

International Conference on the Harmonisation of Private Antitrust Enforcement: A Central and Eastern European Perspective. Supraśl, 2–4 July 2015

An International Conference entitled ‘Harmonisation of Private Antitrust Enforcement: A Central and Eastern European Perspective’ was held in Supraśl (Poland) on the 2-4 July 2015. It was organized jointly by the Faculty of Law of the University of Białystok (Department of Public Commercial Law) and the Centre for Antitrust and Regulatory Studies (CARS, University of Warsaw). The Conference focused on issues connected to the implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union – the Damages Directive. The Conference has gathered numerous competition law researchers primarily from countries of Central and Eastern Europe (CEE).

The Conference was preceded by a meeting of CRANE – *the Competition Law and Regulation. Academic Network. Europe – Visegrad, Balkan Baltic, East*. During this meeting, Professor Tadeusz Skoczny (Director of CARS) presented the initial assumptions and objectives of the CRANE initiative.

The Conference was officially opened by Professor Anna Piszcz (University of Białystok, Poland) who welcomed the participants and presented the assumptions and scope of the Conference.

A welcome address was subsequently delivered by Professor Emil W. Pływaczewski (Dean of the Faculty of Law of the University of Białystok). He emphasized that the international character of the Conference provides an excellent opportunity for the exchange of experiences of CEE countries on issues related to private competition law enforcement. Professor Pływaczewski noted also that the Conference was a result of a fruitful cooperation between the Faculty of Law of the University of Białystok and CARS. He also acknowledged the support given to the organizers by, *inter alia*, the Polish Office of Competition and Consumer Protection and the Polish Supreme Court.

Bernadeta Kasztelan-Świetlik (Vice-President of the Office of Competition and Consumer Protection) spoke next. She stressed that the public and the private model of competition law enforcement must complement each other. The role of an antitrust authority is to detect and punish the most severe of infringements; the application of competition

law by the antitrust authority must be supplemented by its private enforcement. She later pointed out that the adoption of the Damages Directive will establish a basic standard for private enforcement and should eliminate barriers to its development. She informed the Conference participants that works had begun at the Polish Ministry of Justice aimed at the implementation of the Damages Directive into the Polish legal order.

The final welcome address was given by Professor Tadeusz Skoczny (Director of CARS, University of Warsaw).

Professor Sofia O. Pais (Catholic University of Portugal, Oporto) delivered the keynote speech which focused on the Portuguese model of private competition law enforcement. Professor Pais spoke also of the most important problems arising because of Portugal's duty to implement the Damages Directive. She stated that Portuguese law does not provide specific rules on procedures for claims arising from antitrust violations. As a result, they are conducted in accordance with the rules established in Portuguese Competition Law, Civil Code and the Code of Civil Procedure. Despite the fact that there are many national public enforcement decisions concerning antitrust infringements, she noted that there are very few examples of private enforcement in Portugal. Professor Pais emphasized also that public competition law enforcement remains dominant there and that this should not be changed. Public and private enforcement should complement each other.

After the keynote address, the Conference participants discussed the possibility of applying class actions in private competition law enforcement in Portugal, and the reasons for the low number of such private enforcement cases. Professor Pais spoke here of the reasons for the apparent lack of popularity of private enforcement in Portugal listing the absence of a private enforcement tradition, and the fact that consumers are not familiar with the applicable rules (while relevant consumer damages would generally be very low).

Four sessions were held during the second day of the Conference. The first was moderated by Professor Pais and dedicated to substantive challenges facing the harmonisation of private competition law enforcement.

The first paper was delivered jointly by Professor Alexander Svetlicinii (University of Macau, Macau, China) and Professor Marco Botta (University of Vienna, Vienna, Austria). It was dedicated to the phenomenon of umbrella pricing. Professor Svetlicinii presented the umbrella pricing model, paying particular attention to provisions of US law concerning the recovery of claims resulting from price agreements. He stressed that even if only a few companies are party to the anti-competitive agreement, other entities (not-parties) may also benefit from it in practice since they may remain 'under the umbrella' of the agreement. Claiming damages from the price agreements is extremely difficult, due to the need to prove the causal link between the agreement and the damage as well as the actual amount of damages. Professor Botta spoke subsequently of problems related to claiming damages arising from umbrella pricing under EU law, which concern, in particular, the lack of a general standard for a causal link that has to occur in order to claim damages.

Professor Agata Jurkowska-Gomułka (University of Information Technology and Management, Rzeszów, Poland) presented the next paper. She indicated that the

public and private model of competition law enforcement interfere with each other. In order to ensure that each fulfils its goal, jurisprudence has to establish a good balance between them. Professor Jurkowska-Gomułka did not share general concerns about difficulties in determining the actual amount of damages suffered as a result of a competition law infringement. She drew attention to the fact that antitrust is not the only area which suffers from difficulties in calculating the amount of damages. She also expressed the opinion that the implementation of the Damages Directive into the Polish legal order will not significantly increase the popularity of private enforcement.

The last paper in this session was presented by Professor Anna Piszcz. In her speech, she focused on those issues which had, in her opinion, received too little attention in the Damages Directive. Professor Piszcz pointed out that there is no justification for limiting the Directive to claims for damages and actions for damages only. Since the Directive regulates only this type of claims, the harmonisation of private competition law enforcement is only partial. Professor Piszcz spoke therefore in favour of the Damages Directive not becoming the end of the harmonisation process of private competition law enforcement in Europe.

Dr Maciej Bernatt (University of Warsaw, Warsaw, Poland) moderated the second Conference session dedicated to the procedural challenges related to the adoption of the Damages Directive.

The first paper was presented by Professor Aleš Galič (University of Ljubljana, Slovenia) who focused on issues surrounding the disclosure of documents in the process of private enforcement. He stressed that private enforcement is not possible without ensuring extensive access to information and documents. Procedural tools enabling such access are thus particularly important for the development of this enforcement model. While discussing the solutions provided in this regard by the Damages Directive, he emphasized that the implementation of the Directive will require much more than just a technical adaptation of the Code of Civil Procedure. He stressed that in a number of key aspects relating to the disclosure of documents, Member States' legislation contains fundamental differences. In this regard he also gave examples on the basis of Slovenian law. In some EU Member States, the implementation will thus also require amendments of currently applicable fundamental procedural principles – merely introducing changes required by the Directive would be ineffective.

Professor Vlatka Butorac Malnar (University of Rijeka, Croatia) presented subsequently a paper in which she emphasized that cartels have the greatest number of victims of any antitrust infringement. An additional difficulty in the investigation of claims of cartel victims is that cartels are so secretive that even competition authorities have difficulties in searching for evidence proving their existence. If the authorities encounter such significant problems in obtaining evidence, an expectation that such evidences would be in the possession of a private person would thus be naïve. Professor Butorac Malnar stressed furthermore that most cartels are now disclosed as a result of the leniency and settlements procedures – yet the use of these procedures would facilitate the hiding of information and documents from victims. There is therefore a risk that entrepreneurs will be even more likely to want to engage in leniency and settlements so as to hide documents and to make it more difficult for victims to claim damages.

Anna Gulińska (legal counsel, Dentons Europe Oleszczuk, Warsaw, Poland) gave the last speech of the session. She focused on key issues related to access to documents collected in antitrust proceedings in Poland. She emphasized that in Polish civil proceedings, the plaintiff is obliged to present the facts as well as to provide evidence to support them. At the same time, civil procedural rules introduce time-limits for the presentation of evidence – a fact that has a negative impact on the development of private enforcement of competition law in Poland.

Professor Anna Piszcz moderated the third session regarding the benefits associated with the adoption of the Damages Directive for consumers.

Professor Rafał Sikorski (Adam Mickiewicz University in Poznań, Poland) presented the first paper. He drew attention to the fact that antitrust injuries suffered by most consumers are small. For that reason, individual consumers are unlikely to sue individually. He compared the US and EU private enforcement model noting their basic difference. He noted that the problem of overcompensation does not exist in the US model. In EU law, the main goal of the damage is to compensate, which means that the compensation may not exceed the damage.

Dr Raimundas Moisejevas (Mykolas Romeris University, Vilnius, Lithuania) spoke of the consensual application of competition law. He pointed out that the use of consensual methods of enforcing competition law may prove to be beneficial for the infringer. On the one hand, the settling infringer can get a fine reduction and on the other hand, his liability is subject to a limitation. According to Dr Moisejevas, the Damages Directive might encourage the use of alternative methods of resolving disputes arising on the basis of competition law. This may prove beneficial for consumers since they will not have to bear the high costs associated with claiming damages in courts.

Professor Tadeusz Skoczny moderated the last session of the second day of the Conference focused on private antitrust enforcement by CEE countries which are not members of the EU.

Ermal Nazifi (PhD candidate, University of Tirana, Albania) presented the first paper. He first briefly described the evolution of competition law in Albania, focusing on problems related to the indication of the grounds for compensation (infringement, damage and the causal link). He pointed out that effective competition law is necessary for the proper functioning of the economy. In addition, it is one of the conditions for Albania's EU accession. Yet implementing EU solutions by Albania should not take place by way of their automatic transfer into the national legal order – current Albanian solutions should also be considered.

The next paper was presented jointly by Professor Anzhelika Gerasymenko and Professor Nataliia Mazaraki (Kyiv National University of Trade and Economics, Ukraine). Professor Mazaraki described existing regulations on private enforcement of competition law in Ukraine. She also discussed a number of major obstacles that prevent effective private enforcement of competition law. Amongst them, she mentioned psychological barriers, which prevent people from seeking compensation before the courts, difficulty in determining the amount of damages, and problems associated with obtaining evidence of the infringement. Professor Gerasymenko

subsequently spoke of the rules for determining the amount of damages in Ukrainian law and compared them with the EU model.

Zurab Gvelesiani (PhD candidate, Central European University, Budapest, Hungary) closed this session by presenting a brief history of the development of competition law in Georgia. The origins of its competition law date back to 1992, when the first competition act was adopted. Mr Gvelesiani continued on to present existing Georgian rules concerning claims arising from antitrust infringements.

One session was held on the third day of the Conference. It was dedicated to private enforcement of competition law in CEE countries that are members of the European Union. This session was moderated by Professor Agata Jurkowska-Gomułka.

The first paper was presented jointly by Professor Rimantas Antanas Stanikunas (Vilnius University, Lithuania) and by Arunas Burinskas (PhD candidate, Vilnius University, Lithuania). It addressed issues related to the interactions between public and private competition law enforcement in Lithuania. The Lithuanian Competition Act makes it possible to claim damages by victims of antitrust infringements – the public competition law enforcement model supports claims by victims. Nevertheless, Lithuanian law requires more detailed legislation on the recovery of claims by victims.

Dr Ondrej Blažo (Comenius University in Bratislava, Slovakia) outlined problems surrounding private claims in Slovakia, which relate primarily to the following spheres: obtaining evidence, establishing the entity liable, the limitation period, and calculating the amount of the damage.

The last paper in this session was delivered by Judge Katarzyna Lis-Zarrias (judge, Ministry of Justice, Poland). Judge Lis-Zarrias presented the background of the negotiations on the Damages Directive. She also discussed the basic problems relating to its implementation into the Polish legal order. They concern, *inter alia*, the methods of implementing the Damages Directive. According to Judge Lis-Zarrias, it would be best to create a separate legal act for that purpose, rather than adopting changes to several relevant existing acts. She also spoke of problems with the scope of the implementation of the Directive. If the rules resulting from this Directive were to be limited solely to competition law issues, it would in practice result in creating two separate procedures for the investigation of damage claims in Poland – one in cases of competition law and a one for other cases. This might significantly impede the conduct of court proceedings because in their course, the case may change its nature as a result of the disclosure of new facts and evidence.

The session was concluded with a discussion of issues covered during the Conference including: the economic aspects of private competition law enforcement and the impact on the development of private enforcement of new solutions, where the competition authority would act as *amicus curiae* in civil proceedings.

The Conference was subsequently closed by Professor Anna Piszcz.

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