken from domestic law to the supplier. These rules may vary between countries (some inclined towards contractual, others towards extra-contractual liability).[9]

III. The Protection of the Person in its Virtual Dimension

In our society of information, telecommunications and computer science, personhood cannot be restricted to the physical person, without regard to the virtual or online presence that individual may have.

Two major new elements have appeared in this regard: the approval of a Regulation on the protection of personal data, replacing the directives on the matter, and the draft regulation on e-privacy (COM(2017) 7 final communication from the Commission to the European Parliament and the Council Exchanging and Protecting Personal Data in a Globalised World).

The Regulation, in gestation since 2012, improves the law on the subject. *Inter alia*, it inserts the so-called right to be forgotten among those rights of the data's owner that are to be protected, deals with the 'profiling' of users, seeking to prevent or limit both solicitations to purchase and unfair trade practices, and specifies in detail the remedies for breach of the provisions on the gathering, storing and use of personal data (Regulation EU 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC – General Data Protection Regulation).

From this standpoint the Regulation is in the vanguard of efforts to protect the 'digital person' and is a guarantee for the movement of data abroad. It is well known that one reason why the European Union could not sign the Transatlantic Trade and Investment Partnership (TTIP) with the United States was the

[9] D. Fairgraive, *Products Liability in Comparative Perspective* (Cambridge: Cambridge University Press, 2005).

American negotiators' reluctance (echoing the requests of the US private sector) to accept data protection rules which were more restrictive than those applying for US residents.

In the Regulation's recitals the purposes of the new regime are explained, which are worth highlighting.[10]

With regard to remedies, the Regulation includes a rather morally righteous provision that imposes a presumption of fault on the data controller (but one might argue that here it is not liability of an objective kind). Evidence to the contrary is admitted, but this concerns the discharge of obligations or absence of liability for the harm done (Art 82).[11]

[10] Any processing of personal data should be lawful and fair. It should be transparent to natural persons that personal data concerning them are collected, used, consulted or otherwise processed and to what extent the personal data are or will be processed. The principle of transparency requires that any information and communication relating to the processing of those personal data be easily accessible and easy to understand, and that clear and plain language be used. That principle concerns, in particular, information to the data subjects on the identity of the controller and the purposes of the processing and further information to ensure fair and transparent processing in respect of the natural persons concerned and their right to obtain confirmation and communication of personal data concerning them which are being processed. Natural persons should be made aware of risks, rules, safeguards and rights in relation to the processing of personal data and how to exercise their rights in relation to such processing. In particular, the specific purposes for which personal data are processed should be explicit and legitimate and determined at the time of the collection of the personal data. The personal data should be adequate, relevant and limited to what is necessary for the purposes for which they are processed. This requires, in particular, ensuring that the period for which the personal data are stored is limited to a strict minimum. Personal data should be processed only if the purpose of the processing could not reasonably be fulfilled by other means. In order to ensure that the personal data are not kept longer than necessary, time limits should be established by the controller for erasure or for a periodic review. Every reasonable step should be taken to ensure that personal data which are inaccurate are rectified or deleted. Personal data should be processed in a manner that ensures appropriate security and confidentiality of the personal data, including for preventing unauthorised access to or use of personal data and the equipment used for the processing.

It is appropriate to establish the controller's general responsibility for whatsoever processing of the personal data that it shall have effected directly, or that others shall have effected on its behalf. In particular, the controller should be bound to put in place adequate and effective measures and be able to demonstrate the compliance of its processing activities, including the measure's effectiveness, with the present regulation. Such measures should take into consideration the nature, scope, context and purposes of the processing as well as the risk to the rights and freedoms of natural persons.

[11] Art 82, 'Right to compensation and liability':

1. Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered.

2. Any controller involved in processing shall be liable for the damage caused by processing which infringes this Regulation. A processor shall be liable for the damage caused by processing only where it has not complied with obligations of this Regulation specifically directed to processors or where it has acted outside or contrary to lawful instructions of the controller.

3. A controller or processor shall be exempt from liability under para 2 if it proves that it is not in any way responsible for the event giving rise to the damage.

4. Where more than one controller or processor, or both a controller and a processor, are involved in the same processing and where they are, under paras 2 and 3, responsible for any

IV. The Protection of the Environment

The environmental liability directive (2004/35) has created many problems of interpretation and application due to the misunderstanding caused by the 'polluter pays' principle. Since in the economic analysis of law the principle is understood in a literal sense, an operator who is ready to repair any damage caused is deemed authorised to pollute in some States, Italy amongst them:[12] it was considered sufficient to burden the polluter with the obligation to compensate for damage in a pecuniary manner, that is, paying compensation 'equivalent' to damage caused. On the other hand, the Court of Justice, and even earlier the Commission, had specified that the primary obligation consisted in restoration of the damage caused, and not in disbursement of sums of money. This generated a quarrel that pitted the Italian government against the Commission, and several rectifications of the Italian bill implementing the directive.

The Court, ruling on 4 March 2015 in a case concerning Italy, precisely, stated that:

> 'Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage must be interpreted as not precluding national legislation such as that at issue in the main proceedings, which, in cases where it is impossible to identify the polluter of a plot of land or to have that person adopt remedial measures, does not permit the competent authority to require the owner of the land (who is not responsible for the pollution) to adopt preventive and remedial measures, that person being required merely to reimburse the costs relating to the measures undertaken by the competent authority within the limit of the market value of the site, determined after those measures have been carried out'.

In other words, the Italian legislator (with the Environmental Code) has established that the restoration of sites is to be done by the public authorities, and that the owner of the land must reimburse the costs.

The liability should be of objective nature, although not all of those interpreting

damage caused by processing, each controller or processor shall be held jointly and severally liable for the entire damage in order to ensure effective compensation of the data subject.

5. Where a controller or processor has, in accordance with para 4, paid full compensation for the damage suffered, that controller or processor shall be entitled to claim back from the other controllers or processors involved in the same processing that part of the compensation corresponding to their part of responsibility for the damage, in accordance with the conditions set out in para 2.

6. Court proceedings for exercising the right to receive compensation shall be brought before the courts competent under the law of the Member State referred to in Art 79.

[12] The literature on the topic is indeed wide-ranging. For a preliminary overview see G. Alpa et al, *Interpretazione giuridica e analisi economica* (Milano: Giuffrè, 2001); M.Benozzo et al, *Commentario al codice dell'ambiente* (Torino: Giappichelli, 2013).

the law in question are convinced by this solution.

V. The Protection of Investors' Economic Interests

Other cases of liability concern the banking, financial and accountancy sectors. Here it has been deemed at the EU level that the operator's liability is grounded in its *fault*: in my opinion, there is no true reason to distinguish the maker of goods from the producer of services (for liability purposes). Nor should there be any reason to consider that the party performing a service conducts an intellectual professional activity that implies the assumption of a business risk, but rather a fault in the execution of a personal service.

The liability regime ought to be uniform: it should not make distinctions, on the production side, between operators according to their specific jobs, insofar as the consumer and user would be exposed to risks and harm in an equal manner. It is true that in these cases the harm is not always physical (as with harm to health in the case of a defective product, or pollution of the environment), but the type of interest affected – economic interest – is no less significant than those which have stronger protections in place.

The losses sustained by savers in the past few years, due to the severe economic crisis having struck the Western world, have been caused largely by activities of a banking and financial kind. Demonstrating the fault of an alleged injuring party is difficult in many cases. Thus the reversal of the burden of proof, when relations are not contractual but rather extra-contractual, ought to be a universally acknowledged rule.

On the other hand, the same is not the case with auditors' and auditing firms' liability. Directive 2014/56 (which amended Directive 2006/43) has introduced several new elements and reinforced the professional obligations of auditors, the controls made by public authorities and the penalties imposed but, as concerns liability, it simply refers to domestic legislation.

Indeed, Art 30 of this Directive (Systems of investigations and sanctions) says:

> '1. Member States shall ensure that there are effective systems of investigations and sanctions to detect, correct and prevent inadequate execution of the statutory audit.
>
> 2. Without prejudice to Member States' civil liability regimes, Member States shall provide for effective, proportionate and dissuasive sanctions in respect of statutory auditors and audit firms, where statutory audits are not carried out in conformity with the provisions adopted in the implementation of this Directive, and, where applicable, Regulation (EU) no 537/2014'.

Nor have things changed as regards financial assets with the adoption of

Directive 2014/65 (so-called MiFID II). This Directive (which came into force on 3 January 2018) has the goal of developing a single EU market for financial services in which transparency and investor protection will be ensured.

Operators must act in their clients' best interest, guarantee that investors are properly informed, point out potential conflicts of interest between the parties and provide appropriate representations of the risks involved, distinguishing the investor's profile – a matter of assessing the appropriateness of a given product for the saver's needs.

But other proposals for reform are on the table: one for a Regulation on the prudential requirements of investment firms (COM(2017) 790 final), another for a Directive on the prudential supervision of investment firms (COM(2017) 791 final).

The question of liability has remained open; thus in Italy there is discussion as to whether the investor may demand the nullity or voiding of an investment contract or obtain compensation for loss.

VI. The Protection of Competition, and Injury Resulting from Breach of Competition Rules

The rules on competition, as originally conceived in the Treaty establishing the European Economic Community (since transmuted into the TFEU), go beyond the simple subject of study wherein legal interpretation and economic interpretation may be conducted in parallel. They are a set of rules in which economic appraisal and legal appraisal are co-essential, cross-interfering and inseparable.

One perceives this in examining the Treaty rules that prescribe proper conduct in the *internal market* (Arts 26 et seq, Arts 101 et seq) and the rules of the Charter of Fundamental Rights of the European Union – a normative text now deemed equivalent to the Treaties – which deal with economic relations, in particular Art 16 on freedom of enterprise and Art 38 on consumer protection.

Thus, when addressing the problems concerning breach of the competition rules (in terms of *antitrust violations*) and the prejudicial consequences thereof (in terms of *antitrust injury*), this junction must necessarily be taken into consideration.

But there is more: both the competition law violation and the injury are conceived in such a manner as to combine factors of EU law and those of domestic law.[13] It would be simpler if the entire juridical construction, with its rules for interpretation, were dissolved *in toto* within the Union framework. This would permit the retention of the meanings of typical Union terms and concepts in mind in order to solve the related problems. When the harmonisation is

[13] See, for all, C. Imbriani and A. Lopes, *Macroeconomia. Mercati, istituzioni finanziarie e politiche* (Torino: Giappichelli, 2013); P. Ciocca and A. Musu, *Economia per il diritto. Saggi introduttivi* (Torino: Giappichelli, 2006).

maximal, and the regime is nearly 'complete', it is easier to apply EU law and integrate it with domestic law, if the European legislator has left some leeway. If, on the other hand, that legislator regulates only one aspect of a given case, application becomes more complicated, more uncertain and, since a maximum harmonisation level has not been reached, it lends itself to divergences patterned on national models. Consequently, the safeguard of legally protected interests varies from jurisdiction to jurisdiction. Thus, inequalities may arise, both on the side of the interests of companies having infringed the rules (more or less intensely affected by damages reparation for violation of competition legislation) and on that of the interests of the competing businesses and consumers (more or less intensely favoured by the compensation for injury sustained).

Unhappily, the cases are manifold, as has been seen in the hypothesis of injury resulting from a breach of EU rules by a State, in particular by its law courts,[14] and in the aforementioned case of manufacturers' liability.

Still, the directive on unfair terms (13/1993/EC) is more detailed and precise and leaves the entire domestic legal system – and therefore the domestic courts – less room for action (eg in the assessment for preservation of a contract when a ruling has invalidated one or more of its clauses), thus ensuring a more uniform application of EU law.

And yet in its interpretation, the implementation by national legislators and the application by domestic courts have led to divergent solutions. Businesses are subject to uniform treatment as to the identification of clauses deemed abusive, but not all jurisdictions have given concurring answers in this regard.

For competition law, the EU legislator's choice has been both less courageous and less invasive than it might have been, for it has regulated only some elements of the tort and delegated the ascertainment of the others to the national courts.

In other words, it has regulated certain aspects of the harm caused, but has not established rules on the tort in a complete manner. This perhaps stems from the assumption that it was enough to demonstrate, on the basis of economic market data, a distortion of competition in order to affirm that the offence was constituted and thus the tort caused could be determined concomitantly. Not that offence and tort are conceptually separable: they are so from the normative standpoint, and also in the EU programmes where the regulation concerned is a product of successive stratifications, recourse having been had to all kinds of sources of law (regulations, directives, decisions, opinions).[15]

[14] See the entry 'Responsabilità dello Stato (dir. UE)', available at www.treccani.it, and the cases Francovich (Case-6/90 and 9/90 *Francovich and Bonifaci* v *Repubblica italiana,* Judgment of 9 November 1991), Brasserie du Pêcheur and Factortame (Case 46/93 and 48/93 *Brasserie du Pêcheur* v *Factortame*, Judgment of 5 March 1996), Koebler (Case173/03 *Koebler* v *Austria*, Judgment of 30 September 2003), Traghetti del Mediterraneo (Case 379/10 *Traghetti del Mediterraneo* v *Repubblica Italiana*, Judgment of 13 June 2006), all available at www.eur-lex.europa.eu.

[15] See G. Alpa, *Illecito e danno antitrust* (Torino: Giappichelli, 2016).

Indeed, in the field of competition the EU legislator has drawn on all the sources of law: the Treaties (Arts 101 and 102), the implementing regulations, the case law of the Court of Justice and now the directive. This directive, passed by the European Parliament and the Council on 26 November 2014 (EU Directive 2014/104), deals essentially with the criteria for establishing an instance of harm. It then expands to comprise a detailed regulation of the burden of proof and of the economic criteria for quantification of harm, leaving the task of ascertaining the existence of the two other requisites, unfairness and link of causation, to the domestic judge.

One must then emphasise that the legislator's object was twofold: on one side, to clarify how to compensate the harm arising from breach of antitrust rules, on the other, to bolster *private enforcement* or recourse to private remedies, having deemed public controls insufficient.

The directive, dealing with the last segment of the hermeneutical process leading to the ascertaining of the harm and its determining, aligns itself with the legal policy that addresses the action of individuals. This means, precisely, that *private enforcement* is used to monitor the regular progress of markets on the basis of the principle of competition, placing it alongside *public enforcement*, and presupposes the acceptance of certain basic concepts for the configuration of the tort arising from violation of antitrust provisions. These provisions, along with the Treaties, regulations, Court of Justice guidelines and decisions of the Commission, already constitute a compact body of rules reflecting those of the national laws which existed before the antitrust regime and which introduced this regime after joining the EU (as occurred, after much delay, in our country).[16]

But, in truth, the title is at the same time concise and reductive. In fact, the regulations concern aspects of both substantive law and procedural law, and go well beyond the simple determining of harm, affecting elements of the antitrust offence that deserve careful examination.

One hardly need recall that the proposal for the Directive (on 11 June 2013 (COM(2013) 404 final) had aroused great interest and considerable volume of writings, in Italy and abroad, were devoted to it. It began with the Green Paper (COM(2005) 672 final) and the White Paper (COM(2008) 165 final), in which matters of general interest were especially discussed, namely the appropriateness of resorting to remedies sought by private individuals to enforce the competition rules, the types of remedies to be sought and the entering into collective actions,

[16] For a first commentary see E. Malagoli, 'Il risarcimento del danno da pratiche anticoncorrenziali alla luce della Direttiva 2014/104/UE del 26 novembre 2014' *Contratto e impresa/Europa*, 390-399 (2015), to which the reader is referred for a detailed illustration of the contents and aims of the directive in question. On the interaction between *private and public enforcement* see M. Libertini, *Diritto antitrust dell'Unione europea* (Milano: Giuffrè, 2014); M. Maugeri, 'Premessa' and A. Zoppini, 'Introduzione', in M. Maugeri and A. Zoppini eds, *Funzioni del diritto privato e tecniche di regolazione del mercato* (Bologna: il Mulino, 2009), 147 et seq.

as part of Recommendation 2013/396/EU and Communication 2013/401/final of 11 June 2013. Following this, the Resolution of the Presidents of European competition authorities, entitled 'Protection of the information contained in cases for favourable treatment in the context of civil actions for damages' (23 May 2012), was another testimony to the close collaboration in the matter between the Central Authority and National Authorities. The discussions concluded with a focus on the circularity of initiatives and to the models of action and sanction, all measures geared towards the creation of a perfectly competitive single market.

Moreover, on the basis of Arts 101 and 102 of the TFEU and on that of Arts 103 and 104, which authorise the Union to take measures directly affecting Member States' domestic law, the Union's competencies cannot be questioned.

The directive's contents are substantial, for it gives ample room for cooperation between private individuals and public authorities. It introduces a kind of 'rewarded self-reporting' enabling a company that has breached the rules to report the others involved in the matter in exchange for exemption from fine or reduction thereof (the so-called 'leniency programmes'). The directive deals with the regime on evidence and its disclosure of, acquisition of, and exemption from the obligation to produce documents, and the acquisition of information. On the procedural level it seeks to resolve definitively a long-standing disagreement on the relations between investigations conducted and measures taken by national authorities, on the one hand, and the lawsuits brought by parties affected by sanctions before the competent court, on the other hand. In this respect the national authorities' decisions, if definitive insofar as, although challenged, they have been confirmed in court, have binding effect and constitute grounds for a claim for damages. However, national decisions are not directly effective outside the confines of the State involved and may be subject to challenge in court proceedings in another Member State where new evidence is adduced.

The directive also deals with time-barring, quantification of injury, passing on of loss, and out-of-court settlement of disputes caused by breach of the competition rules.

However, not all problems opened up by compensation for loss are resolved. Therefore, when it occurs, critical views have already been expressed, especially due to disappointment at seeing problems that the directive might have definitively resolved being debated still.

Perhaps it is self-restraint, owing to application of the principle of subsidiarity, that has kept the EU bodies from laying down complete regulations concerning antitrust offences.

Since the directive also deals with passing on of loss, it is fitting to examine the so-called downstream relations having arisen as a result of infringement or otherwise affected by infringement of the rules. It is precisely here that a clarification, or a decisive specification of the remedy to be prescribed, would be desirable so as to ensure that injured parties living in different countries, but

injured by the same economic operator's antitrust act or conduct, were not subject to national rules differing one from another, thus to preclude consequently varying compensation.

The categories affected are indeed different from one another: competing businesses, harmed by an abuse of dominant position or by agreements, or suppliers, employees, consumers, all with varying interests.

Then there were other problems to be solved. In the various legal systems, the rules of jurisdiction of the competition authorities and those of the courts did not match: in the event of an appeal against the Authority's administrative ruling, a dilemma arose. Would the court have to conduct further examinations to ascertain the breach of competition rules, or was the preliminary investigation already conducted by the Authority, and evaluated in terms of sufficiency to ascertain the breach, enough? How could all these exigencies be combined unless by way of two courses of procedure coordinated between them?

The European Union has opted for a combination of *public and private enforcement* remedies.[17]

But the directive has addressed only certain aspects of the harm, focusing on methods of quantification (thus favouring the economic perspective) and neglecting the juridical aspects of this complex matter.

Following the analytical theory of tort liability, we ought to identify, in the configuration of the antitrust offence, certain fundamental requisites:

(*i*) the subjective requisite, dictated by fault or wrongful act, or the imputation by business risk;

(*ii*) injury to a protected interest (wrongful damage);

(*iii*) link of causation;

(*iv*) direct injury, resulting from infringement of the rules for the safeguard of competition;

(*v*) injury consequent to infringement in connection with business actions conducted by the injuring party with third parties claiming to have suffered injury.

Obviously, the injuring party's capacity to intend and to desire to injure is assumed. However, the classification of the competition regulations may be relevant in order to establish whether their violation implies infringement of compulsory rules, of public order, of public economic order, so as to grasp whether the 'downstream' business actions are valid or void, whether compensation

[17] On the coordination of the two types of action see, for all, M. Libertini, *Diritto* antitrust *dell'Unione europea* (Milano: Giuffrè, 2014); but see also the studies selected by P. Barucci and C. Rabitti Bedogni, *20 anni di antitrust. L'evoluzione dell'Autorità Garante della Concorrenza e del Mercato* (Torino: Giappichelli, 2010), I and II. For an overview of the economic and legal problems see L. Prosperetti, E. Pani and I. Tomasi, *Il danno antitrust* (Bologna: il Mulino, 2009); G. Afferni, 'La traslazione del danno nel diritto *antitrust* nazionale e comunitario' *Concorrenza e mercato*, 2008, 494 (2009), In light of the directive, one will note in particular the research of I. Lianos, 'Causal Uncertainty and Damages Claims for Infringement of Competition Law in Europe' 34(1) *Yearbook of European Law*, 170 (2015).

is due and how it may be calculated, and also taking into consideration the 'passing on of the loss'. One must also determine, should there be more than one author of the injury, how to solve the problem of co-liability or joint liability.

As concerns the injuring party, reference should be made to the EU legal concept of a business and, more specifically, of a business as understood in the framework of competition law. In turn, the legally protected interest implies ownership of such interest and therefore the identification of the categories of the injured parties.

The identifying of the requisites brings with it a distinction of competencies and roles: in other words, must the domestic judge who has to quantify and ascertain the damages arising from breach of the antitrust rules reconstruct all the elements of the tort, or are some of them already established or determined by other domestic or EU authorities?

As may be seen, the antitrust offence presents strong analogies with another type of offence made up of the same EU and domestic components. Thus one might follow, as in the past, the same model of reasoning to delineate the contours. Indeed, State liability for breach of EU rules implies that the ascertainment of such breach has been made in the light of European law, and likewise the infringement of the injured party's interest (which may be constituted by a right established by EU law directly with respect to the victim), whilst the injury and the link of causation between it and the breach must be proved by the victim and ascertained by the court.

The directive clarifies competencies and roles. Here the national court, that is the 'review court' – according to the definitions in Art 2 –

> 'is empowered by ordinary means of appeal to review decisions of a national competition authority or to review judgments pronouncing on those decisions, irrespective of whether that court itself has the power to find an infringement of competition law'.

Thus, the infringement may concern either rules of EU law, or rules of domestic law corresponding to those of EU law (Art 2 (1) (3)).

The infringement may be ascertained either by an administrative authority (the Guarantor Authority) or by an administrative court (asked to review the administrative ruling), but the ordinary court has the power of revision.

The injury is established under EU law, but its quantification falls to national law.

But let us come to the problems of civil liability.

(*i*) The directive does not specify whether the injured party must prove the fault or wrongful act of the firm having infringed the antitrust rules. The EU legislator probably deems objective fault for an infringement of the law implicitly but has not even posed the problem of objective liability, in matters of a business, or of a wrongful imputation, insofar as the infringement is intentional (with all

the consequences that the harm resulting from a wrongful act entails in terms of foreseeability).

If conduct constituting an antitrust offence has been ascertained by an administrative measure or by a ruling of an administrative court, it will fall to the defendant firm to demonstrate the inapplicability of the antitrust rules, the existence of exemptions or any circumstance that might exclude the occurrence of infringement.

The burden of proof is – for the type of the case in point – reversed.

If the injured party goes directly to an ordinary court to obtain compensation for harm, proof of the violation is facilitated both by the rules on the disclosure of data (Arts 5 et seq) and by the courts' ability to obtain and disclose evidence pursuant to Arts 5 et seq of the directive. Thus, a demonstration of the existence of a subjective requisite is not needed because what matters for the purposes of applying the competition law, and therefore the sanctions in connection with its violation, is the *result*, the effect of the conduct concerned.

Since it is a question of a *typical* case, the general rules on unlawful act do not apply.

(*ii*) But proof of causation between the conduct and the injury suffered is necessary.

(*iii*) As concerns the injured interest, it is closely linked with the purpose of the law infringed, and therefore with the regime's purpose of protection. Recital no 11 states:

> 'According to the case-law of the Court of Justice of the European Union (Court of Justice), any person can claim compensation for harm suffered where there is a causal relationship between that harm and an infringement of competition law'.

It is a question of an *acquis communautaire*, explains recital no 12, which repeats: 'Anyone who has suffered harm caused by such an infringement can claim compensation for actual loss'.

But what is the *injured interest?* And how is *anyone* defined?

Recital no 13 states that

> 'the right to compensation is recognised for any natural or legal person – consumers, businesses and public authorities alike – irrespective of the existence of a direct contractual relationship with the infringing business, and regardless of whether or not there has been a prior finding of an infringement by a competition authority'.

And the harm is constituted by resultant injury, loss of profit (recital 12) and loss of opportunity (recital 13).

Therefore, to ascertain a claimant's entitlement to bring proceedings, the directive must be checked for a designation or sufficient indication of the type to

which such claimant belongs. The word 'anyone' is not in itself decisive.

Besides the generic enunciation (*consumers*, *businesses*, *public authorities*), there are many indications that the directive specifies explicitly: eg recital no 43 speaks of conditions under which goods or services are sold, of supplies in the case of a purchasers' cartel (thus the category of *suppliers* is included), of *direct* and *indirect purchasers*.

Therefore, the following may be deemed entitled to bring suit:

(*i*) the competing business, which consequent to the antitrust infringement has suffered a financial loss in relation to its viability (as is the case with loss resulting from slavish imitation, dumping, denigration of products, etc);

(*ii*) the 'weaker' business having participated in the commission of the offence by reason of its relations with the stronger; the business having suffered due to another's abuse of dominant position, or to abuse of its economic dependence; the suppliers; here too it is a matter of reduced earnings or financial loss;

(*iii*) the consumers and users. Here one may speak of restrictions on the freedom to contract or, as the case may be, financial loss due to having been obliged to pay a price greater than what would have been applied had the abuse, or, in general, anti-competitive conduct, not occurred;

(*iv*) the public authorities, with regard to the relations established with the company or companies having committed the antitrust infringement.

There also exist cases wherein the right held by the injured party is not only the generic one (although now deemed a fundamental right) consisting in the freedom to contract, but a truly different right, such as, for instance, copyright. And some authors have written of the interest of the market as a 'common good'. However, if we are in the presence of '*private*' *enforcement* and the remedy is one of private law, the requisites laid down by private law must be observed.

In particular, one must identify, in terms of *wrongful* damage, the type of private interest that has been injured – and this varies according to the category to which the victim belongs –, and the causal connection must be demonstrated.

But the causal connection is not addressed by the directive. Art 17, 'Quantification of harm', contains a provision regarding proof of the link of causation: 'It shall be presumed that cartel infringements cause harm. The infringer shall have the right to rebut that presumption'. The presumption of harm implies a presumption of liability and, in any event, a link between the harm sustained by the victim and the infringer's conduct. Moreover, in the recitals there is mention of the loss of *chance*, another aspect of the harm that implies ascertainment of a link of causation and a calculation of the probability of loss of opportunity for profit.

The link of causation is decisive in cases wherein the injured party is of the category of consumers having purchased goods or services via 'downstream' contracts (with respect to the agreement, accord, practices or *de facto* conduct of the company having distorted the competitive contest), ie indirect purchasers

and consumers who, via collateral relations established with firms other than those having infringed the rules, have suffered the deleterious effects (the so-called umbrella customers mentioned above).

With this 'diminished' regime, the directive looks to the national courts' assessments for ascertainment of a link of causation which, as is well known, constitutes one of the techniques for selecting the compensable losses and, especially, for ascribing liability.

Various types of problems then arise.

First of all, one must ascertain whether the gaps can be filled by references to rulings of the Court of Justice, which, however, does not lay down precise rules in this respect.

The research conducted in order to draft the text of the directive has made it plain that, in terms of causality, the various member countries' systems are grounded in diverging models. There are systems wherein no distinction is made between causality in fact and causality in law, others wherein the judge proceeds first with ascertainment in fact and then with selection of causes. Some require proof of a direct link, others select the compensable loss on the basis of a criterion of foreseeability. Hence the attempts, still in the proposal stage, at codifying uniform criteria for the selection of compensable losses.

The situation is rendered difficult by the fact that the case law of the Court of Justice is not unequivocal, and the projects for standardisation of the rules of civil liability, and thus of legal causality, differ from one other.

In order to solve all these problems a unitary regime of civil liability within the Union would be needed.

VII. Projects for Unification of Civil Liability Rules

Scholars of comparative law maintain that the various models prevailing in national legal systems already show a tendency to converge.[18] But the process is quite slow and full of pitfalls, for it requires the cooperation of case law and jurisprudence, as well as a particular sensitivity on the part of national legislators. Also, the *acquis communautaire* in this field is limited, geared as it is towards regulating rather narrow areas. And as has been seen, the rules diverge according to sector, in a wholly sporadic manner.

The research underway, results of which are published from time to time, show how far apart the various systems still are and, conversely, how useful it would be to arrive at a uniformity of terms, concepts and general rules.

Some treatises have already apprised jurists of certain particular aspects and difficulties presented by a common acknowledgement of the rules, originating

[18] B. Markesinis, *The Gradual Convergence, Foreign Ideas, Foreign Influences and English Law on the Eve of the 21st Century* (Oxford: Clarendon Press, 1994).

from both statute law and case law, of civil liability.

The current research resulting from analyses coordinated by Jaap Spier, Helmut Koziol, Ulrich Magnus and Bernhard A. Koch is commendable. It concerns the limits and the expansion of civil liability, illegality, causality, injury, objective liability. Commendable as well are the attempts at codification being made by the European Group on Tort Law based at the University of Girona, and by the Study Group for the drafting of a European civil code, coordinated by Christian von Bar.

In both cases, they are documents in progress, of interest particularly because they follow different systematising logics.

The proposals from the study centre at the University of Girona, which have been conveyed to the working group coordinated in Vienna by Professor Koziol, identify certain fundamental principles (PETL) disposed in an order quite similar to that chosen by the Italian legislator for the codification of civil liability rules (Arts 2043-2059 of the Italian Civil Code).

Liability for injury caused to third parties is ascribed on the basis of fault, or of the exercise of dangerous activities, or of the act of an auxiliary agent (Art 1.101); the compensable loss is of an economic nature and a moral nature (Art 2.101); the legally protected interests concern the person, property, breach of contractual relations, harm done voluntarily (Arts 2.101 et seq); the burden of proof lies with the injured party, but the court has the power to alleviate it when proof is too difficult or costly; the link of causation is grounded in the *condicio sine qua non*, but concurrent, alternative, potential and minimal causes are distinguished (Arts 3.101 et seq); liability is ascribed after taking into consideration the foreseeability of the injury, the nature and value of the legally protected interest, the ground for ascription, the extension of the ordinary risks of life, the purpose of the law infringed (Arts 3.201 et seq); the ground for liability is supplied by the fault, but there are cases of presumption of fault and of objective liability (Arts 4.101 et seq); in particular, there is objective liability in a case of performance of abnormally risky activities, and in cases where special domestic laws prescribe it (Arts 5.101 et seq); special rules are prescribed for liability for injury caused by minors and by the mentally incompetent, and for auxiliary agents (Arts 6.101 et seq); the framework is completed with rules regarding exemptions and items of compensable loss.

The project developed by Christian von Bar is closer to the German model of the BGB (§ 823 et seq) There is insistence on the injuring harm of a legally significant subjective situation, which consists in the injury of a series of interests listed that correspond roughly to the type of interests normally safeguarded in the realm of civil liability. The criterion of imputation is the fault or wrongdoing. However, there are also special rules for harm caused to property by employees or members of a group, for harm caused to the environment by defective products, by the circulation of vehicles or of dangerous things. The framework is completed

by a series of meticulous rules regarding imputability, solidarity or joint liability, contributory fault, remedies for loss and heads of damage.

The field of civil liability is an extraordinary laboratory for the jurist who deals with national law, comparative law or European Union law, or even European private law. The emergence of the values of the person in the area of civil liability is a guarantee of progress and stability. But a great commitment by jurists is still needed to reach a satisfactory level of protection for the interests concerned.