THE LEGAL STUDY OF CIVIL LIABILITY UNDER COMPETITION LAW: COMPARISON BETWEEN EU AND US

Aida Asiabanzadeh[*]

Master's Candidate, Commercial Law Programme, Faculty of Law,

Universiti Malaya, Kuala Lumpur, Malaysia.

Abstract

This paper focuses on civil liability under competition law in EU and US. Civil liability is a sanction that imposes obligation on a violator of competition law to compensate for losses caused by the activity of violator. Although antitrust regulations in US and EU have stated regarding civil liability, there is ambiguity in law, which has caused the courts not to award the injured parties' compensation properly. This study is important as civil liability must be analyzed in the field of competition with the increase of anti-competitive behaviors, serious damage caused by them and the necessity of compensating this damage for society. According to Article 101 and 102 of TFEU in EU, the principles of civil liability are based on non-negligent, and according to the Clayton Act, the principles are based on negligence. In US, the method of compensation is based on restitution in kind, but in EU, it is based on pecuniary compensation. Doctrinal research methodology has been adopted to conduct this research. The conditions of injured parties for seeking compensation require better steps, whereby recommendations for the European Commission and the Bureau of Competition have been put forth.

Keywords: Civil liability, Competition, Compensation
JEL: K2, L1, L4

DOI: 10.48047/ecb/2023.12.si4.1068

I. INTRODUCTION

Based on economic ideas, in a free market system, the correct implementation of economic programs depends on competition between business units[1,2]. It is a competition mechanism that controls the price, quality and accessibility of goods and services. The results of the ant-competitive behaviors, directly and indirectly, impact the interests of many entities, including individuals and businesses. Therefore, the formulation and correct application of competitive rules will ensure the rights of these entities[3,4].

Undoubtedly in competition law, guaranteeing the application of the rules require sanctions.[5] Sanctions can be divided into three main categories: 1) criminal sanctions, 2) civil sanctions 3) Administrative and disciplinary sanctions. Civil sanctions are classified into different types which civil liability is considered as the most important type of it.

Civil liability in competition law emerges when a company or companies participate in anti-competitive conducts, the result of these conducts will cause damage to other firms and businesses or even individuals. The firm and company or the person which suffer damage from the anti-competitive practices can seek financial monetary remedies in civil court. The company which damages other companies by engaging in anti-competitive practices will could end up being responsible for paying for the other firm's or individual's losses. This is called as "civil liability" in competition law.

The researcher selects American and European legal systems for comparative study in order to scrutinize civil liability under the competition law of these two systems as the most legal systems have followed EU and US in formulating and approving their set of rules. Additionally, analysis of these two legal systems means analysis of the general principles and rules of competition law. Therefore, the focus of this research is on evaluating civil liability under the completion law in EU and US.

A. Literature Review

There are scholars who have tried to compare EU and US competition law system and show that how similar and different these two systems are. Regarding monopolies, Yann Davie examined single firm conduct, which it is illegal for a company to monopolize or seek to monopolize trade, which means that a company with market power cannot act to retain or gain a dominant situation by eliminating competitors or restricting new entry.[6] She explained that the US antitrust law does not prioritize the preservation of the competitive market operation, and the EU regulations do not only focus on the customer at the expense of energetic competition[7]. Besides, Anna Tzanaki and Juan Delgado indicated that how Europe differs from the US in terms of structural differences in approaching to anti-competitive practices especially about single firm conduct enforcement.[8] She explained that the US antitrust law does not prioritize the preservation of the competitive market operation, and the EU regulations do not only focus on the customer at the expense of energetic competition. Davie believed that consumer welfare is at the heart of both systems.

Kostis Hatzitaskos et al. compared US and UK approaches to civil antitrust lawsuit regarding anti-competitive practices and discussed diverse conclusions in US and UK courts in respect of these practices, but they failed to discuss about the role of US and UK courts in civil liability.[9]

Moreover, although Ann O'Brien, Marc Hansen and Daiske Yoshida have illuminated the European Union's and the United States' systems of competition policy in respect of differences and similarities of cartel and mergers settlements, they failed to evaluate the civil liability regarding anti-competitive practices and rights of an injured party.[10]

William E. Kovacic and Pamela Jones Harbour explored the structures of both systems in respect of their competition rules against anti-competitive conducts, but they failed to indicate that how EU and US legal systems support the victims of anti-competitive behaviors and how they can claim compensation.[11] Douglas H. Ginsburg compared the system of competition enforcement in EU with US and highlight some characteristics of private enforcement in EU and US legal systems, but he did not compare the civil liability under competition law of EU and US.[12]

Lawyers of Bryan Cave law firm explained US antitrust law, Penalties & Remedies of breaking the competition law, EU competition law and the consequences of breaking it.[13] They pointed out that the consequences of violating the competition law are criminal and civil penalties, but these

researchers could not discuss about civil liability resulting from breaking the competition law in EU and US.

Gregor Erbach evaluated significance differences of breaching the competition regulations in both regimes. He explained that EU has an administrative system for antitrust enforcement, in which companies are penalized with fines, and US antitrust enforcement is based on criminal law, with financial penalties, but he failed to compare and scrutinize competition rules regarding civil liability in both legal systems.[14]

It can be highlighted from the earlier literatures of the selected competition law that the authors have compared EU and US antitrust law in respect of their approaches to anti-competitive practices while they have failed to explain and compare civil lability resulting from these conducts, and those who become victims of anti-competitive practices and their rights.

Therefore, this legal study will explain and compare civil liability resulted from anti-competitive practices in US and EU competition law.

Although antitrust regulations in US and EU have stated regarding civil liability, there is still ambiguity in law, which has caused the courts not to award the injured parties compensation properly. Complexity and ambiguity in some parts of competition law in EU and US have left the injured parties in confusion about their rights for seeking claim.

This research will identify the gap of explaining civil liability under the completion law of EU and antitrust law of US, and describe effective ways to raise awareness of civil liability which emerges from anti-competitive conducts in legal and business communities on the possible consequences on individuals, firms and markets.

The aim of this legal study is to analyze civil liability under the completion law of EU and U.S. in order to discover which legal system between EU and U.S has precise procedure in respect of civil liability in antitrust law.

B. The concept and The Most Important Types of Anti-competitive Practices

Competition law is a set of rules that protects competition process and improves the function of the markets. These rules, which are enforced by the competition authority, are used to prevent collusion, abuse of monopoly power by the dominant firm and other anti-competitive practices, and the result is to facilitate and expand competition in the market.

In Antitrust law of US, anything that affects market competition and disrupts market order would be anti-competitive practices. In EU and US antitrust law, the anti-competitive agreements are divided into two main parts, which are vertical agreements and horizontal agreements.

C. The Notion of Civil Liability from the Perspective of Competitive Rules

Since civil liability is the obligation of a person to compensate for the damage caused by her or his action against another person or persons, it can be distinguished from other titles of sanctions.[15]

Civil liability arising from anti-competitive practices is one of the sanctions of non-contractual liability, which is considered as the most important of them.

Civil liability is the most important sanction of anti-competitive practices. Liability arising from the contract, due to the overwhelming secrecy of anti-competitive contracts, the unwillingness of the parties to the contract to break the agreement due to profitability and the impossibility of entering of persons who are outside the contract for creating liability cannot meet the needs of the competitive market.

One of the most important practical problems of accepting civil liability due to violation of competition law is the difficulty of determining the injured party. It is difficult to determine exactly who has been harmed in violation of competition law, because if in the supply chain, a supplier violates the rules of competition and causes damage to the buyer of their product, the buyer will also inflict the loss on the other people who are placed after the buyer.

It should be said that in all cases, the damage resulting from the violation of competition rules is not tangible, and in addition, not all anti-competitive practices are potentially created based on the violator and the injured party relationship that by transferring damage to the other people, the passing-on defense becomes meaningful.

In all cases, the damage caused by anti-

competitive conducts is not insignificant and the need to compensate it based on accepted principles is obvious. Even in the case of insignificant losses, the need for compensation by the economic enterprise should not be overlooked.

D. Objectives of Civil Liability Arising from Violation of Competition Law

Without recognizing the goals of competitive regulation, it is not possible to draw a coherent framework for competition law. Without properly identifying the objectives, analyzing other issues of the law is useless. Despite the economic nature of the competition, it is not correct to be satisfied with economic goals as the only regulatory goals, because in many competitive regulations, non-economic goals are far more important than economic goals.

E. Sources of Civil Liability Resulting from Violation of Competition Law

The possibility of compensation for the injured party is determined by referring to the rules and regulations in the sources of civil liability. Violation of competition rules creates liability. There is a set of rules in EU and US antitrust law that these rules are the most important sources of civil liability arising from violation of competition law.

1. The United States of America

It should be said that the law enforcement in the United States is reviewed at both the federal and state levels, both public and private.[16] There are two categories of civil sanctions in the codified texts of American law, contractual sanctions and non-contractual civil liability.

Pursuant to the Sherman Act[17] in the field of contractual sanctions, all assets acquired through the conclusion of a contract or as a result of collusion under section 1 of this Act during transportation from one area to another or to a foreign country will be confiscated by the US government, and in accordance with regulations, these assets, which enter the U.S. illegally will be confiscated.

However, there are limitations in the US legal system in the area of civil liability in antitrust law. According to Illinois Brick doctrine,[18] only direct buyers of goods have the right to receive the extra price, which they have already paid, even if they had transferred the goods to others, but indirect buyers are deprived of this right.

2. The European Union

After the United States and Japan, it was the EU that incorporated the Antitrust Act into the European treaty in 1957.[19] With the principle of free competition in the market, which is one of the accepted principles in economic systems based on free market, the possibility of the principle of free competition in the markets is achieved by gaining a few important objectives, such as convergence, integration, efficiency and equity and fairness.

In the EU system for sanctions of competition law, there was no common approach among members to litigation. This situation affects the economy and makes it a major problem, especially during a recession. In different legal systems of EU countries, the civil sanctions of competition laws are different.

II. LEGAL ECONOMIC PRINCIPLES AND THEORIES UNDERLYING CIVIL LIABILITY AND ITS EXEMPTIONS FROM VIOLATION OF COMPETITION LAW

A. The Principles of Civil Liability Resulting from Violation of Competition Law

It is necessary to know the principles of any kind of responsibility in the correct application of the rules of that kind of responsibility. Proper implementation of the rules of civil liability resulting from the violation of competition law also requires understanding the principles of this liability.

B. Factors of Civil Liability Exemption Due to Violation of Competition Law

As explained in the general rules of civil liability, for establishing non-contractual civil liability, the realization of three pillars is necessary. The realization of loss and negligence or harmful act and the causal relationship between the realization of loss and negligence or harmful act.

In the first part of Sherman Act, all agreements that affect free trade were banned.[20] The US Supreme Court limited this generality to the approach of rule of reason. The Supreme Court banned agreements that unreasonably restrict free trade. According to this rule, all pro-competitive and anti-competitive effects of the agreement are examined to determine the net competitive effect of the agreement, and based on this effect, it is decided whether the action is anti-competitive or not. in EU, Article 101 of TFEU prohibits collusive agreement.

From the point of view of economic analysis of law, some experts examined this rule and its application in the proposed agreement, and others from the legal-social point of view paid attention to this rule and the agreements. According to the guidelines on the application of Article 101(3) of TFEU, the third Clause of this Article states the exceptional rule that is considered a defense for the enterprise (violator of competition law).[21]

In order to examine whether the agreement is beneficial to the consumer and the consumer can be considered as a partner in benefits, any agreement in the related market should be considered. Negative effects on consumers in a geographic market or production market cannot be combined with its positive effects on the consumer in an unrelated market.

Agreements reached between enterprises must be notified to the Commission in order to enjoy the exemption referred to in Clause 3. Pursuant to Regulation No. 1/2003 of the Union,[22] the burden of proving the application of Clause 3 of Article 101 of TFEU, for the application of exemptions, lies with the entity which claiming the benefits. It should be noted that there is a leniency program under the competition law of EU and US, which gives the opportunity to firms to provide adequate information about cartel that they have engaged in to receive immunity from heavy fines and prosecution.

C. Economic Analysis of Competitive Civil Liability

Although economic analysis is found in law school curriculum, its application is nowhere more effective than civil liability. George L. Priest believes that few articles have been written on civil liability in the last ten years, but no significant articles have been written that have addressed this new approach to law.[23] From an economic point of view, the imposition of financial and monetary fines is a more desirable sanction than imprisonment, because imprisoning people is more expensive than receiving a fine.

III. SCOPE, EFFECTS AND COLLECTIVE ACTION OF CIVIL LIABILITY DUE TO COMPETITION LAW INFRINGEMENTS

A. The Scope of Civil Liability Arising from Violation of Competition Law

There are discussions on civil liability which raise questions about the scope of civil liability resulting from the violation of competition law and what kind of damages are included and whether anti-competitive agreements affect the formation of civil liability and by whom compensation has to be paid.

When a firm enters into a discriminatory agreement that can be reached through collusion or other anti-competitive practices, there are people outside the agreement who have been harmed by these practices. In addition, the person who has concluded the contract is subject to conditions such as unfair or imposed contracts and the possibility of contractual liability rules for that person is not possible or does not compensate the losses. As a result, the issue of several liabilities in the field of competition law arises.

1. Contractual Sanctions of Competition Law

The annulment of the contract has been considered for the contractual implementation of anti-competitive agreements in European and American antitrust law.[24] Taking advantage of a long history of the common law, in American law, if an agreement is reached between firms as a result of a breach of the prohibition of competition rules, that agreement will be null and void. In other words, the interpretation of American jurisprudence as an illegal term in the context of section1 of the Sherman Act shows this invalidity well.[25]

2. Indirect Buyer and the Possibility of Compensation for Anti-competitive Practices

In this section, there is a question of whether a third party can pursue civil liability due to the

anti-competitive practices. Third party in this matter can be an indirect buyer or a consumer. There is an issue in EU law and in American law called the passing-on defence and indirect damage, which based on that the infringer defends against the claimant (the indirect buyer).

Pursuant to Section 4 of the Clayton Act,[26] which states that if someone or a firm causes damage to a business or personal property because of any of the practices prohibited by antitrust law, the injured party can file a lawsuit regardless of the amount in dispute, and claim three times the loss, plus court costs as compensation.

Compared to US, in EU legal system, with the existing Directive, the right to compensate the indirect buyer has been accepted. However, the identification of the indirect buyer and the exceptions to the claim of these individuals are left to the internal rights of the members and the judicial procedure of the Union.

3. Possibility of Compensation Based On Anti-competitive Practices

EU law explicitly states in Article 13 of the preamble of Directive 2014/104/EU,[27] in the field of civil liability for breaches of competition law, the right to compensation under this law applies to all persons, private legal persons, consumers, businesses and governmental institutions are considered, regardless of the direct relationship of the contract with the infringer and without the need to recognize the application of the procedure by regulatory bodies in the field of competition rules.

In litigation arising from contractual liability, one of the most important defenses rejected by a lower court and the US Supreme Court is the anti-competitive claim of the contract by the violator of the contract.

B. The Methods of Compensation in Civil Liability for Violation of Competition Law

The methods of compensation in civil liability are in fact the ways of fulfilling the obligation of the cause of loss and are subject to the objectives of civil liability. In any legal system, according to society, civil liability has goals. In most legal systems, the purpose of civil liability is to obtain the consent of the injured party and to compensate for harm and deterrence.

The obligation to compensate for loss prevents the perpetrator from gaining an unjust gain through the commission of a harmful act. In the American legal system, the main effect of civil liability is the payment of a sum of money. However, on August 4, 2004, The Federal Trade Commission (FTC) referred to the policy of fair financial compensation, which means that restitution in kind can also be applied to sanction in anti-competitive practices.

In contrast to US, in the EU member states, the principle is financial compensation in civil liability, and the method of pecuniary compensation is the most common method to compensate the injured party.

C. Collective Action of Civil Liability Resulting from Anti-competitive Practices

Collective action is one of the most effective procedural laws that enforces the rights and compensation of a large number of people in order to reduce costs and increase judicial efficiency, which can be an effective reason to deter violators by collecting claims of individuals.[28] Collective action that can take place in a variety of areas, including consumer rights, the environment, and competition law, with one or more people representing the group and a large number of people in a group file a lawsuit against a common issue.

1. The Main Differences between the American and European Systems Regarding Collective Action

There are three major differences between US and EU on class action.

- The opt-in and opt-out systems: This is due to the fact that any victim can participate in a class action lawsuit. US law is the opt-out system.[29] With this approach, individuals in a group will be involved in a class action lawsuit with a legal presumption and without a declaration of intent, unless they have stated their will to leave the lawsuit before the ruling.
- The second issue that shows the difference

in US and EU legal systems in this regard is how to access to evidence. While the broad discovery rules are widely accepted in the American legal system,[30] the protection of the information held by the defendant is important in the legal system of European countries.

- In European law, countries use the loser-pays principle. In this system, the court costs are reimbursed by the losing party who can be a plaintiff or a defendant. But in the American system, the costs incurred by defendant must not be paid by the plaintiff even if the plaintiff is convicted as the losing party later.[31] In US legal system, there is the contingency fee principle regarding class action.

IV. CONCLUSIONS

The main goal of competition law is to strengthen welfare of consumers by encouraging market competition and prevent anti-competitive practices that limits it. Anti-competitive practices are those conducts, which are unfair, fraudulent and deceptive that firms engage in them in relationships with each other or with consumers to gain more market share or their products or reduce market share and sales volume of competing products. These anti-competitive conducts lead to damage to other firms or individual, which civil liability arises from damage. Civil liability is the obligation of a person to compensate for the damage caused by violator's action towards another individuals or firms. Civil liability is divided into two objectives. Economic goals and non-economic goals. In US, economic goals are considered as important goals of civil liability, while in EU, non-economic goals are the most significant objectives. The sources of civil liability in US are the Clayton Act, the FTC Act and the Robinson-Patman Act, but in EU, the sources are Articles 101 and 102 of the TFEU and Directive 2014/104/EU.

The legal principles of civil liability resulting from violation of competition law are Liability based on negligence and non-negligent liability, which theory is divided into two theories. Risk theory and theory of guaranty. The accepted theory in American jurisprudence in the field of civil liability in antitrust law is liability based on negligence. There are other legal principles which is used in these two systems that are called corrective and distributive justice. There are economic principles which are based on economic analysis of competitive civil liability and economic favorability of private sanctions. In contrast to US, in EU, Liability for violation of competition rules in the law of this union is based on non-negligent liability. There are factors of civil liability exemption due to violation of competition law. In US, the approaches of rule of reason, per se illegal and quick look determine exemptions. Compared to US, in EU, Article 101(3) and Council Regulation (EC) No 1/2003 states the factors civil liability exemption,[32] which these exemptions can be the franchise agreement and a joint venture agreement.

Regarding the possibility of compensation based on anti-competitive agreements in US, the possibility of compensation is according to three principles. 1) The principle of prohibition of obtaining assets in an unfair way 2) The principle of the prohibition of courts from providing assistance in violation of competition rules by firms 3) The principle of keeping claims resulting from a contract simply. Contrary to US, all beneficiaries of compensation, regardless of the existence or non-existence of a contractual relationship can seek compensation through sanctions. The method of compensation in civil liability for violation of antitrust law is based on restitution in kind, but in EU, is based on pecuniary compensation. Regarding unfair agreements, in US, the result of unfair contracts is invalidity. In contrast to US, in EU, the result of unfair agreements is termination.

Compared to US, in EU, the Supplementary provision of the 2014 Directive is a proposal for collective redress and calls on member states to provide collective redress mechanisms, including damage claims.

FUNDING

None.

CONFLICT OF INTEREST

The authors declare that they have no conflict of interest.

REFERENCES

1. ÇAKAR S, ÖZYER K, AZİZOĞLU Ö. The Mediating Role Of Emotional Labor In The Impact Of Organizational Climate On Burnout. J Organ Behav Res. 2022;7(1): 1-13

2. Kirilmaz SK, Kirilmaz SK. Mediating Role Of Positive Psychological Capital In The Effect Of Perceived Organizational Support On Work Engagement. J Organ Behav Res. 2022;7(1): 75-85
3. Sadovnikova N, Lebedinskaya O, Bezrukov A, Davletshina L. The correlation between residential property prices and urban quality indicators. J Adv Pharm Educ Res. 2022;12(2):98-103.
4. Nakagawa N, Yamashita T. Comparative study of traditional face-to-face teaching, audience response system, and a flipped classroom plus audience response. J Adv Pharm Educ Res. 2022;12(1):9-16
5. Mann, K. 1992. Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law, *Yale Law Journal*, 101(8): 1795.
6. 'EU and US Antitrust: Converging approaches to monopolies?', (Web Page, 11 March 2014) <https://www.lepetitjuriste.fr/eu-and-us-antitrust-converging-approaches-to-monopolies/>.
7. Mirghaed MT, Karamaali M, Bahadori M, Abbasi M. Identification and Prioritization Technologies and Types of Threats in Future Warfare Using Future Studies Approach. Entomol Appl Sci Lett, 2022;9(1): 7-19
8. Tzanaki, A., Delgado, J. 2020. The European and U.S. Approaches to Antitrust and Tech: Setting the Record Straight - A Reply to Gregory J. Werden and Luke M. Froeb's Antitrust and Tech: Europe and the United States Differ, and It Matters, speech, Competition Policy International, 23 May.
9. Hatzitaskos, K., Howells, B., Nevo, A. 2021. A Tale of Two Sides: Sabre/Farelogix in the United States and the UK. *Journal of European Competition Law & Practice*, 47.
10. O'Brien, A. 2008. Cartel Settlements in the U.S. and EU: Similarities, Differences & Remaining Questions, Speech, 13th Annual EU Competition Law and Policy Workshop.
11. Kovacic, W.E. 2008. Competition Policy in the European Union and the United States: Convergence or Divergence? Conference Paper, Bates White Fifth Annual Antitrust Conference; Harbour, P.J. 2005. Developments in Competition Law in the European Union and the United States: Harmony and Conflict, Conference Paper, NYSBA International Law and Practice Section.
12. Ginsburg, D.H. 2005. Comparing Antitrust Enforcement in the United States and Europe, *Journal of Competition Law & Economics*, 1(3): 427.
13. 'Safeguarding Your Rights in US and EU Antitrust/Competition Investigations', (Web Page, 12 April 2014) <https://www.bclplaw.com/images/content/7/3/v2/73893/Safeguarding-Your-Rights-in-US-and-EU-Antitrust-Competition-Inve.pdf>.
14. Erbach, G. 2014. EU and US competition policies: Similar objectives, different approaches, Research Paper, Parliamentary Library, European Parliament.
15. Ross, D.L. 2018. *Civil Liability in Criminal Justice*, 7th ed., Routledge.
16. Hovenkamp, H. 2000. The Robinson-Patman Act and Competition: Unfinished. Business. *Antitrust Law Journal*, 68(1): 125-144.
17. The Sherman Act 1890.
18. 'Illinois Brick Doctrine', (web page, 14 May 2019).
19. The Treaty of Rome, signed 25 March 1957, '5 ETS 249' (entered into force 1 January 1958).
20. 'Rule of Reason', (Web Page, 17 March 2002) <https://stats.oecd.org/glossary/detail.asp?ID=3305>.
21. The Treaty on the Functioning of the European Union.
22. Council Regulation (EC) No 1/2003.
23. Priest, G.L. 1992. The Inevitability of Tort Reform, *Valparaiso University Law Review*, 26(3): 701.
24. 'Note', 'The American Law Register', (1901) 40(1) University of Pennsylvania Law Review 50.
25. Polinsky, A.M. 1980. Private versus Public Enforcement of Fines, *Journal of Legal Studies*, 9(1): 105-107.

26. The Clayton Antitrust Act 1914.
27. Directive 2014/104/EU of the European Parliament and of the Council 2014.
28. Bigdeli, S., Ekhtiyari, A. 2018. The Possibility of Claim for Collective Damages by Associations and Non-Government Organizations (NGOS) (With a Comparative Study on French Law), *Private Law Journal*, 6(23): 39.
29. Williams, R.C. 2015. Due process, Class action opt outs, and the right not to sue, *Columbia Law Review*, 115(3): 599.
30. Federal Rules of Civil Procedure' United States Courts (Web Page, 1 December 2020).
31. Woods, D. 2004. Private Enforcement of Antitrust Rules - Modernization of the EU Rules and the Road Ahead, *Loyola Consumer Law Review*, 16(2): 431.
32. The Treaty on the Functioning of the European Union (n16); Council Regulation (EC) No 1/2003(n17).