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The Issue of Damage in Civil Liability for Anti-Competitive Practices: A Study of the French and European Models

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Abstract
Competitive harm is considered one of the fundamental elements that defines civil liability in the context of anti-competitive practices. It is accompanied by the element of fault as a general principle (represented by engaging in acts that harm the integrity of competition). In the absence of harm, legal liability cannot be established, as this element constitutes the cornerstone in proving it. French and European legislation has devoted significant attention to this element, with legal systems in both contexts providing detailed clarifications on the concept of competitive harm, relying on specific legislative directives, as well as contributions from legal scholarship and judicial rulings in this area.
Keywords: Civil liability; competitive harm; anti-competitive practices; Competition Council; market.

1. Introduction

The evolution of civil liability in the field of anti-competitive practices represents one of the most prominent developments witnessed by legal thought in recent decades. Legislative intervention is no longer limited to criminalizing acts that undermine market integrity; it has extended to empowering affected parties with civil mechanisms to obtain effective compensation. This shift signals a growing awareness of the importance of protecting the competitive structure of the market through legal tools that go beyond punitive measures, thereby laying the foundations for a comprehensive system based on the principles of justice and balance among economic actors.

In this context, the notion of competitive harm has emerged as a cornerstone of civil liability, alongside the element of fault, which is manifested in conduct that violates market ethics. What distinguishes competitive harm from other types of damage, however, is its complex nature and its close connection to the specificities of a competitive economy. This complexity has necessitated the development of a distinct legal approach that takes into account the intertwinement of interests, the overlapping of legal positions, and the evidentiary challenges involved.

Both French and European legal systems have accorded considerable importance to this concept. Judicial decisions and doctrinal contributions have multiplied, all aiming to delineate its parameters and standardswhether in terms of the conditions for its existence or the means of its proof and evaluation. While these contributions vary in methodology, they converge in their objective of formulating an integrated understanding of competitive harm that maintains a balance between safeguarding market

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freedom and ensuring the rights of injured parties.

From this standpoint, a fundamental question arises that frames the present studynot only regarding the very nature of competitive harm, but also concerning the legal structuring of this notion in light of the particularities of modern economic disputes. This inquiry may be articulated as follows:

To what extent is the legal construction of competitive harm effective as a central element in civil liability arising from anti-competitive practices, and what mechanisms can ensure a balance between the protection of competition and the compensation of harmed parties?

Section One: The Theoretical Framework of Competitive Harm and the Conditions for Compensation Entitlement

Competitive harm constitutes a subset of economic damage that is directly linked to the violation of competition rules within the market. It is characterized by its impact on both the market structure and the individual interests of economic actors. The effects of such harm range from what may be considered lawful by the very nature of competition to what constitutes a violation warranting compensation.

The compensability of this harm is governed by precise conditions related to its direct and certain nature, while modern evidentiary approaches are adopted to account for the complexity and interdependence of economic relations.

Subsection One: The Legal Concept of Competitive Harm

Competitive harm is considered one of the fundamental concepts in competition law, as it encompasses the damages resulting from practices that affect market balance and the freedom of commercial exchange. This area of law illustrates how such harm is identified within the context of competition, with a focus on the various classifications it may assume depending on the practices involved.

In this regard, a distinction is drawn between damages that may be deemed lawful within the framework of competition and those arising from unlawful competitive practices, thereby opening the door to an examination of the conditions under which such damages may be compensated.

First: The Definition of Harm in the Context of Commercial Competition

The distinction between competitive harm and economic harm does not rest on separating two independent concepts, but rather on the understanding that competitive harm constitutes a specific and distinct manifestation of economic harm, directly linked to market mechanisms and competition rules. Economic harm forms the basis of any infringement upon economic life, particularly within the market, which lies at the core of competition law. Competitive harm is thus a form of economic harm, not separate from it, as most

anticompetitive practices arise within the market itself. This makes competitive harm a direct reflection of distortions in the economic system. Although economic harm is a broader concept, its most significant manifestation lies in competitive harm, du

to its connection with the losses suffered by individuals or entities as a result of violations of competition rules.Thus, competitive harm is a general concept that encompasses all damage related to competition, specifically that arising from anticompetitive practices (Dorandeau & Nicolas, 2000).

Based on its impact, competitive harm may be defined from two distinct perspectives:

From the perspective of harm inflicted upon the market, competitive harm consists in any conduct that disrupts market dynamics or impedes its natural mechanisms, thereby preventing the determination of prices in accordance with the principles of free competition—that is, based on genuine supply and demand (Maurice, 2019).

From the standpoint of the impact on undertakings or third parties, competitive harm refers to any material or moral loss suffered by the affected party as a result of such practices (Dorandeau & Nicolas, 2000).

When clarifying these concepts and defining their implications within the framework of civil liability arising from anticompetitive practices, the meaning of competitive harm emerges as the damage suffered by the affected undertaking, whether material or moral. This harm manifests in various forms, such as the loss of market share, a decline in turnover, and, in severe cases, the complete disappearance of the undertaking from the market. This can be attributed to the fact that the essence of competition between undertakings lies in the pursuit of attracting the maximum number of customers and achieving the highest possible profits, making any violation of competition rules a direct cause of harm to those undertakings that adhere to them (Dorandeau & Nicolas, 2000).

Second: The Distinction Between Types of Competitive Harm (Compensable and Non-Compensable)

Harm, in its general sense, refers to the injury sustained by a person as a result of an infringement upon one of their rights or a legitimate interest, even if the law does not explicitly guarantee the realization of that interest. This injury manifests in the deterioration of the state of the right or interest, rendering it worse than it was prior to the occurrence of the wrongful act.

Within the framework of competition law, the exercise of competitive freedom in the market may give rise to various forms of harm, some of which resemble anticompetitive harm resulting from conduct that contravenes the rules of competition. Based on this criterion, harm may be classified into two distinct categories, a distinction that aids in identifying the type of harm that is legally recognized as giving rise to civil liability**.**

1 – Non-Compensable Harm

When addressing the issue of competitive harm, it is essential to recall that the principle of freedom of competition is one of the fundamental principles enshrined in the exercise of commercial activities. Nevertheless, this freedom may, in certain cases, result in harm to others. However, such harmdespite its occurrenceis not considered compensable under the law.

These forms of harm can be categorized into two main groups:

- The first category: Harm arising from rivalry and competition among market participants.
- The second category: Harm that affects the economy at large.

Revised Academic Legal Translation:

The first category pertains to the harm resulting from commercial conduct carried out by an undertaking within the market under the scope of lawful competitive freedom. Such conduct falls within the domain of legitimate competition, which constitutes a regular economic activity fundamentally grounded in the principle of free competition among market participants,Competition, per se, does not constitute an unlawful act. Consequently, undertakings engaged in the market are not obliged to compensate their competitors for damages stemming from competitive conduct, unless such conduct departs from accepted standards of commercial behavior by employing illicit methods or unlawful means (Dorandeau & Nicolas, 2000).

Such damages are inherent to the freedom of competition and, as such, cannot give rise to claims for compensation or reparation The concept of harm to the economy refers to the inclusion, in its assessment and evaluation, of the notion of harm affecting victims who may be market competitors or consumers. This type of harm is considered a consequential effect, as it encompasses the disruption and disarray caused by a given practice to the competitive process within the market (CLAUDEL, 1994, p. 32), Legal doctrine and jurisprudence have established that the assessment of harm to the economy is based on the general disruption that is likely to result in relation to the economic system (CLAUDEL, 1994, p. 32), Some legal scholars do not distinguish between harm to the economy and harm suffered by direct victims. However, the overlap between the two has been clarified by affirming that the damage inflicted upon the economywhich serves as the basis for the imposition of administrative sanctionsdoes not merely involve the attainment of unlawful gains by the offender, but rather encompasses all forms of disruption likely to affect the competitive process, whether directly or indirectly, as well as the overall economic order (Laurent, 2020, pp. 30-35).

2-Compensable harm:

Compensable harm can be defined as harm that entails a violation of a personal right that is, harm affecting individuals, referred to in French law as préjudiceconcurrentiel. This notion isaddressed in Article L.481-3 of the French Commercial Code, which states: “Les sanctions pécuniaires sont proportionnées à la gravité des faits reprochés, à l’importance du dommage causé à l’économie…”Anti-competitive practices may result in the infringement of a specific right of the injured party that is protected under competition law. From the perspective of competition law, it makes no difference whether the right relates to the injured party's tangible interests such as their financial assets or to non-material harm affecting the person's emotions, feelings, or dignity, although the latter is considered less common under tort liability compared to material damage (Dorandeau & Nicolas, 2000).

Thus, compensable competitive harm is the harm that affects an interest recognized and protected under competition law, resulting from the commission of practices that are contrary to free and fair competition. For such harm to give rise to compensation, it must involve a violation of an interest that contravenes the provisions of competition law and the principle of free competition.

Subsection Two: Legal Criteria for Compensation for Competitive Harm

Compensation for competitive harm requires that the damage result directly from anti-competitive practices, with a close causal link between the unlawful conduct and the resulting harm. Moreover, the damage must be actual and established, or at the very least, reasonably foreseeable. This ensures that the impact of such practices is not merely a remote possibility, but rather a tangible or likely consequence**.**

First: The competitive harm must be direct

In order for competitive harm to be compensable, it must be direct. This means that the harm must be a direct result of the anti-competitive practice in question. Accordingly, the injured party must prove that each element of the competitive harm for which compensation is sought is a direct and natural consequence of the anti-competitive conduct. Indirect damages are not eligible for compensation (CLAUDEL, 1994, p. 32).

Second: The Requirement of Actual and Certain Harm

The assessment of harm in competition law cases has come to rely on factual foundations grounded in economic analysis tools, rather than being limited to traditional legal criteria. Article 45 of Directive 2014/104/EU of the European Parliament affirms the right of injured parties to claim compensation, emphasizing that the quantification of harm is a complex factual exercise that may require the use of advanced economic models. Furthermore, Article 46 of the same Directive clarifies that the European Union does not impose uniform rules in this regard, thereby granting Member States the freedom to establish their own national rules for assessing damages resulting from infringements of competition law (union, 2014, pp. 1-19).

This approach is reflected in granting national courts broad discretionary power, provided that general principles such as the principle of equivalence and the principle of effectiveness are respected, in order to ensure that the injured party's right to claim compensation is not restricted.

The assessment of competitive harm requires constructing a hypothetical scenario of the market condition in the absence of the infringement, a concept known as the *counterfactual*. This may be done by comparing the current situation with the one prior to the violation, or by comparing similar markets or institutions, or by using advanced economic simulation models (Maurice, 2019). However, this assessment cannot be separated from the issue of proving the harm, which presents both theoretical and practical challenges. The judge is faced with a complex question: is competitive harm a purely factual matter or a legal issue? This calls for a nuanced approach that combines economic analysis with judicial reasoning (Maurice, 2019).

In this context, it is not always required for the harm to have already occurred in order to be compensable; it suffices that the harm is certain to occur

in the future. If the prospective harm is unlikely to materialize, then no compensation can be claimed. Nonetheless, loss of opportunity is considered a form of actual harm and may give rise to compensation. Some scholars argue that the requirement of actual harm does not align well with the nature of competition law, as waiting for the harm to materialize may render redress impossiblesuch as in the case of the exclusion of a competitor from the market. Thus, halting the anticompetitive practice itself may be the most appropriate remedy for the injured party, especially if restoring competitive conditions later proves to be difficult (Maurice, 2019).

This approach highlights how competition law has moved away from certain traditional rules of civil liability, which only recognize compensation for direct and actual harm. By contrast, competition law emphasizes its preventive and deterrent functions, not merely its compensatory role, in order to protect market mechanisms (Dorandeau & Nicolas, 2000).

Accordingly, it can be said that the modern concept of civil liability in the context of competition increasingly takes into account the evolving nature of harm over time, and accepts certain future harms as compensable, provided they are likely to occur. This reflects a qualitative shift in the assessment of economic harm arising from anti-competitive conduct.

Section Two: The Causal Link Between Anti-Competitive Practices and Competitive Harm

Civil liability in the field of competition is based on the necessity of proving a causal link between the anti-competitive conduct and the resulting harm. This causal relationship raises several theoretical and practical issues, particularly with regard to determining its nature and the requirements for proving it within a complex economic context. Additionally, it presents challenges related to the proof of damage and the interplay of contributing factors, which necessitates distinguishing between effective and incidental causes, as well as examining the limits of the interruption of this causal link.

Subsection One: The Conceptual Basis of Causation in Competition Disputes

This section is concerned with the fundamental understanding of causation in competition disputes, with a focus on the challenges that may hinder the establishment of a causal link in the context of anti-competitive practices. It involves identifying the connection between the harmful act and the infringement of competition rules, in addition to addressing the particularities of economic evidence and its procedural complexities. The section also examines the distinctions between legal standards in this field, highlighting the importance of an accurate understanding of causation to ensure the fair and effective application of sanctions.

First: Defining the Scope of the Relationship Between the Harmful Act and the Violation of Competition Rules

This connection constitutes the third essential element of civil liability, without which such liability cannot be established. Similarly, it cannot be invoked in the absence of anti-competitive conduct or competitive harm. Civil liability is aimed at compensating for the damage caused by the economic operator through their activity. Accordingly, if the damage was not directly caused by the activity of the economic operator, there can be no liability attributed to them. Therefore, it is imperative to establish what is referred to as the causal link between the economic operator's conduct and the competitive harm for which redress is sought.

The foundation for establishing causation in civil liability claims concerning anti-competitive practices lies in determining whether the conditions set forth in the anti-competitive agreement are themselves the direct cause of the alleged damage (Dorandeau & Nicolas, 2000).

Second: The Specificity of Evidence in the Economic Context and Its Procedural Complexities

The standard for proving causation in competition law differs significantly from that required under civil liability law. It is based on the adoption of the theory of the proximate or effective cause, rather than the theory of the equivalence of causes, which considers all events that contributed to the occurrence of the harm (Schweitzer, 2023),Within the framework of civil liability for anti-competitive practices, it is necessary to distinguish among the various causes involved, separating incidental causes from operative ones. Only those causes deemed effective and operative are considered to be the legal causes of the harm. A cause is deemed operative if, under normal circumstances, it would typically lead to the type of harm that has occurred. The fact that an incidental cause may have contributed to the occurrence of the harm is irrelevant if it did so merely by chance, since the proximate or effective cause is the legal cause recognized by the law and constitutes the limit of legal liability (peter & franziska, 2022).

Accordingly, this theory holds that for a factor to be considered a cause of the harm, it must be an effective cause in producing the resulting damage. It is not sufficient for a factor to have merely intervened in the occurrence of the harm in order to exclude an established fault as the cause of the damage (Schweitzer, 2023).

Accordingly, the theory underlying competition law requires only the establishment of a potential and indirect causal link. A competition authority may sanction a practice solely on the basis of its anti-competitive object, without the need to examine whether it has produced actual anti-competitive effects in practice. It is also permissible for the authority to condemn conduct based on its "potential effects"that is, on theoretical grounds without concrete demonstration. Consequently, a practice may be qualified as anti-competitive and subject to sanction even in the absence of any clearly identified victim. (There has been a noticeable rise in this type of case before competition authorities in France and the European Union) (Andrian & Pierre, 2014, p. 189).

Economic analysis aimed at establishing causality is a necessary outcome of the complex economic environment, which often involves multiple stakeholders. This complexity makes it difficult to precisely identify the direct cause of harm (peter & franziska, 2022).

Subsection Two: Challenges and Limitations of Causation in Competitive Harm

The nature of competitive harm and the specific characteristics of the market constitute some of the main limitations that may hinder the establishment of causation in the field of competition. Legal and factual complexities may, at times, lead to the absence of this causal relationship, thereby making it more difficult to attribute liability for anti-competitive conduct. This section is dedicated to examining the various theoretical and practical challenges associated with proving causation in this context.

First: The Difficulty of Proving Harm in Cases Involving the Pass-Through of Price Increases to Consumers:

The foundation of this theory lies in the fact that harm resulting from an agreement or abuse of a dominant position typically manifests as an additional cost incurred by the perpetrator of the unlawful practice. This raises the critical question of who ultimately bears this additional cost. In French law, the civil judge's refusal to recognize the impact of price increases on the indirect purchaser leads to unjust enrichment for those purchasers who have passed on the price increase. Consequently, it becomes essential to acknowledge the 'passing-on defense' as a valid argument for the defendant when facing a damages claim brought by the direct purchaser. Through this mechanism, the direct purchaserhaving been unable to pass on the price increase to its own customersmay claim to have suffered actual harm or loss. The assessment of the passing-on effect relies on multiple factors and methodologies, including economic theories, analysis of the relevant market structure, profit margins, and cost considerations, among others (Luis & Joseph, 2016, p. 24).

Accordingly, although this indirect dimension and relationship may contribute to filtering out frivolous claims, the indirect purchaser may encounter difficulty in bringing an action. The indirect nature of the relationship renders it challenging to establish the causal link between the anti-competitive conduct and the harm suffered. This, in turn, may preclude the indirect purchaser from initiating legal proceedings, thereby creating substantive limitations on compensation claims when it comes to indirect purchasers. Therefore, allowing indirect purchasers to obtain compensation requires facilitating their access to the necessary evidence. Indeed, it is difficult for such purchasers to ascertain that the price increase passed on to them is the actual cause of the harm sustained. This is a key element likely to substantiate compensation claims (Luis & Joseph, 2016, p. 24).

Second: Situations Leading to the Severance of the Causal Link Between the Wrongful Act and Competitive Harm

Pursuant to the principle that the burden of proof lies with the claimant, as enshrined in Article 1315 of the French Civil Code, the defendant must demonstrate that the alleged fault was not the decisive factor leading to the harm suffered. If the defendant is able to present substantial arguments that cast doubt on the causal link, the claimant may be denied compensation or may receive only limited damages. The implication of this article is that whoever alleges discharge from an obligation must prove either its performance or its extinction. Consequently, the defendant, when raising a defense, assumes the role of a claimant and is thereby required to prove the grounds for such defense. This constitutes a complementary principle to the general rule that the burden of proof lies upon the party asserting a claim (Marchant, 2007, p. 154).

In other words, the fault of the injured party may fully or partially exonerate the economic operator who engaged in the anti-competitive practice, to the extent that the injured party's own conduct contributed to the harm. Contributory negligence arises when the fault of the injured party played a role in aggravating or causing the damage resulting from the anti-competitive behavior of the economic operator.

In application of this principle, in civil liability claims related to anti-competitive practices, the Paris Court of Appeal rejected a compensation claim brought by Mars, ruling that there was no evidence establishing a link with the anti-competitive conduct. The court held that the alleged damages resulting from increased costs or loss of customers were not sufficiently proven to have stemmed from the defendant's original conduct (Marchant, 2007, p. 24).

Conclusion :

Civil liability for anti-competitive practices, both under French law and European Union law, is founded on the principle of compensation for damages resulting from violations of competition rules. In French law, and influenced by the European Directive, any party harmed by anti-competitive conductsuch as unlawful agreements or abuse of dominant positionis entitled to full compensation. This compensation encompasses not only actual losses but also loss of profit, provided that a causal link between the unlawful conduct and the damage is established. This approach reflects the legislators' intent, at both the European and French levels, to facilitate victims' access to justice and enable them to prove damage through mechanisms such as document disclosure and procedural simplification, thereby enhancing the effectiveness of competition rules and ensuring comprehensive redress.

This study has yielded several important findings regarding the assessment of damage resulting from anti-competitive practices, particularly within the framework of French law and European legislation. It has been shown that:

- Such harm often affects other competitors in the market and is referred to as competitive harm, which is difficult to establish directly. Therefore, the "counterfactual scenario" methodology is used to estimate the damage, by hypothesizing the situation that the injured party would have been in had the anti-competitive conduct not occurred.
- It is observed that the traditional standard applied under French law for damage assessment is based on general civil law principles, especially the principle of equivalence between the actual harm and the compensation awarded. This approach focuses on compensating the injured party on a personal basis, without giving due consideration to the broader market effects of such practices, making it somewhat inconsistent with the objectives of competition law, which aim not only to compensate victims but also to deter harmful behaviors and preserve market balance.
- In the context of the European Union, the approach to compensation assessment has evolved, especially under European directives that promote private enforcement as an effective means of protecting competition. The European approach regards compensation as serving a dual function: on the one hand, to redress harm suffered, and on the other, to achieve general deterrence by imposing full liability on the infringer for the anti-competitive effects of their conduct.
- The modern standard for damage assessment relies on economic tools and precise quantitative models designed to reconstruct the hypothetical scenario that would have occurred in the absence of the anti-competitive practice. This method aligns more closely with the complex and

multifaceted nature of harm in this field, necessitating in-depth analysis of the practice's impact on market dynamics.

- There is no unified standard for assessing this type of damage; rather, judges have discretionary power to choose the appropriate model based on the nature of the case. Parties may submit evidence based on economic analyses or expert reports to persuade the court. Among the methods used in this context are: time-series analysis, cross-sectional analysis, difference-in-differences methodology, as well as financial models and economic simulation techniques used to model the market's counterfactual state and estimate damage with greater precision.

Based on the findings of this study, the following recommendations are proposed:

- To strengthen the consideration of damage assessment standards in compensation claims by linking them to market efficiency and performance, given that anti-competitive practices pose a serious threat to market stability and have adverse effects on the national economy as a whole.
- To strive for the establishment of a clear and comprehensive legal framework for determining the basis of damage assessment arising from such practices, ensuring consistency between judicial decisions and the goals of competition laws.
- To encourage cooperation and coordination between legal and economic experts in the field of damage assessment, recognizing that this process requires shared understanding, as it is not purely a legal matter but one intrinsically linked to economic realities.
- To emphasize the respect for fundamental legal principles in damage assessment, such as justice, fairness, and proportionality between the extent of the damage and the nature of compensation, in order to avoid deviation from the spirit of the law.
- To involve competition authorities as consultative bodies assisting the judiciary in compensation cases, given their technical expertise and field experience which enable them to more accurately assess the extent and effects of damage on the market.
- To work toward the development of national legal jurisprudence focusing on the issue of competitive damage assessment, by establishing practical and applicable standards that help unify judicial approaches and foster a specialized legal culture in this domain.
- To pay greater attention to the study of the "passing-on" theory and the impact of scale on determining compensation, as the transfer of losswhether in whole or in partcan significantly affect the calculation of the actual financial harm incurred by the injured party.

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